

March 1, 2024

Via Electronic Filing

Ms. Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

Re: *Response to Duke's characterization of its efforts to resolve the outstanding issues and its estimation of an anticipated resolution*

DOCKET NO. E-2, SUB 1314

DOCKET NO. E-7, SUB 1289

In the Matter of

Petition of Duke Energy Progress, LLC,
and Duke Energy Carolinas, LLC,
Requesting Approval of Green Source
Advantage Choice Program and
Rider GSAC

DOCKET NO. E-2, SUB 1315

DOCKET NO. E-7, SUB 1288

In the Matter of

Petition of Duke Energy Progress, LLC,
and Duke Energy Carolinas, LLC,
Requesting Approval of Clean Energy
Impact Program

Dear Chair Mitchell and Commission Members:

Pursuant to the North Carolina Utilities Commission's (NCUC or Commission) Order Requiring Update on Stakeholder Engagement and Efforts to Resolve Outstanding Issues, issued February 20, 2024 in the above-captioned dockets (collectively, GSAC and CEI Dockets), the Southern Alliance for Clean Energy (SACE), the North Carolina Sustainable Energy Association (NCSEA), and the Carolinas Clean Energy Business Association (CCEBA) submit this letter responding to Duke Energy Progress, LLC and Duke Energy Carolinas, LLC's (collectively, Duke) characterization of its efforts to resolve the outstanding issues and its estimation of an anticipated resolution, in its update letter filed February 27 (Duke Update).

The central problem with Duke's characterization of its efforts to resolve the outstanding issues in these proceedings—and regulatory surplus in particular—is that it conflates stakeholder engagement with settlement negotiations. As an initial matter, Duke maintains its position that Session Law 2021-165 (H951) does not require the voluntary customer programs that it authorizes in Section 5 to contain regulatory surplus, and further that achieving regulatory surplus is not possible. Duke Update 2. Duke is still incorrect about this on both counts. See Joint Initial Comments of Southern Alliance for Clean Energy, North Carolina Sustainable Energy Association, and Carolinas Clean Energy Business Association at 7-19, *GSAC and CEI Dockets* (N.C.U.C. Apr. 25, 2023)

(explaining legal requirements of H951 concerning regulatory surplus and suggesting methods to overcome any interconnection challenges). If the Commission is concerned about this question, it could order supplemental briefing on the issue. See Joint Motion for a Technical Conference of the Southern Alliance for Clean Energy and the North Carolina Sustainable Energy Association at 18-19, *GSAC and CEI Dockets* (N.C.U.C. Sept. 5, 2023).

Duke's intransigence on this issue is at the root of its conflation of stakeholder engagement with settlement negotiations in its Update. Duke offered stakeholder presentations about its proposed customer programs in late 2022. Counsel for SACE first raised the concern about regulatory surplus during the question-and-answer portion of the August 4, 2022 meeting. See Att. 1, Slide 5 from Aug. 4, 2022 meeting (explaining that money paid by participating customers would "buy down" the cost of renewable energy for other customers). Duke confirmed during its October 26 stakeholder presentation that as proposed none of the voluntary customer programs would procure clean energy surplus to regulatory requirements.

On November 30, 2022, SACE, NCSEA, and Vote Solar submitted a stakeholder letter to Duke expressing their shared concern that as proposed the voluntary customer programs would not offer regulatory surplus. Att. 2, Stakeholder letter of Nov. 30, 2022.

At stakeholders' request, Duke agreed to a meeting on December 8, 2022 to discuss the issue. In addition to the signatories to the letter, invitees included counsel for Carolina Utility Customers Association, Inc. (CUCA), the Carolina Industrial Group for Fair Utility Rates (CIGFUR) and a representative from the Southeast Sustainability Directors' Network (SSDN). Att. 3. The discussion was helpful, particularly concerning the concept of temporally driven regulatory surplus, bringing procurement of a clean-energy resource forward in time. Att. 4. However, the issue was not resolved.

At stakeholders' request, Duke agreed to a second meeting with parties concerned about regulatory surplus on February 7, 2023. Att. 5. However, Duke filed its proposed programs on January 27. The proposed programs that Duke filed were substantially the same as it presented in stakeholder discussions and did not offer any pathway to regulatory surplus. The February 7 call took place but was not as productive. Duke representatives stated that Duke could be amenable to agreeing to revisions in its reply comments, if it found the proposed revisions acceptable. But this was unlikely given its hard-line position on regulatory surplus. Multiple parties expressed concern about regulatory surplus in their reply comments, including the Public Staff and the Attorney General's Office (AGO). See Joint Reply Comments of the Southern Alliance for Clean Energy and the North Carolina Sustainable Energy Association, *GSAC and CEI Dockets* (N.C.U.C. June 23, 2023) (reviewing parties' positions).

Thus concluded the follow-on stakeholder discussions between Duke and the group of stakeholders listed above that initially expressed concern about regulatory surplus. Duke evidently had subsequent discussions with the Public Staff and CIGFUR.

In its reply comments, CIGFUR requested procedural relief, namely, that the Commission stay the dockets for a limited time to allow the parties to continue working to resolve outstanding issues, and that it allow parties to file surreply comments if consensus could not be achieved. Request for Procedural Relief and Reply Comments of CIGFUR II and III, *GSAC and CEI Dockets* (June 23, 2023). CCEBA submitted a letter in lieu of comments in these dockets on June 23, 2023 which proposed an approach to additionality that any variable rate bill credit project procured under the GSA Facility PPA option would not be subtracted from the HB951 procurement volume. In its response to CIGFUR, Duke requested that the Commission approve the GSAC CEEA Purchase Track, issue an order on its Petition for Approval of the CEI Program without a stay, and allow parties to file updates concerning Duke's proposed "regulatory surplus tracks" on November 15, 2023. Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Response to CIGFUR's Request for Procedural Relief at 6, *GSAC and CEI Dockets* (N.C.U.C. Aug. 1, 2023). Duke represented that the Public Staff and CIGFUR supported its request. *Id.*

SACE, CCEBA and NCSEA, at a minimum, were not invited to the discussions that evidently took place between Duke, the Public Staff and CIGFUR, and opposed the proposal to cabin discussion of regulatory surplus to limited "tracks" for fear it would divert the central issue in the proceeding into a secondary process where it would pass away out of the Commission's sight. Joint Response of the Southern Alliance for Clean Energy and the North Carolina Sustainable Energy Association at 10, *GSAC and CEI Dockets* (N.C.U.C. Aug. 9, 2023). SACE and NCSEA were forced to conclude that stakeholder discussions had reached an impasse and requested a ruling from the Commission that regulatory surplus was required of all H951 voluntary customer programs. *Id.* at 8-11. However, they asked to be included in any further stakeholder discussions. *Id.* at 11.

Having proposed multiple pathways to regulatory-surplus customer programs in their initial comments, SACE and NCSEA proposed another solution to the impasse in their Joint Motion for a Technical Conference. Joint Motion for a Technical Conference of the Southern Alliance for Clean Energy and the North Carolina Sustainable Energy Association, *GSAC and CEI Dockets* (N.C.U.C. Sept. 5, 2023). The presentations of third-party experts at a technical conference would help the Commission develop successful H951 voluntary customer programs. *Id.* at 15-16. CIGFUR filed a letter stating that it was "not convinced" of the need for a technical conference and reiterating that the needs of customers that would be eligible to participate in the GSAC program should be the central focus of the proceeding. CIGFUR Letter, *GSAC Dockets* (N.C.U.C. Sept. 13, 2023). Duke opposed the motion, but stated that Duke, the Public Staff, and CIGFUR were all committed to engaging in further discussion regarding the "regulatory surplus tracks" before November 15 and would keep the Commission apprised of the discussions. Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Response to Southern Alliance for Clean Energy and the North Carolina Sustainable Energy Association's Joint Motion for a Technical Conference, *GSAC and CEI Dockets* (N.C.U.C. Sept. 15, 2023).

Duke, the Public Staff, and CIGFUR evidently continued discussions and Duke later circulated the proposed “resource acceleration option” (RAO) to counsel for all parties on October 23, 2023.¹ As described in Duke’s Update and the emails attached to it, SACE and NCSEA expressed appreciation for the effort that Duke put into developing the RAO, but maintained concerns and could not support it as proposed. Duke Update at 2, Exh. 1.

SACE and NCSEA continued to look for solutions and offered their third separate solution in the form of a revised version of the RAO, which CCEBA supported as well. After discussions with staff at the Center for Resource Solutions (CRS) and others, SACE and NCSEA came to believe that the RAO as proposed would likely provide a very limited form of regulatory surplus, lasting from the time that a facility was contracted from among the losing bids in an annual solar procurement until the time that it was incorporated into Duke’s baseline procurement in development of the subsequent Carbon Plan-integrated resources plan (CPIRP). Accordingly, a large customer enrolling in the GSAC RAO option would be expected to enter a “sleeved” PPA with a developer for as many as 20 years when the project would be surplus to regulatory requirements for only a short time, likely one or two years. Furthermore, the clean-energy project in question almost certainly would not enter commercial operation before it was “rolled into” the CPIRP baseline, meaning it would not generate certifiable renewable energy credits (RECs).² Through discussions with counsel for large-customer groups, SACE and NCSEA came to understand that while the RAO option represented progress towards regulatory surplus, it would not work for any large customers for which the initially proposed GSAC and CEI programs would not work, considering their corporate commitments.³

Under the revised RAO concept developed by SACE and NCSEA, customers would purchase only to “pull forward” clean energy in time. In other words, customers would pay for a credit like a regulatory-surplus version of a “clean energy and environmental attribute” (CEEA) and in exchange Duke would advance the procurement of some amount of solar under the annual CPIRP-driven solar procurement by selecting among the losing bids. The price of the regulatory-surplus CEEA would be determined by the excess cost to bring the clean energy online sooner, represented principally by the difference between the highest “winning” bid and the losing bid selected for the program, thus ensuring customers would be held harmless. Ideally, the program capacity would not be limited, but instead would be derived from the market—leaving it to large customers to determine how much they were willing to pay each year to accelerate clean energy adoption and carbon emissions reduction. Projects procured in this way still likely would not generate while they were surplus to regulation—assuming Duke rolled them into its next CPIRP baseline—and thus likely would be ineligible to generate Green-e certified

¹ Phrasing in the draft RAO plainly indicates that it was circulated to other parties much earlier.

² A REC is equivalent to one megawatt-hour of electricity actually generated by a qualifying source. CRS, which runs the Green-e independent REC certification program, certifies sources of RECs annually.

³ SACE and NCSEA now understand there might be CIGFUR members of which this is true.

RECs, but additional work on the program or discussions with CRS might resolve that issue.

At stakeholders' request, Duke agreed to a follow-up discussion of its RAO proposal and agreed to expand the discussion to include all interested parties. Att. 6. The conversation took place on January 11, 2024. While some progress was made improving the RAO as proposed by Duke, no agreement was reached, particularly on regulatory surplus. Evidently Duke continued discussions with the Public Staff and CIGFUR. According to Duke's Update, the Public Staff and CIGFUR support Duke's forthcoming proposed RAO after some revisions. Duke Update at 2.

The procedural history recited above ceases to describe a stakeholder engagement process after Duke filed its initial proposed H951 customer programs on January 27, 2023. From then on, it describes something more akin to a settlement process in which certain stakeholders including SACE were not aware of the discussions until after decisions had been made and were not included in discussions unless initiated and proactively requested. Any party is within its rights to seek settlement with any other party and the Commission has historically encouraged settlement. See Order Declining to Adopt Proposed Settlement Rules, *In the Matter of Rulemaking Proceeding to Consider Proposed Rule Establishing Procedures for Settlements and Stipulated Agreements*, Docket No. M-100, Sub 145, at 13 (N.C.U.C. Mar. 1, 2017). And settling parties may exclude other parties when it is no longer fruitful to include them. *Id.*

But selecting merely two intervenors for settlement discussions does not constitute the rosy picture of a company "actively engaged" with stakeholders and "collaborative efforts," such as Duke presented. Duke Update at 2. Proper stakeholder engagement should allow all parties to engage and advocate for their positions. See Order Adopting Commission Rule R8-60A and Amending Commission Rules R8-60, R8-67, AND R8-71, *In the Matter of Rulemaking Proceeding Related to Biennial Consolidated Carbon Plan and Integrated Resource Plans of Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC, Pursuant to N.C.G.S. § 62-110.9 and § 62-110.1(c)*, Docket No. E-100, Sub 191, 2023 WL 8170910 (N.C.U.C. Nov. 20, 2023) (explaining purpose of stakeholder process in CPIRP proceeding); Order Adopting Commission Rule R1-17B, *In the Matter of Rulemaking Proceeding to Implement Performance-Based Regul. of Elec. Utilities*, Docket No. E-100, Sub 178, 2022 WL 463120, at *51 (N.C.U.C. Feb. 10, 2022) (discussing CIGFUR's concerns underlying its request that stakeholder process to cure performance-based regulation application be facilitated by independent and impartial third party, ultimately rejected by NCUC as unduly burdensome in that context).

It is not surprising, then, that Duke's anticipated resolution of the outstanding regulatory surplus issue is not consensus. Duke anticipated that it will circulate a stipulation among Duke, the Public Staff, and CIGFUR, and later file the stipulation with the Commission. Duke Update at 2. As SACE and NCSEA predicted last August, despite their efforts, "it appears very likely that voluntary customer programs under H951 will comply with the law and deliver the additional clean energy and emissions reductions that

customers want and expect only if the Commission requires it.” Joint Response of the Southern Alliance for Clean Energy and the North Carolina Sustainable Energy Association at 10, *GSAC and CEI Dockets* (N.C.U.C. Aug. 9, 2023).

As yet another proposed solution, SACE hereby submits that it would not be opposed to including the voices of large customers in particular in the technical conference requested in SACE and NCSEA’s Joint Motion. SACE agrees with CIGFUR that large customers’ perspectives are vital to successful H951 voluntary customer programs. However, on information and belief, there are multiple large customers for which regulatory surplus matters a great deal. These large customers might be wary of locating in North Carolina if that were to preclude access to regulatory-surplus clean energy, particularly when the new demand identified by Duke in its 2023 fall update to its CPIRP load forecast is driven by large customers—potentially linking large customers to the nation’s largest proposed methane gas build-out rather than to clean energy.

There are viable paths forward that can achieve regulatory surplus, but to date they do not include any proposed by Duke. Although the RAO is an incremental improvement, it too is still far from sufficient. It is new and complex territory, both in North Carolina and nationally. But the Commission should not let the difficulty—or the apparent urgency created by the coming full-subscription of the GSA Bridge program after the lengthy process set forth above—lead it to approve programs that will not meet the needs of large customers and could put economic growth and H951 compliance at risk.

Sincerely yours,

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