STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1283
DOCKET NO. E-7, SUB 1259

In the Matter of Joint Petition of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC to Request the Commission to Hold a Joint Hearing with the Public Service Commission of South Carolina to Develop Carbon Plan	))))))	CUCA'S INITIAL COMMENTS

Carolina Utility Customers Association, Inc. ("CUCA"), by and through counsel, respectfully submits these initial comments pursuant to the November 23, 2021 Order Requesting Comments on Petition for Joint Proceeding issued by the North Carolina Utilities Commission ("Commission" or "North Carolina Commission") in response to the joint petition filed by Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively, "Duke").

BACKGROUND

On October 13, 2021, the Governor signed into law House Bill 951 ("HB 951"), which required, among other things, the adoption of a Carbon Plan.[1] Specifically, the legislation requires the Commission to:

> [d]evelop a plan, no later than December 31, 2022, with the electric public utilities, including stakeholder input, for the utilities to achieve the authorized reduction goals, which 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

[1] *See* S.L. 2021-165, § 1.

with the authorized carbon reduction goals (the "Carbon Plan").[2]

On October 27, 2021, the South Carolina Supreme Court issued a decision affirming the Public Service Commission of South Carolina's ("PSCSC" or "South Carolina Commission") disallowance of certain costs associated with Duke's compliance with North Carolina's Coal Ash Management Act ("CAMA").[3] The PSCSC had disallowed certain CAMA-related expenses because they were "incurred as a direct result of [North Carolina] state's laws, which are specific to that jurisdiction."[4] In affirming this decision, the South Carolina Supreme Court found that, while costs of a cross-jurisdictional system are presumed to benefit the entire system, the CAMA costs were an exception to the rule because "there is no evidence of any direct benefit to South Carolinians that stems from coal ash remediation costs required by North Carolina's CAMA scheme."[5]

Shortly after the South Carolina Supreme Court decision, on November 9, 2021, Duke initiated this docket in which they request that the North Carolina Commission and the South Carolina Commission hold a joint proceeding to develop an "initial plan to achieve the least cost path to meet HB 951's authorized carbon reduction goals ('Carbon Plan')."[6] Duke simultaneously filed a similar petition with the PSCSC asking the South Carolina Commission to coordinate with the North Carolina Commission in a joint proceeding.[7]

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[2] S.L. 2021-165, § 1.

[3] *Duke Energy Carolina, LLC v. S.C. Office of Reg. Staff,* 864 S.E.2d 873 (S.C.S. Ct. 2021).

[4] *Id.* at 883–84.

[5] *Id.* at 885.

[6] DEC & DEP Joint Petition, at 1.

[7] *Joint Petition of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC to Request the Commission to Hold a Joint Hearing with the North Carolina Utilities Commission to Develop*

INITIAL COMMENTS

Without question, CUCA supports the allocation of system costs on a bi-jurisdictional basis consistent with the Commission's historical practice, as was likely assumed by the North Carolina General Assembly in scoring the impacts of HB 951. However, without taking a position on Duke's petition, CUCA would observe that issues relating to cost allocation are premature and, in any event, Duke's request to hold a joint proceeding with the Commission and the South Carolina Commission may result in an unwieldy process raising fundamental state sovereignty concerns.

I. Duke's petition is a Trojan horse.

Duke's petition for a joint proceeding with the South Carolina Commission appears to be a component of Duke's regulatory strategy vis-à-vis the PSCSC with regards to the recovery of system costs. While, as stated, CUCA supports the assignment of costs across jurisdictions consistent with current practice, Duke is, in essence, asking the Commission to invite the South Carolina Commission to watch the North Carolina Commission adopt the Carbon Plan required by North Carolina law to implement the North Carolina carbon goals—something the South Carolina Commission could do by monitoring the docket if it wished to do so. There is no reason to expect the South Carolina Commission would wish to partake in this exercise; and it certainly is not necessary for a "joint proceeding" to be launched to achieve this result.

The impetus for Duke's invitation is two fold. First, Duke apparently envisions a spending spree resulting from the Carbon Plan's investment potential. In fact, Duke's

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Carbon Plan, Public Service Commission of South Carolina Docket No. 2021-349-E (Nov. 9, 2021).

newfound zeal for carbon reduction seems directly proportional to its discovery that carbon reduction can be a justification for new, nearly unlimited capital spending by a vertically integrated monopoly in an uncompetitive energy market. In an earnings call shortly after the passage of HB 951, Duke spoke of the benefits of North Carolina's Carbon Plan for shareholders:

> As we look ahead, our pace of change will accelerate as we work toward our carbon reduction goals and the broader clean energy transformation across all of our jurisdictions. With this in mind, we expect our enterprise capital plan for the next five years through 2026 to increase to the $60 billion or $65 billion range. And then moving into the back half of the decade, we estimate to be in the top half of our $65 billion to $75 billion range.[8]

That is a likely increase of $6 billion in capital expenditures in the next five years (above Duke's previous plan of spending $59 billion through 2025) and new-found confidence that expenditures through 2030 will be on the higher side of what Duke had hoped.[9] This spending spree, as one might imagine, is the source of considerable discomfort to Duke's customers, including CUCA, as it presages substantial rate increases.

Second, given the recent decision of the South Carolina Supreme Court, Duke is now concerned about the potential for disallowances by the South Carolina Commission

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[8] Duke Energy, Q3 2021 Duke Energy Corporation Earnings Call Edited Transcript (Nov. 4, 2021), available at https://desitecoreprod-cd.azureedge.net/_/media/pdfs/our-company/investors/news-and-events/2021/3qresults/3q21-edited-transcript.pdf?la=en&rev=3b118d9e75944b808df5b7512ab5769c. Although this statement references investments "across all of our jurisdictions," Duke's earnings call was focused primarily on North Carolina's recent legislation. *See generally id.*

[9] John Downey, *Duke Energy earnings: Key takeaways on NC rules, federal funds and future CapEx*, Charlotte Business Journal (Nov. 5, 2021), available at https://www.bizjournals.com/charlotte/news/2021/11/05/duke-energy-earnings-four-key-takeaways.html?utm_source=st&utm_medium=en&utm_campaign=ae&utm_content=ch&ana=e_ch_ae&j=25600201&senddate=2021-11-05

of its expenditures, as the Carbon Plan is a byproduct of North Carolina legislation. Such risk is inherent in Duke's dual-state operations, though. Both North Carolina and South Carolina courts have held that multi-state utilities—and not ratepayers—bear the risk of the utility operating in multiple jurisdictions. The North Carolina Supreme Court affirmed the Commission's decision to reject Virginia-driven costs being imposed on ratepayers, holding that, while inconsistent determinations of avoided costs may burden a utility, the burden is a consequence of doing business in more than one state.[10] Likewise, days before Duke's petition, the South Carolina Supreme Court forced Duke's shareholders to bear the burden of North Carolina driven costs.[11] Like a host of similar regulatory issues, Duke's decision to conduct bi-state operations is accompanied by the risk of inconsistent regulatory treatment between states—a risk borne by Duke's shareholders, not the ratepayers of a particular state.

Any discomfort Duke is experiencing from its envisioned Carbon Plan spending has been caused solely by Duke. That Duke convinced the North Carolina's political leadership to negotiate, in secret and without stakeholder involvement, over an energy bill, is a testament to Duke's lobbying prowess but hardly an endorsement of true consensus. Over the objections of its customers and other stakeholders, Duke doggedly pursued energy legislation in North Carolina and poured substantial resources into ensuring its passage, for strategic regulatory and policy reasons of its own. HB 951—at least as regards the Carbon Plan—was not necessary: Duke had already, with great fanfare, announced voluntary

[10] *State ex rel. Utils. Commn. v. N.C. Power*, 338 N.C. 412, 420, 422, 450 S.E. 2d 896, 902 (1994).

[11] *Duke Energy Carolina, LLC v. S.C. Office of Reg. Staff,* 864 S.E.2d 873, 883–85 (S.C.S. Ct. 2021).

corporate carbon goals, Governor Cooper had issued an Executive Order mandating state policy to a similar effect, and Duke had proposed resource plans in both North and South Carolina that included various plans for carbon reduction.

Now, having secured passage of HB 951 in North Carolina, Duke is seeking the assistance of the North Carolina Commission in convincing the South Carolina Commission to comply with North Carolina's policy mandates—a matter more appropriately taken up with the South Carolina General Assembly than the North Carolina Commission. That Duke apparently did not foresee the cost allocation risks from pushing carbon legislation in only one of the two states in which it operates is a risk to be borne by Duke's shareholders, not its ratepayers.

To be clear, CUCA does not oppose a true joint planning effort whether for resource planning or other related planning purposes. For example, the South Carolina Commission is currently engaged in a study of potential market reform that could potentially lead to substantial ratepayers benefits. For the Commission to consult with the PSCSC in a study of market reform would seem to fall squarely within Section 62-110.1(c)'s authorization that the Commission can "confer and consult with . . . the utilities commissions . . . of neighboring states" as part of the integrated resources planning process.[12] CUCA would fully support, and encourage, the Commission's participate in such a study process on a joint basis. However, what Duke proposes here is a Trojan horse, where Duke's true objective is not joint planning but rather building a case for cross-jurisdictional cost allocation—a matter which is controlled by state law and inappropriate for a joint proceeding.

[12] N.C. Gen. Stat. § 62-110(c).

II. There is no need for a joint proceeding as proposed by Duke.

Duke claims that a joint proceeding is necessary for ratepayers to have a voice in the resource planning for their respective states. According to Duke, "[s]imply put, both North Carolina and South Carolina stakeholders should have a seat at the table as decisions are made regarding the resources needed to meet Duke Energy customers' energy needs for the next decade."[13]

But both states already have processes that give ratepayers from both jurisdictions a voice in selection of generation assets for which they will pay. In North Carolina, Duke must present its biannual Integrated Resource Plan for scrutiny by ratepayers[14] and, now, it must develop a Carbon Plan *with* "*stakeholder input*."[15] Likewise, in South Carolina, Duke must present a resource plan every three years.[16] Although Duke acknowledges that the issues raised in the joint proceeding overlap with the state's respective IRPs,[17] it apparently views those IRP proceedings—or maybe just the participation of intervenors in those proceedings—as inconsequential: for ratepayers to have any say in Duke's generation investments, this new proceeding is needed. Existing proceedings, though, already give ratepayers a seat at the table. For example, the South Carolina Commission considered the

[13] DEC & DEP Joint Petition, at 2.

[14] *See* N.C. Gen. Stat. § 62-100.1(c); N.C.U.C. Rule R8-60.

[15] S.L. 2021-165, § 1.

[16] *See* S.C. Code Ann. § 58-37-40(A).

[17] "The issues to be addressed in the Commission's upcoming proceeding to consider and adopt the Carbon Plan overlap closely with issues that must be included in the Companies' IRPs filed in both States." DEC & DEP Joint Petition, at ¶ 14.

interests of South Carolina ratepayers when it recently rejected Duke's latest resource portfolio (which strived for carbon reductions similar to the Carbon Plan).[18]

A joint proceeding is also unnecessary for the two commissions to allocate costs across jurisdictions. Duke admits such. "Although there have been some generation-related costs through the years that have been directly assigned to one state or the other as state-specific, the majority of costs attributable to the production of electric power have been fully shared between the two States."[19] Thus, despite never having had a joint proceeding before, the commissions have, for years, adequately allocated generation costs between the two jurisdictions. Duke's request is entirely novel; it has never before seen a need for a joint proceeding to protect ratepayers from the risk of generation attribution.

Finally, the issue of cost allocation is simply not ripe for decision by either Commission. The Carbon Plan proceeding is designed to be a planning exercise. At this point, no firm plans regarding carbon transition have been made, no costs have been incurred, and, accordingly, there are no costs to allocate. Each Commission has well-established procedures for approving and allocating system costs, and there is no reason to believe that such procedures are inadequate to address carbon transition costs.

[18] *See* Public Service Commission of South Carolina, Commission Directive, Docket No. 2019-224-E/2019-225-E (December 14, 2021) (mandating that Duke select Portfolio A2 as its base plan); *see also* Proposed Order of DEC & DEP, Docket No. 2019-224-E/2019-225-E (Nov. 23, 2021), at 14–18 (proposing the PSCSC adopt Portfolio C1, which would achieve 66% reductions by 2030).

[19] DEC & DEP Joint Petition, at ¶ 15.

III. It is difficult to perceive material benefits from a joint proceeding of the nature proposed by Duke.

Duke's proposed joint proceeding may waste the limited resources of the Commission, the Public Staff, and the stakeholders in what would be a complex and difficult proceeding.

First, there is little assurance that a joint proceeding will "reach[] a coordinated and cooperative approach to resource planning."[20] The purpose of the Carbon Plan proceeding is to implement clean energy goals established by the North Carolina General Assembly. North Carolina's standards are set by North Carolina law; they are not up for debate based on South Carolina's needs, concerns, or policy. Duke premises its request for a joint carbon-reduction plan on the supposition that South Carolina is equally committed to North Carolina's new carbon goals—a question that is far from clear. At the time of Duke's Joint Petition, Duke had proposed to the PSCSC a "66% emissions reduction proposed by DEC and DEP in their modified 2020 IRPs," which Duke described as "directionally comparable" to the 70% reduction goal required in the Carbon Plan.[21] However, since then, the PSCSC issued a unanimous decision that rejected Duke's proposed portfolio that would achieved a 66% reduction in emissions and, instead, selected a portfolio that would achieve only a 56% reduction in carbon.[22] Although CUCA agrees that there would be some benefit—especially for Duke—to inter-state coordination on such matters, at present it appears that the two states are plotting different trajectories for carbon reduction.

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[20] DEC & DEP Joint Petition, at ¶ 14.

[21] DEC & DEP Joint Petition, at ¶ 14.

[22] *See* Public Service Commission of South Carolina, Commission Directive, Docket No. 2019-224-E/2019-225-E (December 14, 2021) (mandating that Duke select Portfolio A2 as its base plan); *see also* Proposed Order of DEC & DEP, Docket No. 2019-224-E/2019-225-E (Nov. 23, 2021), at 14–18 (proposing the PSCSC adopt Portfolio C1).

Second, the joint proceedings would not be determinative of anything. Duke states upfront that it does "not seek to have the two commissions issue joint orders ruling on the merits of the issues being presented."[23] Rather, Duke proposes "that, following a joint hearing and the creation of a joint record sufficient to support the adoption of the Carbon Plan, the Commission would independently carry out its statutory mandate to adopt the Carbon Plan," and the PSCSC would entertain Duke's request to consider North Carolina's Carbon Plan in the next South Carolina IRP.[24] Thus, the two commissions would hear evidence together and then part ways to make independent decisions in subsequent planning proceedings.

Third, it does not appear the joint proceeding would produce meaningful efficiencies. The benefit of a "joint record through joint hearings" is not apparent.[25] The two states have different needs, laws, policy goals, and stakeholders. It is not clear that a one-size-fits-all solution exists for which Duke might offer a single body of supporting evidence. Indeed, although Duke presents IRPs in both states, Duke has not suggested that combined IRP proceedings would result in efficiencies. To the contrary, Duke argues that there are "potential procedural challenges that would be associated with attempting to hold a joint proceeding on an IRP."[26] If Duke believes a joint IRP proceeding would be too challenging, then a joint carbon-planning proceeding should be equally inefficient.

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[23] DEC & DEP Joint Petition, at ¶ 5.

[24] DEC & DEP Joint Petition, at ¶ 21; *see also id.*, at ¶ 5 ("After consideration of the record of the proceedings and issuance of a Commission order approving the Carbon Plan, the Companies will seek an Order from the PSCSC requiring that the Carbon Plan be incorporated into DEC's and DEP's comprehensive future IRPs to be filed in that State[.]").

[25] DEC & DEP Joint Petition, at ¶ 5.

[26] DEC & DEP Joint Petition, at ¶ 6.

CONCLUSION

As discussed above, Duke's petition raises various potential complications that should be considered by the Commission.

Respectfully submitted, this 20th day of December, 2021.

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Certificate of Service

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

This the 20th day of December, 2021.

BROOKS, PIERCE, MCLENDON,
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/s/ Craig D. Schauer