STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-100, SUB 178

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Rulemaking Proceeding to Implement Performance-Based Regulation of Electric Utilities	))))))	ORDER APPROVING TEMPLATE NOTICE AND PROVIDING INITIAL GUIDANCE ON ISSUES RELATED TO CPCN PROCESS AND COST RECOVERY UNDER PBR

BY THE COMMISSION: On February 10, 2022, the Commission issued its Order Adopting Commission Rule R1-17B (Order Adopting Rule) to implement performance-based regulation (PBR) which was authorized by N.C. Gen. Stat. § 62-133.16 (PBR Statute) for electric public utilities. In its Order Adopting Rule, the Commission noted that the Public Staff had proposed a template customer notice for a PBR Application. The Commission directed the Public Staff to work with the electric public utilities to propose a template customer notice that conforms with the Rule adopted by the Commission to implement the PBR Statute.

In the Order Adopting Rule, the Commission also requested comments on the interrelation between the process to obtain a certificate of public convenience and necessity (CPCN) for capital projects and cost recovery for those projects in an approved PBR Application. Under the PBR Statute, an electric public utility may request approval of a Multi-Year Rate Plan (MYRP) that includes projected capital projects. In particular, the Commission requested comments on the following questions:

(1) Whether the Commission may approve cost recovery within an MYRP for capital projects for which a CPCN is required but has not been granted as of the date the PBR Application is approved;

(2) 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; and

(3) 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.

TEMPLATE NOTICE

On March 16, 2022, the Public Staff filed a letter noting that it had worked with Duke Energy Carolinas, LLC (DEC), Duke Energy Progress, LLC (DEP) and Dominion Energy North Carolina (DENC or Dominion, and, together with DEC and DEP, the Companies) to draft a template notice. The Public Staff's letter included three attachments consisting of template notices for DENC, DEC, and DEP.

On April 13, 2022, Carolina Industrial Group for Fair Utility Rates I, II, and III (CIGFUR) filed a letter that included suggested edits to the template notices provided by the Public Staff. In its letter, CIGFUR represented that the Public Staff and the Companies consented to the edits recommended by CIGFUR in its letter.

The Commission determines that the template notices proposed by the Public Staff and the Companies, as modified by CIGFUR are reasonable and shall be used by DENC, DEC, and DEP as their respective template for the public notice when filing a PBR Application.

CPCN PROCESS AND COST RECOVERY UNDER PBR APPLICATION

On March 16, 2022, Carolina Utility Customers Association (CUCA) and CIGFUR filed joint comments (jointly CUCA/CIGFUR) regarding the issues raised in the Order Adopting Rule, and the Public Staff filed a letter stating that it had reviewed the CUCA/ CIGFUR comments and agreed with those comments.

Also on March 16, 2022, the North Carolina Sustainable Energy Association (NCSEA) filed comments, and the Companies filed joint comments. On that same date, the Carolinas Clean Energy Business Association (CCEBA) filed a letter in lieu of extensive comments.

On April 13, 2022, the Public Staff filed reply comments. On that same date DEC, DEP, and DENC filed joint reply comments and CUCA/CIGFUR also filed joint reply comments.

On April 13, 2022, the North Carolina Justice Center (NCJC), North Carolina Housing Coalition (NCHC), Sierra Club, and Southern Alliance for Clean Energy (SACE, collectively, NCJC et al.) filed joint reply comments regarding the CPCN issues.

CPCN Requirement for Capital Projects Proposed in MYRP

The Companies assert in their initial comments that the Commission may approve cost recovery for capital projects in an MYRP where a CPCN is required but has not been granted when the PBR Application is approved. The Companies note that the PBR Statute does not directly address this question and assert that interpreting the statute as prohibiting the Commission from approving capital projects that have not yet obtained a CPCN would inject unnecessary inefficiency into the PBR Application process. The

Companies note that the PBR Statute requires a proposed MYRP to include an explanation of the need and costs for any proposed capital project included in an MYRP, and the PBR Statute provides an opportunity for parties to review and evaluate the utility's proposed MYRP as part of the PBR Application proceeding.

The Companies further note that the Carbon Plan process for DEC and DEP will demonstrate the showing of need required for both the PBR Application and CPCN processes. The Companies assert that the PBR process to establish the need and reasonable cost for projects will be effectively identical to a CPCN proceeding and the Commission's ability to approve capital projects prior to issuance of a CPCN will promote administrative efficiency.

CUCA/CIGFUR assert in their comments that the PBR Statute precludes the approval of cost recovery of a CPCN-dependent capital project in an MYRP for projects that have not yet been issued a CPCN. CUCA/CIGFUR point to subsection (c)(1)a. of the PBR Statute which provides that an 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." Therefore, CUCA/CIGFUR argue that the approval of any capital projects for the first year of an MYRP is conditioned on the project being "known" and being "placed in service during the first rate year." CUCA/CIGFUR further assert that for years two and three of an MYRP, the PBR Statute allows rates to be increased only for "Commission-authorized capital investments that will be used and useful during the rate year." CUCA/CIGFUR again emphasize that the PBR Statue provides specific language that requires certainty that the capital project will be constructed. CUCA/CIGFUR note that the approval of recovery of costs for a CPCN-dependent capital project before issuance of a CPCN places risks on consumers as the Commission-approved PBR rules do not currently provide a method to refund ratepayers revenues that are collected for rate-based generation projects that either are not ever built or are not placed in service during the applicable rate year.

CUCA/CIGFUR recommend that the Commission adopt a clear, bright line rule that the utility must first obtain a CPCN before such costs may be included in base rates for an applicable MYRP rate year to avoid the legal and practical problems created by approving a CPCN-dependent capital project before the issuance of a CPCN.

The Public Staff filed a letter in lieu of comments stating that it has reviewed the comments provided by CUCA/CIGFUR and agrees with CUCA/CIGFUR on this question.

In initial comments, NCSEA also asserts that it does not believe that the Commission should approve cost recovery within an MYRP for capital projects for which a CPCN is required but has not been granted as of the date of the PBR Application approval because any project that has not obtained a CPCN is unlikely to be "used and useful" within the three-year period of the MYRP, and Commission approval would create risk for ratepayers.

In a letter filed in lieu of initial comments, CCEBA states that it reviewed NCSEA's and CUCA/CIGFUR's comments and that it shares their concerns and believes that approval of capital projects in an MYRP prior to the issuance of a Commission-approved CPCN would be "based on speculative assessments." CCEBA notes that projects in the Competitive Procurement of Renewable Energy (CPRE) process have faced significant delays in their in-service dates due to the need for Network Upgrades. CCEBA comments that similar delays in projects proposed in an MYRP would result in these projects failing to meet the statutory requirement that they be "used and useful during the rate year."

In their joint reply comments, the Companies address several issues raised by CUCA/CIGFUR that were supported by the Public Staff and the comments of CCEBA and NCSEA. First, the Companies opine that the plain language and intent of the PBR Statute is contrary to the intervenors' arguments. The Companies assert that the intervenors' focus on the need for "certainty" is not supported by the plain language of the statute as the MYRP process recognizes that capital projects will be "projected" and by definition, any projected project has an element of uncertainty. The Companies also assert that the intervenors' characterization of projected capital projects as "aspirational" conflicts with the rigorous review required for the MYRP. The Companies also note that even for projects where a CPCN is granted by the Commission before the approval of an MYRP, there is not absolute certainty that a project will be completed.

The Companies maintain that the intervenors' comments do not meaningfully address the specific types of CPCN-dependent projected capital projects likely to be included in a proposed PBR Application. The Companies explain that these include two discrete categories: (1) new transmission lines equal to or greater than 161 kilovolts; and (2) solar generating facilities. The Companies argue that transmission projects or future solar generating resources likely to be included in an MYRP would have been previously approved in the Carbon Plan process, or a competitive procurement process, and therefore, these projects would not be speculative or uncertain. The Companies further assert that requiring CPCNs prior to seeking recovery in a PBR Application is duplicative, an ineffective use of the Commission's resources, and would result in a "wave" of CPCN applications filed just prior to, and during, the PBR Application review process.

The Public Staff rejects the Companies' assertion that the CPCN process and PBR Application review for capital projects require essentially the same analysis and scrutiny. The Public Staff notes that the CPCN process set out in statute and Commission Rules requires that the Commission find a public need for the proposed project and determine that the public convenience and necessity are best served by the generation or transmission option being proposed by the applicant. Further, the Public Staff notes that the specific considerations and policy goals that underly a CPCN proceeding are notably absent for a proposed capital project in a PBR Application proceeding.

The Public Staff also rejects the Companies' assertion that requiring a CPCN before a capital project could be included in an MYRP would inject inefficiencies into the PBR Application process. The Public Staff states that under the PBR rules, the only protection for ratepayers are the earnings cap and the ability of the Commission or Public

Staff to seek review of the MYRP should a utility not implement its capital projects as approved. The Public Staff asserts that to allow a utility to put into its MYRP a capital project for which it has not yet obtained a CPCN would unfairly burden ratepayers and that the interests of ratepayers should not be sacrificed in the interest of "flexibility and efficiency" for the utility.

CUCA/CIGFUR note in their reply comments that all parties except for the Companies maintain that the Commission cannot approve costs in an MYRP for capital projects where a CPCN is required but has not yet been granted. CUCA/CIGFUR further note that the General Assembly did not modify the statutes governing a CPCN when it enacted the PBR Statute.

NCJC et al. endorse the comments of CUCA/CIGFUR and NCSEA. NCJC et al. assert that N.C.G.S. § 62-133.16 allows the Commission to include in an MYRP 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.” NCJC et al. note that the Commission’s adopted PBR rule does not provide for customer refunds; therefore, customers would be at risk of paying for utility plant that is never built.

NCJC et al. note that they disagree with the Companies’ comment that the assessment of need and costs required under a PBR Application is fundamentally the same as the assessment of need and costs required under a CPCN Application. NCJC et al. argue that an MYRP proceeding is not a substitute for the CPCN process, that the focus in the CPCN proceeding is on the need for a project and its impact on the public. NCJC et al. further note that CPCN proceedings often involve the participation of parties directly affected by the construction of a transmission line or a power plant and that it is not reasonable to expect such parties to participate in an MYRP proceeding, especially since the investment is less than “known and measurable.”

The Commission is not persuaded that the PBR Statute precludes recovery for CPCN-dependent projects that have not obtained a CPCN by the time of the approval of a PBR Application. However, as noted by multiple parties, it is difficult to imagine a situation where a project has not yet obtained a CPCN but will be “placed in service during the first rate year” as required by the PBR Statute. The Commission expects that the utility is more likely to request recovery for such projects in years two and three of an MYRP. As noted in the Order Adopting Rule, the Commission “recognizes a PBR Application, by definition, involves a forward-looking 36-month rate plan that may include future investment in infrastructure projected to be placed in service during the entire PBR Plan Period.” However, the Commission also noted in the Order Adopting Rule that the “projected capital investments for the PBR Plan Period will be reviewed in the PBR Application process, and only those capital investments found to be reasonable and prudent and in the public interest will be approved in the MYRP.” As multiple commenters have noted, the PBR Statute requires that projected capital projects must be “used and useful during the rate year” for recovery to be approved under the MYRP. A utility applying for recovery under an MYRP must provide

sufficient evidence in its PBR Application to establish that projected capital projects will be placed in service in the appropriate rate year under the MYRP.

While a CPCN for an individual project may bolster the argument of the utility that a project will be placed in service in a certain time frame, the utility applying for recovery under an MYRP would need to establish that all projects – even those projects with a CPCN – would be placed into service during a particular rate year for the Commission to approve cost recovery under an MYRP. As multiple parties note, the fact that a project has obtained a CPCN from the Commission does not guarantee that the project will be placed in service in the near term. For example, in Docket Nos. E-2, Sub 1297 and E-7, Sub 1268, Duke sought approval of a process to procure solar energy resources through a competitive procurement process. In its Petition for Authorization of 2022 Solar Procurement Program, Duke notes that projects procured under this process are not "likely to achieve interconnecting and commercial operation prior to 2026 and could extend later into the decade if significant network upgrades are required to achieve interconnection." CCEBA also notes that facilities procured in the CPRE process are also facing significant delays. These solicitations for solar projects demonstrate that the estimated in-service dates for the facilities are often unachievable. Some solar facilities that are subject to these competitive procurements already have CPCNs or may obtain CPCNs before a utility files a PBR Application. The Commission is not persuaded that the absence of a CPCN precludes possible recovery under an MYRP, provided the utility makes a sufficient showing in the PBR process that the CPCN-dependent facility will be "used and useful" in the appropriate rate year. However, the Commission also cautions parties that it is also not persuaded by the corollary to this argument – that a CPCN for a project is definitive evidence that a project will be placed in service during an MYRP. As previously stated, a utility filing for recovery under an MYRP must establish that capital investment projects will be used and useful in a rate year covered by the MYRP.

Further, the Commission notes that it previously determined in the Order Adopting Rule that "certainty" of capital projects included in the PBR Application being implemented cannot be guaranteed due to the projected nature of these projects. Rather, the utility must have the discretion to modify or cancel capital projects when doing so is in the public interest. The customer protections set forth in the PBR Rule provide adequate safeguards to customers with respect to such capital project modifications and cancellations.

The Commission determines that a utility may request cost recovery in a PBR Application for facilities that require a CPCN but have not yet obtained a CPCN at the time of the PBR Application. The Commission will determine whether the projects are eligible for recovery in a MYRP that is part of a proposed PBR Application on a project-by-project basis depending on the evidence submitted in the PBR Application. A utility filing for recovery for these projected projects must provide sufficient evidence in its application that the projects meet the requirements of the PBR Statute – specifically, that they will be used and useful during a particular rate year of the MYRP. The Commission further directs any utility requesting recovery for capital projects in a PBR Application to submit evidence of the need for the requested capital project. For projects that have already received a CPCN, that evidence can be a reference to the CPCN proceeding

where the Commission determined there was a sufficient showing of the need for the project. For projects that have not received a CPCN, the PBR Application must provide sufficient evidence for the Commission to determine that the Applicant has established the need for the project.

Consideration of PBR Approval in CPCN Proceeding

The Companies state in their initial comments that if the Commission approves a capital project for cost recovery through a PBR Application and has not granted a CPCN for that project, the Commission should consider the fact of the approval of the project in the PBR Application in the CPCN approval process. The Companies argue that prohibiting consideration of the approval of a capital project as part of a PBR Application during the CPCN proceeding for that project would be inefficient and contrary to the overarching goal of administrative efficiency underlying the PBR Statute and the PBR Rule.

CUCA/CIGFUR state that utilities should only include a CPCN-dependent capital project in an MYRP after the Commission has issued a CPCN. CUCA/CIGFUR further assert that there is no suggestion that the General Assembly intended the PBR Application process to substitute for the CPCN process, and that the CPCN process and the PBR Application process have different purposes as they relate to capital project approvals. The CPCN process is intended to scrutinize whether a capital project is needed to provide reliable and economic service to utility customers, whereas capital projects included in PBR Applications are not subject to the same scrutiny.

The Public Staff states that it has reviewed and agrees with the CUCA/CIGFUR comments.

NCSEA states in its initial comments that it does not believe that the inclusion of a capital project in an approved PBR Application should be considered in the CPCN approval process. NCSEA argues that Commission approval of a capital project for cost recovery in a PBR Application does not mean that the utility needs the capital project. A CPCN Application, in contrast to a PBR Application, must show the utility's need for a capital project. NCSEA asserts that utilities must independently demonstrate the need for its proposed facility to obtain a CPCN.

CCEBA responds that it agrees with CUCA/CIGFUR and NCSEA that the CPCN process and the analysis of cost recovery within a PBR Application are two separate processes and that the Commission should not conflate them.

In reply comments, the Companies argue that the Commission should not disregard prior conclusions in other dockets in rendering a decision in a CPCN proceeding. Doing so, the Companies assert, has no basis in law or Commission precedent. The Companies note that the intervenors' arguments to disregard past decisions regarding a proposed project in a PBR Application proceeding when considering a CPCN Application for that same project, are without legal basis, and appear to ignore many ways that the Commission has historically

taken judicial notice of prior decisions and, in many cases, expressly relied on evidence and findings of fact from prior proceedings.

In reply comments, the Public Staff notes that the requirements for approval of a project in an MYRP and for approval of a CPCN are different. The Public Staff also notes that, if the Commission finds it appropriate to approve a project without a CPCN for inclusion in an MYRP, in the later CPCN proceeding the Commission could take notice of its findings in the earlier PBR proceeding. The Public Staff cautions, however, that the prior determination should not supplant or abbreviate the detailed CPCN process and the Commission's nuanced determination of whether a project is in the public interest and required by public convenience and necessity, nor should parties be prevented from asserting different or more nuanced positions.

In reply comments, NCJC et al. endorse the comments of CUCA/CIGFUR and of NCSEA.

The Commission agrees with the intervenors that the CPCN process was not modified in the PBR Statute or the legislation enacting the PBR Statute. The Commission further notes that while Duke optimistically projects that the Commission "may consider whether it might be appropriate to modify those aspects of the CPCN process that are not governed by the applicable statutes in order to streamline the CPCN process for those projected capital projects that are approved in the PBR process or through other regulatory processes such as the Carbon Plan," the Commission is not currently inclined to lessen the rigor of the CPCN review. Approval for certain types of projected capital expenditures in the PBR process, or the Carbon Plan, makes the need for Commission oversight for CPCNs, particularly the siting decisions for these projects, vitally important. As the Companies note in their comments, it is likely that transmission facilities and solar generating facilities are the type of CPCN-dependent capital projects for which utilities will request approval in a PBR Application and in the Carbon Plan. In either proceeding, the Commission is not abdicating its responsibilities to ensure that utilities site these facilities appropriately and to ensure that these facilities meet the least cost mandate of N.C.G.S. §§ 62-2 and 62-110.9. The Commission further notes that part of the Commission's CPCN process is the provision of notice to the public of the exact siting of a proposed facility and the opportunity for comment from the public and other state agencies. Neither the PBR Application process nor the Carbon Plan provide an adequate substitute for the public notice and opportunity for comment found in the CPCN process.

The Commission determines that the PBR process is not a substitute for a CPCN proceeding but that the approval of a project in a PBR Application may be considered in a CPCN proceeding. The Commission agrees with the intervenors that the CPCN process and the PBR approval process are different proceedings with different standards of review. If a CPCN-dependent capital project is the subject of a previous PBR Application, the parties may request the Commission to take judicial notice of both the evidence from the prior proceeding and the Commission's decision in the prior proceeding.

CPCNs for Non-Utility Owned Assets

The Companies' initial comments assert that a utility can include, as part of its MYRP proposal, capital projects which it does not yet own and for which another party would be filing a CPCN Application. The Companies argue that the PBR Statute does not limit an MYRP to capital projects that the utility already owns and that a utility can include capital projects that it anticipates acquiring later during the MYRP provided the project goes into service during the MYRP period. The Companies further note that this would include projects that a third-party developer develops and the utility later purchases, including both build-own-transfer projects that already have CPCNs in North Carolina and other project structures that do not have CPCNs.

CUCA/CIGFUR reiterate that both statutory and practical concerns mandate that utilities only include a CPCN-dependent capital project in an MYRP after the utility has received the CPCN. CUCA/CIGFUR assert that until the utility acquires the CPCN, the project should not be part of an MYRP.

The Public Staff states that it has reviewed and agrees with CUCA/CIGFUR's comments.

In its initial comments, NCSEA states that the question of whether a PBR Application can request cost recovery for capital projects for which a party other than the utility would be applying for a CPCN is not ripe at this time. NCSEA notes that N.C.G.S. § 62-110.9 requires that "fifty-five percent (55%) of the total MW AC of any solar energy facilities established pursuant to this section shall be supplied from solar energy facilities that are utility-built or purchased by the utility from third parties and owned and operated and recovered on a cost-of-service basis by the soliciting electric public utility." NCSEA asserts that the Commission has yet to provide guidance on purchases from third parties and therefore the issue is not yet ripe.

CCEBA agrees with NCSEA that this issue is not yet ripe for full discussion.

In reply comments, the Public Staff states that approving a capital project plan that includes a project owned by a third party from whom the utility expects to acquire the project is speculative, regardless of whether the third party has or has not received a CPCN. The Public Staff also notes that a project's receipt of a CPCN at all or by a certain date is not assured, and the risk that the Commission rejects or delays the CPCN should not be borne by ratepayers. The Public Staff also notes that the Commission should also consider, and may reject, the CPCN transfer, another risk.

NCJC et al. state that it agrees with CUCA/CIGFUR that the utility's ownership of a project is merely speculative until the utility acquires the project.

Similar to a CPCN-dependent project that has not obtained a CPCN prior to approval of a PBR Application, the Commission is not persuaded that the PBR Statute prohibits approval of cost recovery under an MYRP for capital projects which the utility

does not yet own. As with CPCN-dependent projects where the utility has not yet obtained a CPCN, it appears less likely that the utility can show that the project that has not yet been transferred to the utility at the time of filing the PBR Application will be "used and useful" in the first year of the MYRP. However, the utility may be able to show that the project will be "used and useful" later in the MYRP period. Capital projects included in the MYRP are projected and the utility applying for recovery of such costs must provide sufficient evidence in its PBR Application to establish that these projected capital investments will be owned by the utility and placed in service in a specified rate year under the MYRP.

The Commission determines that a utility may request cost recovery in a PBR Application for capital projects which it does not yet own and for which another party would be filing a CPCN Application. The Commission will determine whether the projects are eligible for recovery in a MYRP that is part of a proposed PBR Application on a project-by-project basis as depending on the evidence submitted in the PBR Application. A utility filing for recovery for these projected projects must provide sufficient evidence in its application that the projects meet the requirements of the PBR Statute and sufficient evidence of the need for the requested project.

In sum, the Commission determines that while the PBR Statute does not preclude cost recovery for projects in a PBR Application (i) for which a CPCN has not been obtained or (ii) where the utility does not yet own the project, the PBR Statute does require that the utility requesting cost recovery provide sufficient evidence that the project will be used and useful in the appropriate rate year. The Commission will determine if cost recovery is allowed under an MYRP for each project on a case-by-case basis, provided the PBR Application meets the requirement of the PBR Statute, and the utility demonstrates the need for the project. The Commission also determines that the PBR Statute does not modify the CPCN process for projects for which an applicant seeks cost recovery in a PBR Application.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 8th day of September, 2022.

NORTH CAROLINA UTILITIES COMMISSION

Erica N Green

Erica N. Green, Deputy Clerk