

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

In the Matter of:)	
Rulemaking Proceeding to Implement)	NCSEA’S INITIAL
Performance-Based Regulation of Electric)	COMMENTS
Utilities)	

NCSEA’S INITIAL COMMENTS

Pursuant to North Carolina Utilities Commission’s (“Commission”) October 14, 2021 *Order Requesting Comments and Proposed Rules*, the North Carolina Sustainable Energy Association (“NCSEA”) hereby offers the following initial comments on the Commission’s adoption of rules to implement N.C. Gen. Stat. § 62-133.16, as it was adopted by S.L. 2021-165 (“House Bill 951”). Below, NCSEA addresses the issues that must be decided by the Commission in chronological order as they would appear in a proceeding, including a proposed “run-of-show” for how these proceedings would occur, and attempts to identify issues where the Commission must decide in this instant rulemaking proceeding, and issues where the Commission may decide in this proceeding or could decide in a future proceeding.

The Commission should strive to ensure that the rules adopted to implement N.C. Gen. Stat. § 62-133.16 ensure quality, certainty, transparency, equity, and exercise the authority granted to the Commission by House Bill 951. Though House Bill 951 directs the Commission to adopt rules implementing N.C. Gen. Stat. § 62-133.16 in an expedited process, the Commission should still strive to adopt quality rules, even if those rules defer making some policy decisions to later dockets, such as a performance-based regulation (“PBR”) ratemaking proceeding or, as proposed below, a policy considerations docket or a docket where the Commission authorizes capital investments to be recovered via PBR.

Similarly, the Commission’s rules should ensure certainty for all stakeholders regarding the process by which PBR and the scrutiny of PBR applications will be implemented by the Commission. Transparency should also be paramount to the Commission in adopting rules, as stakeholders will only be able to evaluate the effectiveness of performance incentive mechanisms (“PIMs”) if the metrics used in tracking PIM performance are filed publicly and available for review by all stakeholders. The Commission should also consider equity when adopting rules to implement PBR, with goals such as ensuring equity between customer classes in rates, ensuring that PIMs are equitable in how they impact varying customers, and by ensuring rates do not disproportionately rise for low- to moderate-income (“LMI”) residential customers. Finally, the Commission has been afforded a great deal of authority by the General Assembly in N.C. Gen. Stat. § 62-133.16, and the Commission should actively exercise the authority that has been granted to it.

I. RELATIONSHIP BETWEEN PBR AND THE CARBON PLAN

Section 1 of House Bill 951 directs the Commission to “Develop a plan, no later than December 31, 2022[.]” that “take[s] all reasonable steps to achieve a seventy percent (70%) reduction in emissions of carbon dioxide (CO₂) emitted in the State from electric generating facilities owned or operated by electric public utilities from 2005 levels by the year 2030 and carbon neutrality by the year 2050.” This plan “may, at a minimum, consider power generation, transmission and distribution, grid modernization, storage, energy efficiency measures, demand-side management, and the latest technological breakthroughs to achieve the least cost path consistent with this section to achieve compliance with the authorized carbon reduction goals[.]” Accordingly, the Carbon Plan developed by the

Commission will greatly inform the capital investments that Duke Energy Carolinas, LLC (“DEP”) and Duke Energy Progress, LLC (“DEP”) (DEC and DEP, collectively, “Duke”) will seek to recover through PBR.¹ Furthermore, the Carbon Plan is required by Section 1.(2) of House Bill 951 to comply with least cost planning, which protects ratepayers by ensuring that investments are the least cost method of meeting North Carolina’s statutory requirements.

The Commission’s focus on quality should extend to reading the provisions of House Bill 951 as a whole and the Commission should consider the directives of Section 1 of the legislation, the Carbon Plan requirements, as it is implementing N.C. Gen. Stat. § 62-133.16. To that end, Section 4.(c) of House Bill 951 directs the Commission to adopt rules implementing N.C. Gen. Stat. § 62-133.16 by February 10, 2022 but neither House Bill 951 nor N.C. Gen. Stat. § 62-133.16 dictate that electric public utilities (“utilities” or, in the singular, “utility”) be allowed to file PBR applications on February 10, 2022.

The Commission’s rules should dictate Duke cannot file a PBR application before January 1, 2023 so that the capital investments that the Commission allows to be recovered via PBR will be informed by the Commission’s Carbon Plan. NCSEA does not propose any restrictions on Duke’s ability to file general rate case applications pursuant to N.C. Gen. Stat. § 62-133. However, allowing Duke to file a PBR application prior to the finalization of the Commission’s first Carbon Plan would seriously undermine the General Assembly’s intent in adopting House Bill 951. Assuming Duke requests the full 36-month PBR plan period authorized by N.C. Gen. Stat. § 62-133.16(f), allowing Duke to file PBR

¹ Section 1 of House Bill 951 only applies to electric public utilities serving at least 150,000 North Carolina retail jurisdictional customers as of January 1, 2021. DEC and DEP meet this requirement, while Dominion Energy North Carolina does not.

applications prior to the finalizing of the Carbon Plan would mean that the Commission's Carbon Plan would not be incorporated into PBR until 2025 at the earliest, four years after the General Assembly passed House Bill 951. This undue delay would significantly frustrate the purposes of House Bill 951, and the Commission's rules should dictate that Duke cannot file a PBR application before January 1, 2023.

II. DEFINITIONS

N.C. Gen. Stat. § 62-133.16(a) sets forth definitions for several terms used throughout the statute. However, for purposes of implementation, the definitions of "distributed energy resources" and "multiyear rate plan" should be further clarified in the Commission's rules.

A. DISTRIBUTED ENERGY RESOURCES

N.C. Gen. Stat. § 62-133.16(a)(3) defines a distributed energy resource ("DER") as:

a device or measure that produces electricity or reduces electricity consumption and is connected to the electric distribution system, either on the customer's premises or on the electric public utility's primary distribution system. A DER may include any of the following: energy efficiency, distributed generation, demand response, microgrids, energy storage, energy management systems, and electric vehicles.

While the statutory definition of DER is sufficient for purposes of the law, the definition of DER should be further clarified in the Commission's rules for purposes of implementation. Specifically, the Commission's definition of DER should make clear that the list of technologies specified as DERs in N.C. Gen. Stat. § 62-133.16(a)(3) is not exclusive and that other emerging technologies may be DERs. In addition, the Commission's definition of DER should recognize that DERs can be utilized by the

consumer or utility individually or in aggregate, as was recognized by the Federal Energy Regulatory Commission in Order 2222.²

B. MULTIYEAR RATE PLAN

N.C. Gen. Stat. § 62-133.16(a)(5), which defines “multiyear rate plan” (“MYRP”), states that the MYRP may authorize “periodic changes in base rates[.]” However, the statute does not define the timeframe of the “periodic” nature of these changes. Because N.C. Gen. Stat. § 62-133.16(c)(1)c. requires an annual proceeding to evaluate the earnings sharing mechanism, the decoupling rate-making mechanism, and utility performance with respect to any PIM of any MYRP, the Commission’s rules implementing N.C. Gen. Stat. § 62-133.16 should make clear that rate adjustments during a MYRP are to occur annually, coinciding with the rate year, and not at a different periodic interval.

III. PRE-APPLICATION ISSUES

Proceeding chronologically, the instant rulemaking docket requires the Commission to make decisions about various activities that will occur before a utility files a PBR application. NCSEA provides initial comments on two of those activities: the setting of policy considerations and the identification of the utility’s capital spending plan.

A. POLICY CONSIDERATIONS

N.C. Gen. Stat. § 62-133.16(d)(1) states that the Commission shall approve a PBR application “only upon a finding that a proposed PBR would result in just and reasonable rates, is in the public interest, and is consistent with the criteria established in this section and rules adopted thereunder[.]” (emphasis added). In addition to requiring the Commission

² *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222, 85 FR 67094 (Oct. 1, 2020), 172 FERC ¶ 61,247, at P 1 n.1 (2020), corrected, 85 FR 68450 (Oct. 29, 2020), order on reh’g, Order No. 2222-A, 86 FR 16511 (Mar. 24, 2021), 174 FERC ¶ 61,197 (2021); 18 CFR 35.28(b)(10).

adopt rules governing the criteria for evaluating a utility’s PBR application, N.C. Gen. Stat. § 62-133.16(d) identifies policy goals that the Commission may consider and addresses procedural matters related to the review of a utility’s PBR application. However, N.C. Gen. Stat. § 62-133.16(d) does not require that the Commission set policy goals in rule. Given that policy goals will evolve over time and may vary from one PBR rate case to another, the Commission should adopt rules that set forth a six-month process, to occur prior to the filing of a utility’s PBR application, that will set PIMs and performance and tracking metrics³ which are unique to and appropriate for that given PBR application (“Policy Consideration Docket”). N.C. Gen. Stat. § 62-133.16(j)(2) requires that the Commission’s rules implementing N.C. Gen. Stat. § 62-133.16 include the criteria for evaluating a PBR application. The Commission's rules should establish that the policy goals, PIMs, and performance and tracking metrics adopted in the Policy Consideration Docket are the N.C. Gen. Stat. § 62-133.16(j)(2) criteria by which a PBR application will be evaluated.

Establishing policy goals, PIMs, and performance and tracking metrics in a Policy Consideration Docket before a PBR application is filed will have practical benefits. North Carolina is on a relatively fast process to implement the PBR rules. House Bill 951 requires the Commission to adopt rules to implement N.C. Gen. Stat. § 62-133.16 within 120 days of the legislation becoming law, or February 10, 2022.⁴ In comparison, Hawaii spent nearly three years developing its PBR framework.⁵ The rules adopted by the Commission to implement N.C. Gen. Stat. § 62-133.16 should be impactful and quality, and therefore

³ As discussed further below, House Bill 951 references both performance metrics (see, N.C. Gen. Stat. § 62-133.16(a)(6) and (c)(3)) and tracking metrics (see, N.C. Gen. Stat. § 62-133.16(a)(10) and (c)).

⁴ See, House Bill 951, Section 4.(b).

⁵ See, State of Hawaii Public Utilities Commission, Performance Based Regulation (PBR), <https://puc.hawaii.gov/energy/pbr/> (last visited November 8, 2021).

should address policies that are not already required by other laws or regulations. Developing policy goals, PIMs, and performance and tracking metrics that are not already addressed by other laws or regulations is unlikely to occur during the 120-day rulemaking period.

Moreover, adopting new policy goals, PIMs, and performance and tracking metrics in a Policy Consideration Docket prior to each PBR application ensures that the policy objectives governing a PBR application and PBR plan period are as up to date as possible. In fact, N.C. Gen Stat § 62-133.16(a)(8) anticipates that policy goals may be set by the Commission “prior to and independent of” a PBR application. Ideally, the policy objectives governing a PBR plan period will be achieved by the end of that period, which would render the PIMs, policy goals, and performance and tracking metrics unnecessary for inclusion in the next PBR application. Instead, policy objectives will evolve over time, and equity considerations should dictate that policy goals, PIMs, and performance and tracking metrics evolve over time to match those changing objectives.

The Commission would also provide certainty to stakeholders about procedural logistics if it adopted rules that set forth a Policy Consideration Docket to set policy objectives for the upcoming PBR application. It would be much less likely that parties would file petitions for rulemaking to change PIMs, policy goals, or performance and tracking metrics during the pendency of a PBR plan period. Instead, the Commission could exercise the discretion afforded to it by N.C. Gen. Stat. § 62-133.16(e) to only adjust PIMs during a PBR plan period of its own volition or upon motion of the Public Staff.

1. PERFORMANCE INCENTIVE MECHANISMS

The Commission should strive to adopt rules implementing N.C. Gen. Stat. § 62-133.16 that allow the Commission and intervenors to address failures of the traditional regulatory regime. Notably, LMI residential customers face one such failure: despite LMI assistance being within the utility's control, the utilities have generally failed to identify solutions for these ratepayers or to deploy capital that assists these customers. The Commission's rules should allow the utility to leverage third-party investments in LMI programs if they are necessary to attain the policy goals contained in a PIM, especially if government funds are available or third-party investments would be less costly than the utility investing its own capital in LMI programs. The Commission should adopt rules that address the failure of traditional regulatory regimes to identify solutions for LMI residential customers that are within the utility's control to implement and to require capital be deployed towards implementation.

Aside from the LMI-specific concerns discussed above, this rulemaking will be successful, in part, if it allows for successful implementation of PIMs that address the needs of the North Carolina. The Commission's rules should make clear that the Commission will do the following when it is establishing PIMs in a Policy Consideration Docket:

- Identify areas where PIMs are warranted;
- Ensure that the utility controls the outcome or performance of the PIM, as opposed to larger market factors or trends;
- Establish rewards and, as allowed by N.C. Gen. Stat. § 62-133.16(c)(5), penalties for the utility's performance under a PIM;

- Ensure that PIMs can be accurately measured in performance and tracking metrics, allowing stakeholders to verify the data supporting performance and tracking metrics;
- Establish that PIMs will be evaluated, improved, and, if necessary, repeated based on the utility's performance, as reported in performance and tracking metrics; and
- Ensure that PIMs allocate a fair level of reward to both shareholders and consumers.

The Commission's rules governing PIMs should also note the special circumstances surrounding PIMs for demand-side management and energy efficiency ("DSM/EE"). N.C. Gen. Stat. § 62-133.16(c)(4) requires that "Any incentive related to demand-side management and energy efficiency measures pursuant to G.S. 62-133.9(f) shall be excluded from the limits established and shall continue to be recovered through the demand-side management and energy efficiency (DSM/EE) rider." The tracking metrics and filed data supporting performance need to be specifically tailored to enable the Commission and interested parties to distinguish between PIM performance and achieving pre-existing DSM/EE incentives. This will ensure amounts related to PIMs objectives are accounted for correctly.

Furthermore, if the Commission decides to incentivize DSM/EE goals through PIMs, consideration should be paid to the fact that DSM/EE are generally the least-cost method of meeting energy needs, and therefore should be a least-cost solution to complying with House Bill 951's Carbon Plan requirements. Moreover, DSM/EE measures that allow third parties to finance the costs of measures (even if implemented by a Duke contractor) and that do not allow Duke to pay for measures if a third party is willing and able to pay

for them will result in lower rate impacts for PIM compliance and allow more customers to benefit from the utility's compliance with PIMs.

2. PERFORMANCE AND TRACKING METRICS

N.C. Gen. Stat. § 62-133.16(a)(1) defines a tracking metric as “a methodology for tracking and quantitatively measuring and monitoring outcomes or electric public utility performance.” Pursuant to N.C. Gen. Stat. § 62-133.16(c), a utility's PBR application may propose tracking metrics. In addition, N.C. Gen. Stat. § 62-133.16(a)(6) requires a PIM to include “specific performance metrics and targets against which electric public utility performance is measured” and N.C. Gen. Stat. § 62-133.16(c)(3) requires that “The policy goal targeted by a PIM shall be clearly defined, measurable with a defined performance metric[.]” In order to meet these statutory requirements, the Commission's rules governing performance and tracking metrics for PIMs should include the following requirements for the adoption of performance and tracking metrics in a Policy Consideration Docket :

- The metrics should incorporate specific data definitions, if not already defined in the PIM;
- The metrics should include a precise formula to quantify the utility's performance;
- The metrics should set forth requirements for data collection and analysis practices and techniques;
- The data collected and tracked for the metric should be able to be quantified using reasonably available data;
- The metrics should specify what collected data will be required to be reported and how quantified performance will be reported to the Commission during each month of the applicable rate year, in a manner that is both publicly available and in its

native format with formulae intact and working macros (i.e., spreadsheets should be filed as Microsoft Excel documents or another native format, as opposed to being filed as PDFs); and

- Each metric should include verification techniques that can be verified by stakeholders independently of the utility.

These requirements will allow both the Commission and stakeholders to independently validate and exhibit the utility's performance or non-performance with PIMs. While N.C. Gen. Stat. § 62-133.16 does not facially require the Commission to adopt performance and tracking metrics, the Commission should adopt rules that make performance and tracking metrics mandatory because a utility's progress towards a PIM cannot be measured and verified unless it is transparently reported. As discussed further below, performance and tracking metrics should be regularly reported by the utility in a non-confidential manner, with data provided in its native format with formulae intact and working macros to allow stakeholders to verify the utility's performance. Performance and tracking metrics should also be easily accessible for all stakeholders or parties to use and verify. A proposed way to ensure such performance and tracking metrics are public and accessible is to have a "Data Dashboard" as suggested by the Regulatory Assistance Project's Performance Incentives for Cost-Effective Distribution System Investments report:

Reporting dashboards can provide data collection, analysis and presentation for a PBR approach. In this context, a "dashboard" refers to a summary table in accessible graphic format, compiling data in a form the public can understand. Dashboards provide a way to inform regulators, the public and stakeholders of utility progress toward important goals. Just the collection

of data and public reporting via a dashboard might be enough to motivate utility progress toward the goals.⁶

The Commission's rules should make clear that the dashboard and the data presented should be accessible to the public and be available for download and review. The dashboard should list performance targets, historical performance dates, peer performance, and other comprehensive and up-to-date information that allows stakeholders to examine the utility's performance.

While a utility is permitted to propose tracking metrics, there is nothing in N.C. Gen. Stat. § 62-133.16 that prevents other stakeholders or the Commission from proposing performance and tracking metrics as well. Given this, performance and tracking metrics should be proposed, debated, and decided in the Policy Consideration Docket. Performance and tracking metrics should also be able to be verified independently of the utility if necessary and should be relatively easy to interpret.

B. CAPITAL INVESTMENTS

Prior to a utility making a PBR application, N.C. Gen. Stat. § 62-133.16 requires that the Commission must address issues regarding the utility's planned capital investments.

1. SPENDING PLAN

N.C. Gen. Stat. § 62-133.16(c)(1)a. requires that a utility's PBR application include rates for the MYRP rate years that are based on "Commission-authorized capital investments[.]" The General Assembly's use of the past tense word "authorized" in N.C.

⁶ David Littell, Megan O'Reilly, Jessica Shipley, *Performance Incentives for Cost-Effective Distribution System Investments*, Regulatory Assistance Project (February 2020), <https://www.raponline.org/wp-content/uploads/2020/02/rap-littell-oreilly-shipley-PBR-distribution-system-2020-february.pdf>.

Gen. Stat. § 62-133.16(c)(1)a. indicates that the legislature intended for the Commission to authorize capital investments prior to a utility filing a PBR application.

Given that the statute requires that a utility's capital investments be authorized by the Commission prior to the filing of a PBR application, the Commission's rules implementing N.C. Gen. Stat. § 62-133.16 should include a docketed proceeding that must be initiated at least six months prior to the filing of a PBR application. This proceeding could incorporate the technical conference process required by N.C. Gen. Stat. § 62-133.16(j)(3), discussed below, or could be integrated into the Carbon Plan required by Section 1 of House Bill 951, or could be integrated into Commission Rule R8-60 governing integrated resource plans. Given the interplay between N.C. Gen. Stat. § 62-133.16 and the rest of House Bill 951, the best course of action would be for the Commission to incorporate authorization of capital investments into the Carbon Plan process, which requires that transmission and distribution investments, such as those that will be recovered by the utilities via the MYRP aspect of PBR, be a part of the "least cost path" to achieve the requirements of the Carbon Plan. Such a process would ensure efficient use of both Commission and stakeholder time and resources. This process would also create a logical, cyclical order to identifying the least cost planning scenarios that include the full spectrum of resources and innovations that House Bill 951 dictates the Commission consider in developing a least cost, reliable grid that reduces CO₂ emissions by 70% by 2030.

Furthermore, from an equity perspective, historical processes have not been sufficiently inclusive of the needs and considerations of LMI residential customers; creating the most efficient, transparent, and accessible process can reduce cost, time, and information barriers to allow under-represented stakeholders to effectively participate

before the Commission and improve electric service performance for all of North Carolina's ratepaying electricity consumers.

The criteria for the Commission's authorization of capital investments should also be set forth in the Commission's rules implementing N.C. Gen. Stat. § 62-133.16. Traditionally, the Commission has allowed cost recovery of capital investments that led to a reliable, affordable, and safe electric grid; House Bill 951 added carbon reductions to this list of requirements for capital investments. The Commission's rules governing the authorization of capital investments should examine how the investments are targeted to achieve the PIMs that are set by the Commission in the Policy Consideration Docket, should include information about how the investments are targeted to help achieve the requirements of Section 1 of House Bill 951 (the Carbon Plan), should include information about how the investments support the ownership of solar generation by independent power producers as required by Section 1(2)b. of House Bill 951, should demonstrate how the investments are informed by the Integrated System Operations Planning ("ISOP") process, as has previously been required by the Commission for Duke,⁷ and demonstrate how the investments address congestion relief on the grid, as has previously been required by the Commission for Duke.⁸

⁷ See, *Order Accepting Stipulations, Granting Partial Rate Increase, and Requiring Customer Notice*, Docket Nos. E-7, Sub 1213, E-7, Sub 1214, and E-7, Sub 1187, at Finding of Fact 41 (March 31, 2021) ("*2021 DEC Rate Case Order*") and *Order Accepting Stipulations, Granting Partial Rate Increase, and Requiring Customer Notice*, Docket Nos. E-2, Sub 1219 and E-2, Sub 1193, at Finding of Fact 38 (April 16, 2021) ("*2021 DEP Rate Case Order*"). Given that ISOP is a proprietary process utilized by DEC and DEP, NCSEA believes Dominion Energy North Carolina should be afforded the opportunity to demonstrate how its investments are informed by an alternative planning process.

⁸ See, *2021 DEC Rate Case Order* at 132, Ordering Paragraph 14 and *2021 DEP Rate Case Order* at 133, Ordering Paragraph 11.

2. TECHNICAL CONFERENCE PROCESS

In addition to determining procedures for the Commission’s authorization of capital investments, N.C. Gen. Stat. § 62-133.16(j)(3) requires that the Commission’s rules implementing N.C. Gen. Stat. § 62-133.16 include a technical conference process for the Commission to gather information regarding projected transmission and distribution expenditures. N.C. Gen. Stat. § 62-133.16(j)(3) requires a utility to “request[] initiation of such process[,]” and the Commission should adopt rules similar to Commission Rule R1-17(a) that requires a utility file a notice of intent to file a general rate case application. The Commission’s rule should also require the utility’s request be accompanied by an explanation of how the projected transmission and distribution expenditures will advance the goals set forth in N.C. Gen. Stat. § 62-133.16(d)(2) and any data supporting the utility’s assertions. Further, the Commission’s rule should state that the Commission will issue a scheduling order following the submission of a request to initiate the technical conference process setting dates for specific technical conferences.

N.C. Gen. Stat. § 62-133.16(j)(3) requires “the electric public utility [to] present[] information regarding projected transmission and distribution expenditures” at the technical conference and allows interested parties “to provide comment and feedback[.]” The Commission’s rule, in addition to the presentation required by the utility, should allow interested parties to request to present their own information regarding projected transmission and distribution expenditures or to request to present critiques of the utility’s presentation. The Commission rule implementing N.C. Gen. Stat. § 62-133.16(j)(3) should also require that all presentations and supporting documentation be filed in the

Commission's docketing system, and that supporting documentation should be filed in its native format with formulae intact and working macros.

While N.C. Gen. Stat. § 62-133.16(j)(3) prohibits cross-examination of parties making presentations, it does not prohibit the parties from conducting discovery related to the technical conference presentations. The Commission's rules implementing N.C. Gen. Stat. § 62-133.16(j)(3) should make clear that parties are permitted to perform discovery related to the technical conference presentations during the pendency of the technical conference process. It would be unprecedented for the Commission to authorize capital investments without intervenors having the opportunity to conduct discovery.

Finally, in the interest of transparency, the Commission's rules implementing N.C. Gen. Stat. § 62-133.16(j)(3) should require the utility to provide detailed plans and information about investments, complete with supporting data for the investments, in a public (i.e., non-confidential) format. Such supporting data should include information about how the investments are targeted to achieve the factors the Commission considers in authorizing a capital investment plan: how the investments are targeted to achieve the PIMs that have been set by the Commission,⁹ how the investments are targeted to help achieve the Carbon Plan,¹⁰ how the investments support the ownership of solar generation by independent power producers,¹¹ how the investments are informed by the ISOP process,¹² and how the investments address congestion relief on the grid.¹³

⁹ See, N.C. Gen. Stat. § 62-133.16(c)(1)c.2.

¹⁰ See, House Bill 951, Section 1.

¹¹ See, House Bill 951, Section 1.(2)b.

¹² See, *2021 DEC Rate Case Order* at Finding of Fact 41 and *2021 DEP Rate Case Order* at Finding of Fact 38.

¹³ See, *2021 DEC Rate Case Order* at 132, Ordering Paragraph 14 and *2021 DEP Rate Case Order* at 133, Ordering Paragraph 11.

IV. APPLICATION

As specified in N.C. Gen. Stat. § 62-133.16(c), a PBR application must include a decoupling rate-making mechanism, one or more PIMs, and a MYRP which consists of an earnings sharing mechanism, proposed revenue requirements and base rates for each plan year, or a method for calculating the same. Further, N.C. Gen. Stat. § 62-133.16(a)(6) requires that PIMs “include[] specific performance metrics and targets against which electric public utility performance is measured.” The current Commission Form E-1 Rate Case Information Report (“E-1 Report”) requires a utility to provide specific information when filing a General Rate Case. While the existing E-1 Report provides key information that will be necessary in considering the merits of a PBR application, the Commission should establish rules requiring an expanded version of the E-1 Report be filed when a utility submits a PBR application. In addition to the existing information required by the E-1 Report, an expanded E-1 Report should include, at a minimum, the following additional information:

- Data necessary to establish a baseline for measuring the utility’s progress towards Commission-established PIMs; and
- Data necessary to establish costs associated with the Commission’s pre-approved capital investments, as discussed above.

The expanded E-1 Report should be filed in the Commission’s docketing system with supporting documentation filed in its native format with formulae intact and working macros.

N.C. Gen. Stat. § 62-133.16(j)(2) requires the Commission to adopt rules establishing the criteria by which a PBR application will be evaluated. The Commission’s

rules should make clear that the Commission will evaluate PBR applications for compliance with the policy goals, PIMs, performance and tracking metrics, and any other criteria established by the Commission in the Policy Consideration Docket.

V. PROCEDURAL RUN-OF-SHOW

House Bill 951 is proscriptive about how much of the PBR rate case proceeding pursuant to N.C. Gen. Stat. § 62-133.16 (“PBR Rate Case”) and the accompanying general rate case pursuant to N.C. Gen. Stat. § 62-133 (“General Rate Case”) will coexist and interplay. However, there are still some uncertainties. NCSEA seeks to provide the Commission with its vision of how the various related proceedings could move forward,¹⁴ and, to that end, below is the “run of show” for how the PBR Rate Case and General Rate Case proceedings should occur.

A. POLICY CONSIDERATION DOCKET

180 days prior to the filing of the PBR application, the utility should petition the Commission to open a Policy Consideration Docket to set policy goals for the upcoming PBR Application, as mentioned above. This Policy Consideration Docket would have a twofold purpose: (1) to discuss policy goals that the PBR Application seeks to address and what criteria the Commission should consider when evaluating the PBR Application; and (2) to discuss and set the PIMs for the upcoming PBR Application. This may include, but is not limited to, the evaluation of factors contained within N.C. Gen. Stat. § 62-133.16(d)(2), which include factors the Commission may consider when reviewing a PBR Application.

¹⁴ NCSEA does believe other portions of House Bill 951, including notably Section 1 which will not be implemented until after the Carbon Plan is approved prior to December 31, 2022, may affect some of the proceedings described in this section and will request the Commission implement changes to this procedural structure as needed.

B. COMMISSION AUTHORIZATION OF INVESTMENTS

As discussed above and as required by N.C. Gen. Stat. § 62-133.16(c)(1)a, the Commission should undertake to authorize the investments the utility seeks to recover in a PBR application contemporaneously with the Policy Consideration Docket but in a separate proceeding. This process will provide the necessary authorization for spending as discussed herein and can work in concert with the Policy Consideration Docket, and, possibly, other planning dockets, such as the Carbon Plan, as the Commission sees fit to allow. This will give the Commission and intervenors an understanding of the capital investments and policy vision that the utility seeks to implement while complying with the statutory requirement to authorize capital investments, as noted above. This will also provide a venue for (i) comment, as necessary, (ii) application of least cost analysis, as contemplated by Section 1 of House Bill 951, and (iii) proactive, rather than reactive, planning for PBR Riders (as defined below), true-up, and recurring rate base adjustments.

C. TECHNICAL CONFERENCE

N.C. Gen. Stat. § 62-133.16(j)(3) states, in pertinent part:

The parameters for a technical conference process to be conducted by the Commission prior to submission of any PBR application consisting of one or more public meetings at which the electric public utility presents information regarding projected transmission and distribution expenditures and interested parties are permitted to provide comment and feedback; provided, however, no cross-examination of parties shall be permitted. The technical conference process to be established shall not exceed a duration of 60 days from the date on which the electric public utility requests initiation of such process.

This portion of the statute is not proscriptive regarding *when* the technical conference must take place relative to the accompanying PBR application other than to say the technical conference must occur within 60 days of the utility's request. House Bill 951

does not, however, limit the Commission's ability otherwise to schedule the technical conference. Accordingly, the technical conference should not be so disconnected from the accompanying PBR Application that it is no longer relevant or reflective of current best practices in transmission and distribution planning and investment. Therefore, the Commission's rules should require the utility to initiate the technical conference process 60 days prior to filing a PBR Application.

D. PBR AND GENERAL RATE CASE NOTIFICATIONS

Before filing a General Rate Case, Rule R1-17(a) requires "[a]ll Class A and B electric, telephone, natural gas, water, and sewer utilities shall file written letters of intent to file general rate applications with the Commission thirty (30) days in advance of any filing thereof." For efficiency, the Commission's rules should similarly require utilities to file a notice of intent to file a PBR Rate Case application thirty days in advance of the filing of the application.

E. GENERAL RATE CASE

The rules governing a General Rate Case are well-established, and the Commission's rules implementing N.C. Gen. Stat. § 62-133.16 should not affect the utilities' rights regarding a General Rate Case as enumerated by both rule and statute. There is one inconsistency between the General Rate Case proceeding requirements and the new PBR Rate Case Requirements. As stated in N.C. Gen. Stat. § 62-134(b), the Commission may suspend the proposed rates in a general rate case application up to 270 days, which is notably different than the 300-day suspension allowable under N.C. Gen. Stat. § 62-133.16(d)(3) for a PBR proceeding, as discussed further below.

N.C. Gen. Stat. § 62-133.16 does interweave some requirements for the filing of a general rate case, though. Any single generation investment which exceeds \$500 million dollars may only be recovered in a future General Rate Case via a regulatory asset:

The revenue requirements associated with any single new generation plant placed in service during the MYRP for which the total plant in service balance exceeds five hundred million dollars (\$500,000,000) shall not be included in a MYRP. Instead, the utility may request and the Commission may grant, if it deems appropriate, permission to establish a regulatory asset and defer to such regulatory asset incremental costs related to such electric generation investments to be considered for recovery in a future rate proceeding.

Practically speaking the next General Rate Case will likely occur at the end of the 3-year PBR plan period when the utility again seeks PBR and PIMs.

F. PBR RATE CASE

House Bill 951 states, in pertinent part:

An electric public utility shall be permitted to submit a PBR application in a general rate case proceeding initiated pursuant to G.S. 62-133. A PBR application shall include a decoupling rate-making mechanism, one or more PIMs, and a MYRP, including both an earnings sharing mechanism and proposed revenue requirements and base rates for each of the years that a MYRP is in effect or a method for calculating the same. The PBR application may also include proposed tracking metrics with or without targets or benchmarks to measure electric public utility achievement.¹⁵

If the utility fails to include the required items stated above in its PBR Application, the Commission should reject the PBR Application and require the utility to re-file, including complying with all pre-PBR Application requirements stated herein.

House Bill 951 further sets forth that:

The base rates for the first rate year of a MYRP shall be fixed in the manner prescribed under G.S. 62-133, [...] Subsequent changes in base rates in the second and third rate years of the MYRP shall be based on projected

¹⁵ N.C. Gen. Stat. § 62-133.16(c).

incremental Commission-authorized capital investments that will be used and useful during the rate year and associated expenses, [...] the amount of increase in the second rate year under the MYRP shall not exceed four percent (4%) of the electric public utility's North Carolina retail jurisdictional revenue requirement that is used to fix rates during the first year of the MYRP pursuant to G.S. 62-133 excluding any revenue requirement for the capital spending projects to be placed in service during the first rate year. The amount of increase for the third rate year under the MYRP shall not exceed four percent (4%) of the electric public utility's North Carolina retail jurisdictional revenue requirement that is used to fix rates during the first year of the MYRP pursuant to G.S. 62-133, excluding any revenue requirement for the capital spending projects placed in service during the first rate year.¹⁶

This portion of the statute is significant for the Commission's rulemaking as it sets out specific limits on the utility's ability to recover capital investments via MYRP rate increases. An integral part of the PBR Application and the MYRP process is setting the rate years and closely tailoring cost recovery for the utility so that cost recovery complies with this subsection. For the purposes of starting the MYRP timeline, the first rate year should begin either (i) at the end of the 300-day suspension of the base rates resulting from the PBR Application¹⁷ or (ii) at any earlier time following the Commission's approval of the PBR Application via final order and approval of any necessary compliance filings.

G. RATE CASE YEAR 1 AND ANNUAL TRUE-UP PROCEEDINGS

As noted above, the first year of the MYRP sets the 4% cap for rate increases in years two and three of the MYRP based upon the "revenue requirement that is used to fix rates during the first year of the MYRP pursuant to G.S. 62-133 excluding any revenue

¹⁶ N.C. Gen. Stat. § 62-133.16(c)(1)a.

¹⁷ N.C. Gen. Stat. § 62-133(d)(3). Notably, this 300-day suspension of proposed base rates in a PBR Rate Case is inconsistent with the 270-day suspension of proposed base rates in a General Rate Case provided in N.C. Gen. Stat. § 62-134. NCSEA does not necessarily see an issue in this contradiction between the PBR Rate Case and that in a General Rate Case but will comment as necessary in its Reply Comments to other parties' positions.

requirement for the capital spending projects to be placed in service during the first rate year.”¹⁸ Notably, the annual revenue requirement for the first rate year of the MYRP also sets the PIMs cap:

Any PIM shall be structured to ensure that, pursuant to subdivisions (1) and (2) of this subsection, any penalty shall be refunded to customers and any reward shall be collected from customers and shall be limited such that the total of all potential and actual PIM incentives or penalties does not exceed one percent (1%) of the electric public utility’s total annual revenue requirement that is used to fix rates during the first year of the MYRP pursuant to G.S. 62-133, excluding any revenue requirement for the capital spending projects to be placed in service during the first rate year, where the PIM is approved.¹⁹

Accordingly, a proceeding will be required to determine the PBR and PIMs recovery caps for the second- and third-rate years. Relatedly, House Bill 951 requires that an annual true-up proceeding occur within 60 days of the conclusion of each rate year, to review, examine, and analyze certain issues related to the MYRP. In the annual true-up proceeding the Commission must (i) examine the earnings of the utility during the rate year to determine if earnings exceeded authorized rate of return on equity, (ii) evaluate the performance of the utility with respect to Commission-approved PIMs applicable in the rate year, and (iii) evaluate the decoupling rate-making mechanism.²⁰

The new statute lays out the need to evaluate rate base adjustment based upon project capital investments stating that “subsequent changes in base rates in the second- and third-rate years of the MYRP shall be based on projected incremental Commission-authorized capital investments that will be used and useful during the rate year[.]”²¹ These

¹⁸ N.C. Gen. Stat. § 62-133.16(c)(1)(a).

¹⁹ N.C. Gen. Stat. § 62-133.16(c)(4).

²⁰ N.C. Gen. Stat. § 62-133.16(c)(1)(c).

²¹ N.C. Gen. Stat. § 62-133.16(c)(1)(a).

changes are net of operating benefits and bound by the requirement that changes in rates for rate years 2 and 3 “shall not exceed four percent (4%) of the electric public utility’s North Carolina retail jurisdictional revenue requirement that is used to fix rates during the first year of the MYRP[.]”²² The authorized capital investments must be based upon projections and must be used and useful during the rate year, and, therefore, would be subject to true-up per the annual true-up proceeding detailed above. The annual true-up proceeding could mimic the Experience Modification Factor (“EMF”) analysis that takes place in other dockets, and this analysis would help to assure that the provisions set forth above are adhered to.

H. RATE YEARS 2 AND 3

Rate increases in rate years 2 and 3 will be subject to a cap of 4% of the first rate year’s retail jurisdictional revenue requirement and also a cap, which can apply to either penalty or incentive, for PIMs available to the utility based upon 1% of “the electric public utility’s total annual revenue requirement that is used to fix rates during the first year of the MYRP pursuant to G.S. 62-133, excluding any revenue requirement for the capital spending projects to be placed in service during the first rate year, where the PIM is approved.”²³ Review of both the PIMs cap and the PBR cap should be contained within the annual true-up proceeding and, as necessary, subject to true-up if the next rate year begins prior to the end of the analysis. Relatedly, a rider may be established in rate years 2 and 3, which would be determined at the same time as the true-up review and analysis regarding the PBR and PIMs caps. It may go without saying, but for the sake of efficiency, these

²² *Id.*

²³ N.C. Gen. Stat. § 62-133.16(c)(4).

separate but parallel analyses should occur in the same docket or, alternatively, in separate dockets which are joined for procedural purposes.

I. MONTH 37 AND BEYOND

At the end of the MYRP period, rates should be reset in a manner reflective of the bargain of House Bill 951, discussed below, which sets the utility up to file a subsequent, new PBR Application. For the purposes of a procedural run-of-show, the annual true-up and related proceedings for the third-year of the MYRP should go on in the next year, which will likely be the first year of a subsequent MYRP period. While the policy goals addressed by the PBR will change, the annual true-up proceeding will not disrupt any new Policy Consideration Docket and subsequent PBR Application. Therefore, NCSEA proposes that the annual true-up proceedings occur independently of any new PBR Application and related MYRP and in the same procedural manner as done in the previous rate year.

VI. RIDERS AND ONGOING REVIEW

N.C. Gen. Stat. § 62-133.16 gives the Commission discretionary authority to conduct periodic review of a PBR rate plan, as well as requires annual reporting on earnings by the utility and annual evaluation of such earnings by the Commission. The Commission should issue rules that would require sufficient reporting to enable informed periodic review and clarity and certainty regarding annual evaluation proceedings.

A. REPORTING

N.C. Gen. Stat. § 62-133.16(e) authorizes the Commission to periodically review a PBR rate plan and to initiate proceedings to adjust rates and PIMs, as may be necessary. A utility is required by N.C. Gen. Stat. § 62-133.16(h) to report, on an annual basis, its earned

return on equity and actual revenue, as well as adjustments for customer refunds and surcharges pursuant to the PBR rate plan. However, for the Commission to have an opportunity to meaningfully examine the reasonableness of a PBR rate plan, the Commission should adopt rules that require ongoing reporting by the utility that will allow the Commission and other stakeholders to evaluate performance upon the established criteria prior to the end of the applicable rate year.

1. MONTHLY REPORTING

Monthly reporting would allow the Commission and other interested parties to monitor the effectiveness of a PBR rate plan to determine if further action by the Commission or Public Staff becomes necessary during the rate year. Commission rules should require the utility to report monthly information including but not limited to (i) the specific tracking metrics, along with supporting data, used to assess PIM performance, (ii) average customer class data, including the monthly actual revenue and target revenue for the residential customer class decoupling mechanism, and (iii) a monthly surveillance report, like the quarterly surveillance reports generated by Commission Report E.S.-1.²⁴

Under any PBR rate plan, the utility is required to defer the difference between actual and target revenue for the residential customer class to an asset or liability account on a monthly basis.²⁵ In order for the Commission to evaluate the decoupling rate-making mechanism and corresponding rider, the Commission should adopt rules that require the utility to file a monthly accounting of these deferrals. Such accounting should include any supporting data in its native format and any calculations with formulae intact and working

²⁴ See, e.g., *Duke Energy Carolinas, LLC's Quarterly Surveillance Report E.S.-1*, Docket No. M-1, Sub 12DEC (August 30, 2021).

²⁵ N.C. Gen. Stat. § 62-133.16(c)(2).

macros as may be used in determining any such difference between actual and target revenue.

2. ANNUAL REPORTING

In addition to the monthly reporting outlined above, N.C. Gen. Stat. § 62-133.16(h) requires annual reporting by the utility. The Commission's rules should require that a utilities' annual filing includes supporting data, including exhibits and related workpapers in their native format with formulae intact and working macros. This data should include the calculations by which earned return on equity, any true-up of actual revenue when set against the revenue requirement, customer refunds or surcharges, and rewards and penalties for PIMS are being calculated.

3. TRANSPARENCY

The Commission's rules should require such monthly and annual reporting outlined herein to be publicly filed in its native format with formulae intact and working macros in the aforementioned "Data Dashboard" or otherwise in the Commission's docketing system and not under seal. To ensure that any PBR rate plan is in the public interest, as required by N.C. Gen. Stat. § 62-133.16(d)(1), all stakeholders must be able to access the necessary data to monitor utility performance and help ensure accurate and fair performance tracking. To this end, any tracking metric used to measure utility performance and outcomes for customers should be made publicly available along with the inputs used in such methodology. The Commission's rules should facilitate interested parties' ability to assess whether a proposed PBR will unreasonably harm or prejudice any class of customers or pose a threat to the safety and reliability of electric service, just as the Commission is

required to consider in reviewing a PBR application.²⁶ NCSEA suggests using the “Data Dashboard” to make this data publicly available.

B. RIDERS

N.C. Gen. Stat. § 62-133.16(c)(1)b. requires the Commission to establish a rider (“PBR Rider”) to refund amounts owed pursuant to earnings sharing mechanisms, PIM rewards and penalties, and decoupling adjustments, in the same proceeding authorizing a MYRP. The Commission should issue rules that will require the utility to provide all information necessary to determine the appropriate rider with specific enough detail to segregate cost allocations between the earnings sharing mechanism, PIM achievement, and the decoupling rate-making mechanism. The Commission should adopt rules that will require sufficiently detailed accounting and reporting so that interested parties can ensure that by achieving one PIM and collecting from customers through the PBR Rider, the utility cannot also recover pursuant to an otherwise-existing incentive program. For example, the current DSM/EE cost recovery mechanisms for Duke provides for a performance-based bonus or penalty if the utility achieves or underachieves specified conservation targets.²⁷ Additionally, the utility may exclude rate schedules or riders related to electric vehicle charging from the determination of the decoupling mechanism.²⁸ The Commission’s rules for establishing a rider should make clear that a detailed accounting of excluded revenue related to electric vehicle charging is required to be provided, as is a detailed accounting of any other source of excluded revenue, each distinct from an accounting of any other source of excluded revenue.

²⁶ N.C. Gen. Stat. § 62-133.16(d)(1)(b).

²⁷ *Order Approving Revisions to Demand-Side Management and Energy Efficiency Cost Recovery Mechanisms*, Docket Nos. E-2, Sub 931 & E-7, Sub 1032 (October 20, 2020).

²⁸ N.C. Gen. Stat. § 62-133.16(c)(2).

C. ANNUAL TRUE-UP PROCEEDING

N.C. Gen. Stat. § 62-133.16(c)(1)c. requires the Commission to evaluate (i) the earnings sharing mechanism to determine any refunds, (ii) performance with respect to any PIMs and corresponding rewards or penalties earned, and (iii) the decoupling rate-making mechanism, within 60 days of the end of each rate year. To provide procedural certainty about this annual true-up proceeding for all interested parties, the Commission should exercise its discretionary authority to issue rules establishing the proceeding by which such evaluation will be conducted.

1. TRANSPARENCY

While the monthly and annual reporting proposed to be required herein will form the basis for the Commission's evaluation of utility earnings and performance, the Commission's rules establishing an annual true-up proceeding should specify that any additional data used by the Commission in determining the PBR rider should be either included in the "Data Dashboard" or filed in its native format with formulae intact and working macros in the Commission's docketing system. The public should also be able to track how the Commission calculates interest, earnings sharing, and any PIM or decoupling adjustments in the annual true-up proceeding when the Commission determines the PBR rider. Public Staff and other interest parties need to be able to independently validate the accuracy of any refunds or charges to customers through the PBR Rider and whether targeted policy goals have been achieved, including whether achievement remained "within the electric public utility's control" as required by N.C. Gen. Stat. § 62-133.16(c)(3).

2. DECOUPLING RATE-MAKING MECHANISM

N.C. Gen. Stat. §62-133.16(d)(1) states that the Commission must consider whether a PBR application will “unreasonably harm” any class of customers or “unreasonably prejudice” any class of electric customers. To ensure equity among customer classes, the Commission should adopt rules requiring the utility to demonstrate how the application of the decoupling mechanism has impacted the residential customer class. Some factors the Commission should consider in determining the impact on the residential customer class include the benefits of increased energy efficiency²⁹, reducing energy-burden for LMI residential customers, and equitability of rates among customers in the residential class, in addition to any substantial rate increases or “rate shock.”³⁰

VII. POST-MYRP PERIOD

N.C. Gen. Stat. § 62-133.16(f) states that “Any PBR application approved pursuant to this section shall remain in effect for a plan period of not more than 36 months.” However, the statute is silent as to what happens upon the expiration of a PBR plan period. Given the statute’s silence, at the termination of a PBR plan period rates should revert to those that are set as a part of the PBR rate case utilizing a historical test year pursuant to N.C. Gen. Stat. § 62-133. N.C. Gen. Stat. § 62-133.16(d)(3)³¹ clearly states that a PBR application shall be submitted in conjunction with a general rate case application pursuant to N.C. Gen. Stat. § 62-133. Thus, the Commission will be setting rates utilizing a historical

²⁹ Given that many LMI residential ratepayers lack the access to capital to pay for energy efficiency upgrades or tax liability to monetize tax credits, many traditional energy efficiency measures benefit high-income residential ratepayers to the exclusion of LMI residential ratepayers. The Commission should consider whether LMI residential ratepayers are able to participate in energy efficiency measures when examining the impacts of decoupling on the residential class.

³⁰ N.C. Gen. Stat. § 62-133.16(d)(1)-(2).

³¹ “When an electric public utility files with the Commission *an application for a general rate case pursuant to G.S. 62-133* and that application includes a PBR application, the Commission shall institute proceedings on the application as provided in this subdivision.” (emphasis added).

test year, pursuant to N.C. Gen. Stat. § 62-133, in addition to the rates set pursuant to N.C. Gen. Stat. § 62-133.16.

As a practical matter, N.C. Gen. Stat. § 62-133.16 requires the Commission set four sets of rates in a PBR proceeding: rates utilizing a historic test year in accordance with the requirements of N.C. Gen. Stat. § 62-133,³² rates for the first year of the multiyear rate plan,³³ rates for the second year of the multiyear rate plan,³⁴ and rates for the third year of the multiyear rate plan.³⁵

Simply put, there is no support to be found in N.C. Gen. Stat. § 62-133.16 for the notion that, upon the expiration of a PBR plan period, customer rates should continue at the levels set for the second or third year of a PBR plan period. The General Assembly could have specified in N.C. Gen. Stat. § 62-133.16 that customer rates should continue at the levels set for the first, second, or third year of a PBR plan period at the conclusion of the PBR plan period, but the General Assembly failed to do so.³⁶ Instead, the General Assembly directed that a PBR Rate Case, pursuant to N.C. Gen. Stat. § 62-133.16, be overlaid on a General Rate Case, pursuant to N.C. Gen. Stat. § 62-133. Rates set pursuant

³² See, N.C. Gen. Stat. § 62-133.16(c), which requires a PBR application be filed in a general rate case proceeding pursuant to N.C. Gen. Stat. § 62-133.

³³ See, N.C. Gen. Stat. § 62-133.16(c)(1)a., which says that rates for the first year of the multiyear rate plan will be set “including actual changes in costs, revenues, or the cost of the electric public utility’s property used and useful, or to be used and useful within a reasonable time after the test period, *plus costs associated with a known and measurable set of capital investments, net of operating benefits, associated with a set of discrete and identifiable capital spending projects to be placed in service during the first rate year.*” (emphasis added). NCSEA notes that the emphasized language does not appear in N.C. Gen. Stat. § 62-133, thereby differentiating the rates set for the first year of the multiyear rate plan from the rates set pursuant to N.C. Gen. Stat. § 62-133.

³⁴ *Id.*

³⁵ *Id.*

³⁶ N.C. Dep’t of Revenue v. Hudson, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (“When a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion.” (internal quotation marks, alteration, and citation omitted)).

to N.C. Gen. Stat. § 62-133.16 expire after not more than 36 months, but rates set pursuant to N.C. Gen. Stat. § 62-133 do not expire.

Further, equity requires that customer rates revert to the rates set pursuant to N.C. Gen. Stat. § 62-133 at the termination of the PBR plan period. Both N.C. Gen. Stat. § 62-133 and § 62-133.16 require that rates are fair to both the utility and to the consumer.³⁷ N.C. Gen. Stat. § 62-133.16 deviates from the traditional “used and useful” ratemaking paradigm by creating a bargain of sorts between utilities and consumers: the utility will be able to recover costs associated with certain capital investments and the consumer will have policies in place that incent the utility to provide improved performance via PIMs. N.C. Gen. Stat. § 62-133.16(f) makes clear that PIMs expire after 36 months, and thereafter consumers will no longer be receiving their end of the bargain. Therefore, it would be inequitable for the utilities to continue receiving their end of the bargain after 36 months without consumers receiving improved performance, so rates must revert to those set by the Commission pursuant to N.C. Gen. Stat. § 62-133. Reverting to the rates set by the Commission pursuant to N.C. Gen. Stat. § 62-133 would also provide protection for ratepayers, including LMI residential customers.

Constructive support for this position is also found in N.C. Gen. Stat. § 62-133.16(d)(3). If a PBR application is rejected by the Commission, i.e., never goes into effect, the utility’s rates will be set in accordance with N.C. Gen. Stat. § 62-133.³⁸ This provision sets forth that, if a PBR application never goes into effect, the rates set pursuant

³⁷ See, N.C. Gen. Stat. § 62-133(a) (“[T]he Commission shall fix such rates as shall be fair both to the public utilities and to the consumer.”) and N.C. Gen. Stat. § 62-133.16(d)(1)a. (The Commission shall consider whether “the rates are fair both to the electric public utility and to the customer.”).

³⁸ “In the event that the Commission rejects a PBR application, the Commission shall nevertheless establish the electric public utility’s base rates in accordance with G.S. 62-133 based on the PBR application.”

to N.C. Gen. Stat. § 62-133 shall be in effect. N.C. Gen. Stat. § 62-133.16(f) sets the maximum period for a PBR plan at 36 months. When the PBR plan period expires, the PBR application is no longer in effect. This has the same practical impact as if the Commission had rejected a PBR application, and N.C. Gen. Stat. § 62-133.16(d)(3) dictates that the rates set pursuant to N.C. Gen. Stat. § 62-133 shall go into effect upon the expiration of the PBR plan period.

VIII. CONCLUSION

NCSEA respectfully requests that the Commission take these initial comments into consideration when it adopts rules to implement N.C. Gen. Stat. § 62-133.16. When reading House Bill 951, the Commission should adopt rules that do not permit Duke to file a PBR application prior to the Commission's approval of the first Carbon Plan by December 31, 2022. Further, the Commission is not required to adopt PIMs and policy goals in the instant rulemaking docket; instead, the Commission should defer these decisions to a stand-alone Policy Consideration Docket to address policy issues before a utility makes a PBR application. N.C. Gen. Stat. § 62-133.16 also requires the Commission to approve a spending plan before a utility files a PBR application, and the Commission should do so in the context of the Carbon Plan. To adequately evaluate a utility's performance under a PBR plan, the Commission should require the utility's PBR application and ongoing tracking and reporting be done as transparently as possible. Finally, the Commission's rules should make clear that upon the expiration of a PBR plan period, customer rates will be based on the rates set by the Commission in accordance with N.C. Gen. Stat. § 62-133 during the PBR application proceeding.

Respectfully submitted, this the 9th day of November 2021.

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CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing document by hand delivery, first class mail deposited in the U.S. mail, postage pre-paid, or by email transmission with the party's consent.

Respectfully submitted, this the 9th day of November 2021.

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