

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. E-100, SUB 179

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Duke Energy Progress, LLC, and	)	
Duke Energy Carolinas, LLC,	)	PARTIAL PROPOSED ORDER OF
2022 Biennial Integrated	)	KINGFISHER ENERGY HOLDINGS, LLC
Resource Plans and Carbon Plan	)	
	)	
	)	

BY THE COMMISSION: On October 13, 2021, Governor Cooper signed into law House Bill 951 (S.L. 2021-165), directing the Commission to take all reasonable steps to achieve reductions in the emissions of carbon dioxide in this State from electric generating facilities owned or operated by certain electric public utilities. The Commission is directed to achieve a reduction of 70% from 2005 levels by the year 2030 and carbon neutrality by the year 2050. Session Law 2021-165 limits the applicability of this requirement to Duke Energy Progress, LLC (“DEP”), and Duke Energy Carolinas, LLC (“DEC,” together with DEP, “Duke”). The Commission is directed to develop by December 31, 2022, a plan (“the Carbon Plan”) to achieve these emission reductions and to review the plan every two years thereafter.

On November 19, 2021, the Commission issued an Order requiring Duke to file a Carbon Plan that is consistent with the requirements of Section 1 of S.L. 2021-165,<sup>1</sup> conduct stakeholder meetings, allowing the filing of petitions to intervene, and allowing intervenors to file a plan or report of its own and to comment on Duke’s proposed Carbon Plan.

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<sup>1</sup> Section 1 of S.L. 2021-165 is now codified at N.C. Gen. Stat. § 62-110.9. The Commission will refer to House Bill 951 (HB 951), Section 1 of S.L. 2021-165, and N.C.G.S. § 62-110.9 interchangeably.

On and after November 29, 2021, the Commission issued numerous orders allowing parties to intervene, which Orders of the Commission are of record in this proceeding. In addition, the Commission issued several other orders that are procedural in nature, extending deadlines, clarifying the stakeholder process, and addressing other matters.

On May 16, 2022, Duke filed its verified petition for approval of the Carbon Plan along with a voluminous set of documents that make up Duke's proposed Carbon Plan.

On July 15, 2022, numerous parties filed comments in response to Duke's petition and proposed Carbon Plan.

On July 29, 2022, the Commission issued an Order scheduling this matter for expert witness hearing, requiring the filing of testimony in advance of the hearing, establishing discovery guidelines, and allowing the filing of responsive comments as to certain issues detailed in that Order.

On August 19, 2022, Duke filed its direct testimony and exhibits addressing those issues identified by the Commission for consideration at the expert witness hearing.

On September 2, 2022, the Public Staff and numerous intervenors filed their direct testimony and exhibits addressing those issues identified by the Commission for consideration at the expert witness hearing.

On September 9, 2022, numerous parties filed comments addressing those issues identified by the Commission for consideration based on written comments instead of based on expert witness testimony.

On September 13, 2022, this matter came on for hearing as scheduled. During and after the hearing, as directed by the Commission, several parties filed exhibits in Docket No. E-100, Sub 179A.

On September 29, 2022, the Chair of the Commission adjourned the hearing pending further order of the Commission. Pursuant to the ruling of the Chair of the Commission made in open hearing, the parties are permitted to file proposed orders and briefs on or before October 24, 2022.

Based upon the foregoing and the entire record herein, the Commission makes the following:

#### FINDINGS OF FACT

*[This space reserved for Findings of Fact related to various issues to be determined by the Commission.]*

##. It is appropriate to require Duke to utilize competitive procurement in the implementation of the Carbon Plan to obtain power purchase agreements (PPAs) with independent power producers as the procurement method for some or all of the resources needed to achieve the carbon reduction goals of HB 951.

##. The use of competitive procurement in the implementation of the Carbon Plan will best effectuate the intent of the General Assembly by ensuring that the procurement of resources needed under the Carbon Plan complies with current law and practice with respect to least-cost planning and by maintaining and improving upon the adequacy and reliability of the existing electric grid.

*[This space reserved for Findings of Fact related to various issues to be determined by the Commission.]*

#### **EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOs. ## and ##**

The evidence for this finding of fact is contained in Duke's verified petition and Carbon Plan, the testimony of Duke witness Bowman, the testimony of Public Staff witness Thomas, the Commission's proceedings in Docket No. E-100, Sub 165, of which the Commission takes judicial notice, and the entire record herein. In addition, while not evidence, the Commission received and considered comments from the parties with respect to the legality of purchasing third party-owned generation excluded from N.C.G.S. § 62-110.9(2), which the Commission will resolve as matter of law.

For reasons explained below, the Commission concludes that, with the exception of the specific ownership requirements for solar resources, the provisions of N.C.G.S. § 62-110.9(2) are not clear or unambiguous in requiring that Duke own all resources needed to implement the Carbon Plan. Therefore, these provisions require interpretation. The Commission concludes that the evidence herein supports allowing third-party ownership of resources needed to implement the Carbon Plan and requiring Duke to conduct competitive procurement of resources needed under the Carbon Plan to best effectuate the legislative intent to implement the Carbon Plan in a manner that is consistent with least-cost planning and that ensures that the existing adequacy and reliability of the Duke electric system is maintained or improved upon. Accordingly, the Commission will require Duke to utilize one or more competitive procurements or requests for proposals (RFPs) to obtain PPAs with independent power producers that satisfy the resource needs under the Carbon Plan, and to file with the Commission within 30 days of the date of this Order a revised Chapter

Four Execution Plan reflecting the planned use of competitive procurements, including a schedule of RFP release dates and an identification of the resources to be procured through these RFPs.

In its initial comments, Kingfisher Energy Holdings, LLC (“Kingfisher”) argues that key provisions of HB 951 provide legislative support for the use of competitive bidding for Duke’s procurement of generation resources needed to comply with the requirements of HB 951.<sup>2</sup> Kingfisher identifies competitive bidding as a significant opportunity to mitigate risk for Duke and its customers and to reduce the costs of implementing the Carbon Plan, while achieving the carbon reduction goals of HB 951.<sup>3</sup> Kingfisher cites the axiomatic canon of statutory construction that the Commission is bound to follow: the cardinal principle of statutory interpretation is to ensure that the legislative intent is accomplished, looking first to the plain words of the statute.<sup>4</sup> Kingfisher argues that several key provisions in HB 951 plainly support the use of a competitive procurement process for obtaining needed resources under the Carbon Plan.<sup>5</sup>

First, Kingfisher notes that § 62-110.9 provides that “[i]n achieving the authorized carbon reduction goals, the Utilities Commission shall: ... (2) Comply with current law and practice with respect to the least-cost planning for generation, pursuant to G.S. 62-2(3a), in achieving the authorized carbon reduction goals and determining generation and resource mix for the future.”<sup>6</sup> House Bill 951 further provides that, “[a]ny new generation facilities or other resources selected by the Commission in order to achieve the authorized reduction goals for electric public utilities

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<sup>2</sup> Comments of Kingfisher Energy Holdings, LLC, p. 2-3, No. E-100, Sub 179 (filed Jul. 15, 2022).

<sup>3</sup> *Id.* at 2 and 4.

<sup>4</sup> *Id.* at 2-3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 3.

shall be owned and recovered on a cost-of-service basis [except for energy efficiency measures and demand-side management and to the extent that new solar generation is selected, which is subject to specific supply methods].”<sup>7</sup> Significantly, Kingfisher notes, the legislation does not specify the supply or procurement methods for resources that are not selected by the Commission.<sup>8</sup>

Kingfisher argues that the General Assembly was intentional in not specifying the supply or procurement method for resources that are not selected by the Commission, essentially, leaving to the Commission’s discretion how Duke procures these resources.<sup>9</sup> Kingfisher then provides citations and references to authorities and publications that demonstrate the use of competitive procurement will ensure least-cost procurement, as required by HB 951, among them the record in Docket No. E-100, Sub 165, wherein the Commission held a technical conference on the subject of competitive procurement.<sup>10</sup> In addition to ensuring least cost, Kingfisher argues that the use of competitive procurement will support maintenance and improvement in the adequacy and reliability of the existing grid, as required by HB 951.<sup>11</sup> In conclusion, based on sound interpretation of § 62-110.9, Kingfisher requests that the Commission direct Duke to adjust its Execution Plan at Chapter Four of the Carbon Plan to implement a competitive procurement of

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.* at 10-11.

resources not subject to a specific ownership mandate, in furtherance of least-cost planning and ensuring adequacy and reliability of the existing grid.<sup>12</sup>

In response to the Commission's request for comments on the legality of third-party ownership, Kingfisher further details its positions and arguments with respect to statutory interpretation, which are summarized above.<sup>13</sup> In addition, Kingfisher identifies the pre-filed direct testimony of Public Staff witness Jeff Thomas as providing evidentiary support for the use of competitive procurement and the CPRE Program as valuable experience in implementing competitive procurement in North Carolina.<sup>14</sup> Kingfisher concludes its comments by stating that the Commission has the authority and discretion to interpret the statute in a manner that promotes least cost planning and furthers compliance with the requirement to ensure that the adequacy and reliability of the existing grid is maintained.<sup>15</sup>

In its comments, Duke responds by arguing that there is no ambiguity in HB 951 with respect to ownership of new generating facilities and other resources selected by the Commission in the Carbon Plan, citing the provisions of N.C.G.S. § 62-110.9(2) that require that third parties own 45% of new solar and solar paired with energy storage and that Duke own the remainder of all facilities selected by the Commission to achieve the Carbon Plan.<sup>16</sup> Further, Duke's position is that "the General Assembly was clear and meant what it said in HB 951: the Commission should develop a plan to retire Duke Energy's owned coalfired generation and other carbon-emitting

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<sup>12</sup> *Id.* at 14.

<sup>13</sup> *See* Comments of Kingfisher Energy Holdings, LLC, No. E-100, Sub 179 (*filed* Sept. 9, 2022).

<sup>14</sup> *Id.* at 4-5.

<sup>15</sup> *Id.* at 6-7.

<sup>16</sup> Duke Energy Carolinas LLC's and Duke Energy Progress LLC's Pre-Hearing Comments on Non-Expert Hearing Track Legal and Policy Issues, p. 19, No. E-100, Sub 179 (*filed* Sept. 9, 2022).

resources to achieve carbon neutrality and should select new Facilities as part of a State-wide plan to reliably replace these resources which shall be subject to HB 951's Ownership Requirements."<sup>17</sup> In addressing the comments of the intervenors that argue to the contrary, Duke cites appellate authority to support its view that the parties' interpretation is contrary to principles of statutory construction.<sup>18</sup> Further, Duke argues that there is no express reading to support the intervenors' interpretation, requiring the impermissible amending or adding to the plain language of the statute, and creating internal conflict in the statute rather than reading the entire section in harmony.<sup>19</sup> Setting aside considerations of statutory interpretation, Duke argues that the utility ownership requirements are not arbitrary but instead represent sound and reasonable policy that is beneficial to customers.<sup>20</sup> In summary, Duke argues that HB 951's clearly stated utility ownership requirement aligns with the regulatory compact and vertically-integrated regulated utility model that has served Duke's customers well through provision of affordable, reliable and increasingly cleaner energy in the Carolinas.<sup>21</sup>

In its comments, the Public Staff cites § 62-110.9(2) as clear and unambiguous expression of legislative intent that new generation facilities or other resources selected by the Commission to achieve the goals of Section 110.9 must be owned and recovered on a cost-of-service basis by

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 20-21.

<sup>19</sup> *Id.* at 24.

<sup>20</sup> *Id.* at 31-36.

<sup>21</sup> Comments of the Public Staff, p. 7, No. E-100, Sub 179 (*filed* Sept. 9, 2022).



the utility.<sup>22</sup> In support of its view, the Public Staff cites several canons of statutory construction that it believes supports its position.<sup>23</sup>

In its comments, Walmart Inc. (“Walmart”) argues that there is an inherent conflict between the first and second sentences of N.C.G.S. § 62-110.9(2) because least cost planning for generation is generally inconsistent with utility ownership of all new generation facilities with recovery on a cost-of-service basis.<sup>24</sup> Walmart cites the comments of Kingfisher and states that it supports the principle that competitive procurement would result in lower costs for customers, and further states that the question is whether competitive procurement is permitted by HB 951.<sup>25</sup> Walmart notes that certain provisions of N.C.G.S. § 62-110.9 are mandatory by the use of the word “shall” while other provisions are permissive and grant the Commission discretion by the use of the word “may.”<sup>26</sup> Specifically, Walmart points to the obligatory nature of least-cost planning and the absences of any mandatory direction to the Commission to “select” resources, the provision that “triggers” the utility-ownership requirement and recovery on a cost-of-service basis.<sup>27</sup> Thus, Walmart argues that it stands to reason that the Commission could require a competitive procurement process, in the absence of a “selection” of resources.<sup>28</sup>

The parties who commented on this issue seem to agree that the question of third-party ownership of resources needed to achieve the goals of the Carbon Plan is a pure legal question.

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<sup>22</sup> *Id.* at 8-9.

<sup>23</sup> Responsive Comments of Walmart Inc., p. 5, No. E-100, Sub 179 (*filed* Sept. 9, 2022).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 5-6.

<sup>27</sup> *Id.* at 6.

<sup>28</sup> *Id.*

As such, the Commission need not base its decisions on evidence, but may consider the parties' comments in reviewing the provisions of the statute and interpret those provisions in a manner consistent with the rules of statutory construction embraced in the decisions of the state appellate courts. In doing so, the Commission may freely substitute its judgment as to the meaning of the statute based on its expertise and authority as the agency charged with administering the Public Utilities Act. The Commission agrees with the parties that the Commission's analysis properly begins with review of the plain language of the statute.

Section 62-110.9 provides in pertinent part, as follows:

The Utilities Commission shall take all reasonable steps to achieve a seventy percent (70%) reduction in emissions of carbon dioxide (CO<sub>2</sub>) 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... In achieving the authorized carbon reduction goals, the Utilities Commission shall:

(1) Develop 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 with the authorized carbon reduction goals (the "Carbon Plan"). The Carbon Plan shall be reviewed every two years and may be adjusted as necessary in the determination of the Commission and the electric public utilities.

(2) Comply with current law and practice with respect to the least cost planning for generation, pursuant to G.S. 62-2(a)(3a), in achieving the authorized carbon reduction goals and determining generation and resource mix for the future. Any new generation facilities or other resources selected by the Commission in order to achieve the authorized reduction goals for electric public utilities shall be owned and recovered on a cost of service basis by the applicable electric public utility except that: a. Existing law shall apply with respect to energy efficiency measures and demand-side management. b. To the extent that new solar generation is selected by the Commission, in adherence with least cost requirements, the solar generation selected shall be subject to the following: (i) forty-five percent (45%) of the total megawatts alternating current (MW AC) of any solar energy facilities established pursuant to this section shall be supplied through the execution of power purchase agreements with third parties pursuant to which the electric public utility

purchases solar energy, capacity, and environmental and renewable attributes from solar energy facilities owned and operated by third parties that are 80 MW AC or less that commit to allow the procuring electric public utility rights to dispatch, operate, and control the solicited solar energy facilities in the same manner as the utility's own generating resources and (ii) 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. These ownership requirements shall be applicable to solar energy facilities (i) paired with energy storage and (ii) procured in connection with any voluntary customer program.

(3) Ensure any generation and resource changes maintain or improve upon the adequacy and reliability of the existing grid.

...

The Commission's independent review of the plain language of the statute discloses three key features of the statute that evidence the intent of the General Assembly as relevant to the legality of purchasing third party-owned generation excluded from N.C.G.S. § 62-110.9(2). First, the Commission agrees with Kingfisher and Walmart that certain provisions of the statute are clearly mandatory by use of the word "shall," while the utility-ownership requirement is predicated upon being selected by the Commission. Second, there is an absence of any direction, mandatory or otherwise, that the Commission "select" all of the resources needed to achieve the carbon reduction goals of N.C.G.S. § 62-110.9. Third, there is only one specific, mandatory provision requiring utility ownership and cost of service recovery, which is found in the provisions related to new solar generation, again, to the extent that resource type is selected by the Commission. In light of these observations based on the plain language of the statute, each of which are discussed in greater detail below, the Commission concludes that the provisions of N.C.G.S. § 62-110.9 are not clear or unambiguous on the question of third-party ownership and the Commission is

obligated to interpret the statute in a manner that best effectuates the legislative intent supporting the enactment of HB 951.

The Commission concludes that certain provisions of N.C.G.S. § 62-110.9 are clearly mandatory, but utility ownership of resources needed to implement the Carbon Plan is not among them. The statute provides that the Commission “shall take all reasonable steps” to achieve a 70% reduction in emissions of carbon dioxide emitted in the state from Duke’s electric generating facilities by 2030 and carbon neutrality by 2050. In achieving the carbon reduction goals, the statute provides that the Commission “shall:” (1) develop a plan by December 31, 2022, and review it every two years, (2) comply with current law and practice with respect to the least cost planning for generation, pursuant to G.S. 62-2(a)(3a), in achieving the authorized carbon reduction goals and determining generation and resource mix for the future, and (3) ensure any generation and resource changes maintain or improve upon the adequacy and reliability of the existing grid. While these three directives follow in an enumerated list after broad direction and the word “shall:” and each is found in the first sentence of a new subsection, the provision on utility ownership is structured entirely differently. It is found in the second sentence and the word shall is followed by other words and phrases that clearly show that the ownership requirement is predicated on a resource first being selected by the Commission. The Commission concludes that the General Assembly was intentional in making the least-cost planning, and adequacy and reliability directives mandatory while the “selection” of resources by the Commission is optional. Further, the Commission finds the use of the phrase “selected by the Commission” inherently ambiguous because it is subject to one or more reasonable interpretations.

Duke and the Public Staff apparently agree that the Commission must select all resources given that they have taken the position that utility-ownership of all resources is required.

Kingfisher and Walmart take a more nuanced view that the Commission may, but need not select all resources, and that it is only the Commission's selection of resources that triggers the utility ownership and cost of service-based recovery. The Commission determines that the parties have presented reasonable interpretations; however, it is for the Commission to decide which of these interpretations best furthers the intention of the General Assembly in enacting HB 951. In approaching this question, the Commission is mindful that the cardinal principle of statutory construction is to affect the intent of the General Assembly and to avoid interpretations that would lead to an absurd result.<sup>29</sup> In short, the Commission's task is to harmonize the mandatory directives of HB 951 with the optional "selection" of resources in light of those legislative mandates that are clear and unambiguous.

After careful consideration, the Commission concludes that the optional "selection" of resources must yield to the unambiguously mandatory requirements for least cost planning and maintaining the adequacy and reliability of the existing grid. As discussed in more detail below, this interpretation of N.C.G.S. § 62-110.9 best promotes compliance with the mandatory legislative requirements and best effectuates the intent of the General Assembly. If the Commission finds that one interpretation based upon a literal reading of the statute would lead to an absurd result that is obviously contrary to the General Assembly's intent, then the Commission is obligated to avoid such an interpretation.<sup>30</sup> In this case, based on the evidence discussed below, the Commission concludes that it would be an absurd result to implement the Carbon Plan in a manner that requires or allows utility ownership of all resources needed under the Carbon Plan, because the evidence demonstrates that requiring competitive procurement and allowing for third-

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<sup>29</sup> *Mazda Motors of America, Inc. v. Southwestern Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979).

<sup>30</sup> *Id.*

party ownership better furthers the clear and unambiguous legislative intent for least-cost planning and ensuring the adequacy and reliability of the existing grid.

On cross examination by Kingfisher, Duke witness Bowman testified that power purchases from independent power producers have historically been a part of Duke’s least-cost planning.<sup>31</sup> This testimony tends to demonstrate that power purchases are and have been a component of “current law and practice with respect to least cost planning for generation pursuant to G.S. 62-2(a)(3a).”<sup>32</sup> Witness Bowman further testified that Duke is not requesting that the Commission select specific resources, but to approve the near-term actions that would allow Duke to proceed to procure a certain list of resources, or the approval of procurement of certain amounts of resources in various categories, such as new solar, battery storage, onshore wind, a new combustion turbine (CT), and a new combined cycle (CC), and that those resources would still need to obtain a certificate of public convenience and necessity (CPCN) under North Carolina law if built in North Carolina.<sup>33</sup> However, on redirect witness Bowman noted that Duke’s petition and the executive summary of the Carbon Plan request that the Commission approve the near-term supply-side development and procurement activities identified above in Table 3, included by deeming the following resources as being selected in this initial Carbon Plan for purposes of House Bill 951, Section 1, 2, and all cases subject to the obligation to obtain a CPCN where applicable, and to keep the Commission apprised of material changes in assuming pricing or schedule.<sup>34</sup> The Commission regards the testimony of witness Bowman on this issue as evidence that the phrase

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<sup>31</sup> Tr. Vol. 7, p. 166.

<sup>32</sup> See N.C. Gen. Stat. § 62-110.9.

<sup>33</sup> Tr. Vol. 7, p. 168-69.

<sup>34</sup> Tr. Vol. 7, p. 174-76.

“selected by the Commission” is ambiguous, given witness Bowman’s inability to clearly articulate Duke’s understanding of the phrase “selected by the Commission” or testify as to the implications of the Commission making selections of resources.

Witness Bowman also testified that Duke expressed support for the use of competitive procurement during the Commission’s technical conference in the 2020 IRP proceeding (Docket No. E-100, Sub 165), and that Duke would competitively procure resources under the Carbon Plan as it has historically done.<sup>35</sup> However, it was unclear in witness Bowman’s testimony whether Duke’s intention is that these RFPs would be for PPAs with independent power producers or only for procurement of materials and labor for design and construction of facilities.<sup>36</sup> While Duke’s Carbon Plan seems to suggest that it is the latter, witness Bowman was less than clear on the question and the Commission is left to understand her testimony, consistent with Duke’s other statements on the legality of third-party ownership, to be that Duke is entitled by operation of the provisions of N.C.G.S. § 62-110.9 to own and recover through rate base all the assets required to implement the Carbon Plan, other than the solar resources identified in N.C.G.S. § 62-110.9(2)(b). This, as alluded above, is a result that the Commission cannot accept as consistent with HB 951, given the record evidence that a better option is available that better promotes least cost planning and ensuring the adequacy and reliability of the existing grid.<sup>37</sup> As witness Bowman testified, PPAs with independent power producers have traditionally been a part of Duke’s long-range

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<sup>35</sup> Tr. Vol. 7, p. 169-70.

<sup>36</sup> Tr. Vol. 7, p. 170.

<sup>37</sup> *See, infra.*, fn. 29 and associated text.

planning and least-cost planning and Duke has previously acknowledged that these resources support least-cost planning and provide reliability and adequacy benefits to the grid.<sup>38</sup>

Witness Bowman was also asked to relate any analysis or planning around policy or legal developments at the federal level that might impact the jurisdiction of the Commission to select resources under the Carbon Plan.<sup>39</sup> Her response, while not precisely clear, is understood by the Commission to be that Duke has not considered the possibility of federal preemption or other developments at the federal level that might impact the legality or enforceability of N.C.G.S. § 62-110.9 or the Commission-developed Carbon Plan.

On cross examination by Kingfisher, Public Staff witness Jeff Thomas testified that the Public Staff believes that all source procurement should be utilized to procure resources identified in the approved Carbon Plan.<sup>40</sup> Despite that view, the Public Staff identified a potential for regulatory changes that would require the procurement of resources to comply with a particular mandate, and he testified that he believes that utility ownership is specified in HB 951, although PPAs could facilitate lower risk resource procurement.<sup>41</sup> He also testified that if the Commission decided that PPAs were a permissible resource procurement method to implement the Carbon Plan, it would be the Public Staff's recommendation that the Commission pursue competitive procurement as a part of the least-cost plan to implement the Carbon Plan.<sup>42</sup> Here again, the Commission must reconcile the position of Duke and the Public Staff that utility-ownership of all

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<sup>38</sup> Tr. Vol. 7, p. 166.

<sup>39</sup> Tr. Vol. 7, p. 172.

<sup>40</sup> Tr. Vol. 21, p. 216.

<sup>41</sup> Tr. Vol. 21, p. 216-17.

<sup>42</sup> Tr. Vol. 21, p. 218-19.



resources other than the solar resources in N.C.G.S. § 110.9(2)(b) is required, on the one hand, with the clear mandates of HB 951 (to ensure least cost planning and adequacy and reliability of the existing grid) and the record evidence that the use of competitive procurement will be least-cost planning under the Carbon Plan and will better ensure the adequacy and reliability of the existing grid, on the other.

Based upon the foregoing, the Commission finds that it is appropriate to require Duke to utilize competitive procurement to obtain PPAs from independent power producers as a component of implementing the Carbon Plan. For reasons explained above, the Commission has concluded that the utility ownership provisions of N.C.G.S. § 62-110.9, other than those specifically identified in N.C.G.S. § 62-110.9(2)(b), are optional and predicated upon “selection” by the Commission of specific resources, while the provisions directing the Commission to undertake traditional least cost planning and to ensure that the adequacy and reliability of the existing grid is maintained are clearly mandatory. In light of the foregoing evidence demonstrating that Duke traditionally has used PPAs as a part of its balanced, least-cost resource portfolio and that competitive procurement ensures least cost and best promotes maintaining adequacy and reliability of the existing grid, it would be an absurd result if the Commission’s approved Carbon Plan foreclosed the use of competitive procurement and ignored the benefits that competitive procurement provide to furthering the mandatory requirements of HB 951. Stated otherwise, the Commission concludes that it would be contrary to the intent of the General Assembly to implement the Carbon Plan in a manner that does not ensure least cost or in a manner that has less than optimal benefits to maintaining the adequacy and reliability of the existing grid. The evidence in this proceeding demonstrates that competitive procurement, as compared to utility-ownership,

better ensures least cost compliance and better promotes the adequacy and reliability of the existing grid.

Further buttressing the Commission's interpretation of N.C.G.S. § 62-110.9 are considerations of federal preemption and jurisdictional issues. While Duke has apparently devoted little effort to ensuring that these issues will not undermine the legality, enforceability, or success of the Carbon Plan, the Commission is quite concerned with this possibility. The Commission has a responsibility to keep apprised of developments in federal policy and has authority to appear before federal courts when necessary to secure adequate utility service for the citizens of North Carolina.<sup>43</sup> While other sections of the Public Utilities Act acknowledge the potential for federal-state jurisdictional issues, N.C.G.S. § 62-110.9 is silent on these issues. Thus, it is left to the Commission to develop a Carbon Plan that, to the extent possible within the authority granted to the Commission by the enactment of N.C.G.S. § 62-110.9, avoids jurisdictional conflict and preemption of the General Assembly's enacted policies.

The recent decision of the 5<sup>th</sup> Circuit of the U.S. Court of Appeals in *NextEra v. Texas P.U.C.*<sup>44</sup> is instructive as to the potential for federal preemption. In that case, the Court held that the dormant Commerce Clause claims against Texas's "right of first refusal" statute should proceed to discovery, reversing the District Court's dismissal pursuant to Rule 12(b)(6).<sup>45</sup> While that case was about the interstate commerce aspect of electric transmission asset ownership, the same principles would apply if the Commission were to select resources and thereby exclude all other market entrants, except for the specific (and relatively small) allocation for solar resources

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<sup>43</sup> See N.C. Gen. Stat. § 62-48.

<sup>44</sup> *NextEra Energy Capital Holdings, Inc. v. Lake*, No. 20-50160 (5<sup>th</sup> Cir. Aug. 30, 2022).

<sup>45</sup> *Id.* at p. 32.

in N.C.G.S. § 62-110.9(2)(b). This provides an additional, highly persuasive, and critical basis for the Commission withholding “selection” of resources under the Carbon Plan and requiring Duke to make use of competitive procurement under the Carbon Plan: doing so will mitigate risk that the policy of this State is undermined in part or in whole by action at the federal level. The Commission concludes that interpretation of HB 951 in this manner avoids the potential for jurisdictional conflict and complies with the intent of the General Assembly to enact a statute and develop a Carbon Plan for North Carolina that will be enforceable against preemption challenges.

Therefore, the Commission will require Duke to undertake competitive procurement to obtain some or all of the resources required to implement the Carbon Plan. Accordingly, the Commission will direct Duke to adjust its Execution Plan set out in Chapter Four of the Carbon Plan to incorporate competitive procurement of PPA-supplied power to obtain resources needed to implement the Carbon Plan, and require Duke to file within 30 days of the date of this Order a plan for implementing competitive procurement as a part of the Carbon Plan

*[This space reserved for additional evidence and conclusions by the Commission.]*

IT IS THEREFORE ORDERED AS FOLLOWS:

*[This space reserved for additional ordering paragraphs.]*

##. That Duke shall utilize one or more competitive procurements or RFPs to obtain PPAs with independent power producers that satisfy the resource needs under the Carbon Plan. Within 30 days of the date of this Order, Duke shall file a revised Chapter Four Execution Plan reflecting

the planned use of competitive procurements, including a schedule of RFP release dates and an identification of the resources to be procured.

Respectfully submitted this 24th day of October, 2022.

/s/ Patrick Buffkin

Patrick Buffkin  
NC Bar No. 44264  
Buffkin Law Office  
3520 Apache Dr.  
Raleigh, NC 27609  
[pbuffkin@gmail.com](mailto:pbuffkin@gmail.com)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing PARTIAL PROPOSED ORDER OF KINGFISHER ENERGY HOLDINGS, LLC has been duly served upon all persons on the docket service list by United States Postal Service or by electronic mail with the party's consent.

This the 24th day of October, 2022.

BUFFKIN LAW OFFICE

BY: /s/ Patrick Buffkin

*Attorney for Kingfisher Energy Holdings, LLC*