STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH
DOCKET NO. E-2, Sub 1315
DOCKET NO. E-7, Sub 1288
DOCKET NO. E-2, Sub 1314
DOCKET NO. E-7, Sub 1289

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, Sub 1315 DOCKET NO. E-7, Sub 1288 Petition of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC Requesting Approval of Clean Energy Impact Program DOCKET NO. E-2, Sub 1314 DOCKET NO. E-7, Sub 1289 Petition of Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, Requesting Approval of Green Source Advantage Choice Program and Rider GSAC	)	**COMMENTS OF THE ATTORNEY GENERAL'S OFFICE**

The North Carolina Attorney General's Office (AGO) respectfully submits these comments regarding Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC's (DEC) (together, Duke or the Companies) joint applications for approval of the Clean Energy Impact Program (CEI), the Green Source Advantage Choice Program (GSA Choice), and Rider GSAC (together, the Programs). The AGO supports offering customers ways to access additional clean energy. However, as designed, the Programs have the potential to mislead customers while not meaningfully supporting the adoption of clean energy. The AGO recommends that the Commission deny the Companies' applications and order the development of Programs that provide customers meaningful ways to support our State's efforts to decarbonize.

On January 27, 2023, Duke filed its joint petitions for approval of the Programs.[1] Both Programs allow customers to voluntarily purchase Clean Energy Environmental Attributes (CEEAs) from the Companies in order to expand access to clean energy options. These CEEAs consist of renewable energy certificates (RECs) and carbon emission reduction attributes.

Under the CEI program, residential and small business customers may purchase CEEAs from the Companies to cover all or a portion of their energy needs. Customers with contract demands under 1,000 kW are eligible to participate. Eligible customers may purchase block sizes of 250 kWh or 1,000 kWh. RECs attributable to the purchased blocks would be tracked and retired with the North Carolina Renewable Energy Tracking System ("NC-RETS"), while the "carbon emission reduction attribute would be separately tracked, recorded, and retired[.]"[2] The blocks are purchased on a month-to-month basis with the price set based on the national market rate for RECs plus an administrative fee.[3]

The GSA Choice program is available for larger commercial and industrial customers with either: (1) a Maximum Annual Peak Demand of at least 1 MW, or (2) an aggregated Maximum Annual Peak Demand at multiple locations in the

[1] Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Joint Petition for Approval of Clean Energy Impact Program, Docket Nos. E-7 Sub 1288 and E-2, Sub 1315 (Jan. 27, 2023) (CEI Application); Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Joint Petition for Approval of Green Source Advantage Choice Program, Docket Nos. E-7 Sub 1289 and E-2, Sub 1314 (Jan. 27, 2023) (GSA Choice Application).
[2] CEI Application at 7.
[3] The national market rate for RECs typically includes "carbon emission reduction attributes," which are excluded from North Carolina's definition of RECs under N.C.G.S. § 62-133.8(a)(6).

Companies' service territories of at least 5 MW.[4] The GSA Choice program has two tracks for obtaining CEEAs: (1) from generating assets owned by the Companies or third-party-owned assets that have an executed power purchase agreement with the Companies, (referred to as "Available Renewable Energy Resources"), or (2) via a three-party agreement between the Companies, the customer, and a renewable developer (referred to as "GSA Facility PPA"), which the Companies propose to limit to 250 MW per year. The Companies propose that any resources procured through the GSA Facility PPA option would directly reduce the amount of renewable generation that the Companies are required to procure under their combined Carbon Plan and Integrated Resource Plans.[5] The GSA Choice program also includes an option to include energy storage.

Section 5, subsection 4 of House Bill 951, Session Law 2021-165, required the Commission to:

> [E]stablish a rider for a voluntary program that will allow industrial, commercial, and residential customers who elect to purchase from the electric public utility renewable energy or renewable energy credits, including in any program in which the identified resources are owned by the utility . . . , to offset their energy consumption, which shall ensure that customers who voluntarily elect to purchase renewable energy or renewable energy credits through such programs bear the full direct and indirect cost of those purchases, and that customers that do not participate in such arrangements are held harmless, and neither advantaged nor disadvantaged, from the impacts of the renewable energy procured on behalf of the program customer, and no cross-subsidization occurs.

The Companies state that the Programs are intended to satisfy the requirements of this subsection; however, as described below, they do not.

[4] GSA Choice Application at 7.
[5] GSA Choice Application at 6.

RECs are legal instruments that separate certain attributes of renewable energy from the underlying electricity, such that the two can be independently traded or used. RECs have been used by the Companies to achieve compliance with the State's Renewable Energy Portfolio Standard since the enactment of Senate Bill 3, Session Law 2007-397 in 2008. However, under N.C.G.S. § 62-133.8(a)(4), the definition of RECs "does not include the related emission reductions, including, but not limited to, reductions of sulfur dioxide, oxides of nitrogen, mercury, or carbon dioxide." The CEEAs offered through the Programs therefore bundle a REC with the related emissions reductions.

I. THE PROGRAMS HAVE THE POTENTIAL TO MISLEAD CUSTOMERS.

The AGO's primary concern is that the Programs, as they are currently designed, have the potential to mislead customers into thinking that they are supporting the addition of renewable resources to the Companies' systems when they are not. The Programs' applications and proposed tariffs exacerbate this confusion by stating that the Programs will allow customers to "support renewable energy,"[6] "to help reduce carbon emissions,"[7] that "[e]nergy associated with [CEEAs] displaces energy that often would have otherwise been produced from traditional non-renewable generating facilities,"[8] and that customers "request[] an annual amount of renewable capacity to be developed or procured on the Customer's behalf."[9] Together, these statements imply that a customer's purchase

[6] CEI Application at 5.
[7] CEI Application at 2.
[8] CEI Application, Appendix A, at 1.
[9] GSA Choice Application, Appendix B, at 2.

of CEEAs would lead to additional renewable energy sources being developed or would displace fossil fuel generating resources. This is not the case.

Under the Programs, the Companies intend to sell CEEAs to customers without adjusting the system-wide procurement of renewable resources or the system-wide environmental attributes. For example, the Companies do not intend to subtract out carbon emissions reductions attributable to the CEEAs from their carbon emissions reduction accounting under the Carbon Plan.[10] The Companies do not intend to subtract out carbon emission reductions attributable to the CEEAs from their corporate carbon emissions reduction goals.[11] The Companies have not stated whether they will adjust the Scope 2 emissions reported to customers to account for CEEAs sold to program participants.[12] Therefore, despite the Companies' contention that the Programs' design will "create certainty to ensure there is no double counting of environmental claims," it appears as though carbon emissions reductions will be counted by both the Companies and purchasing customers.

The Federal Trade Commission (FTC) publishes guides for the use of environmental marketing claims, which are intended to help companies avoid environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45. 16 C.F.R. Part 260. The FTC's guides apply to

[10] Duke Response to AGO GSA Data Request 1-6(a) (attached as AGO Exhibit 1); Duke Response to AGO CEI Data Request 1-6(a) (attached as AGO Exhibit 2).
[11] AGO Exhibit 1 at 1-6(b); AGO Exhibit 2 at 1-6(b).
[12] Scope 2 emissions are the emissions resulting from the generation of electricity a customer purchases. Carbon Emissions Education, Duke Energy, https://www.duke-energy.com/energy-education/energy-savings-and-efficiency/calculate-your-carbon-footprint ("As an electric company, Duke Energy is most able to affect your Scope 2 emissions, or those resulting from the production of electricity.).

environmental marketing to consumers as well as to businesses.[13] 16 C.F.R. § 260.15(d) states that "[i]f a marketer generates renewable electricity but sells renewable energy certificates for all of that electricity, it would be deceptive for the marketer to represent, directly or by implication, that it uses renewable energy."[14] N.C.G.S. § 75-1.1 similarly prohibits unfair and deceptive acts and practices. The FTC Act "may be used as guidance in determining the scope and meaning of G.S. 75-1.1."[15] The Programs would seem to run afoul of the FTC's guidance.

By way of relevant example, the FTC has previously reviewed claims that Green Mountain Power Corporation, an electric utility in Vermont, had deceived customers by claiming environmental benefits of renewable generation while selling RECs to third parties. The FTC stated that:

> The operation of the renewable energy market relies heavily on the expectation of all market participants that these certificates have not been counted or claimed twice (*i.e.*, double counted). Such double-counting can occur, for instance, through multiple sales of the same REC *or through renewable energy claims made by a company that already sold the RECs for its renewable generation.* Therefore, any statement by the company that might lead consumers of that electricity to infer that the energy was produced cleanly risks double counting. Such double counting, in sum, not only risks deceiving consumers but also threatens the integrity of the entire REC market. By selling RECs, a company has transferred its right to characterize its electricity as renewable.[16]

Recently, this Commission addressed this issue in *Order Granting Optima's Request for Declaratory Ruling*, Docket No. E-100, Sub 131 (Dec. 20, 2022). In

[13] 16 C.F.R. § 260.1(c) ("These guides also apply to business-to-business transactions.").
[14] The federal definition of RECs includes the environmental attributes; therefore, the RECs that the FTC's guides are discussing are more analogous to CEEAs than North Carolina's RECs.
[15] *Marshall v. Miller*, 302 N.C. 539, 542, 276 S.E.2d 397, 399 (1981).
[16] Letter from Federal Trade Commission, Bureau of Consumer Protection to Green Mountain Power Corporation (Feb. 5, 2015) (attached as AGO Exhibit 3) (emphasis added).

that docket, the Companies acknowledged the need to avoid double counting under both N.C.G.S. § 75-1.1 and 15 U.S.C. § 45, stating:

> [C]onsistent with anti-fraud laws and regulations, [RECs] are automatically deemed retired as soon as the Duke Utilities make claims about generating renewable electricity using the renewable gas. Were these environmental attributes (VERs) to have any other disposition, whether by the Duke Utilities or the developer, the fuel would not be renewable. . . . [and] would clearly result in the Duke Utilities engaging in greenwashing and deceptive environmental claims, because neither the fuel nor the resulting electricity would be renewable.[17]

Duke's comments noted that FTC Commissioner Rohit Chopra previously stated that "[i]n the case of energy consumption, consumers must often take the information sellers provide at face value, as they lack the resources to verify the accuracy of their statements independently."[18] Duke pointed out "[t]he FTC's position is that the common sense understanding of everyday consumers will control, and 'technical compliance' with other regulations will not provide a defense to greenwashing and deceptive environmental claims."[19]

The Commission ultimately rejected Duke's argument that environmental attributes must be retired by the Companies in order to avoid double counting. In support, the Commission noted that "N.C.G.S. § 62-133.8, enacted as part of Senate Bill 3 (SB3) in 2007, does not deal directly with any of these greenhouse gas or carbon-related environmental attributes, and to the extent it does, it expressly excludes any such environmental attributes from the definition of a

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[17] Joint Reply Comments of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC Regarding Optima MH, LLC's Motion, Docket No. E-100, Sub 113 at 7-8 (Apr. 12, 2021).
[18] *Id.* at 9 (citing Statement of Commissioner Rohit Chopra at 4 (Dec. 22, 2020), available at: https://www.ftc.gov/system/files/documents/public_statements/1585238/20201222_final_chopra_statement_on_energyguide_rule.pdf).
[19] *Id.* at 8-9.

REC."[20] Here, the Programs not only explicitly include environmental attributes in addition to the REC, but N.C.G.S. § 62-110.9 *does* "deal directly with any of these greenhouse gas or carbon-related environmental attributes." The Commission's Order stated that "RECs may be unbundled from the energy itself produced using a renewable energy resource, and claims that energy is renewable is contingent on the energy retaining that intangible renewable attribute" and that "'[b]y selling RECs, a company has transferred its right to characterize its electricity as renewable.'"[21]

Finally, the potential for double counting creates economic risks for both the Companies and corporate customers. In 2022, the Securities and Exchange Commission (SEC) published proposed rules that would require companies to provide certain climate-related information in their registration statements and annual reports.[22] For example, the proposed rule would "require [companies] to disclose the role that carbon offsets or RECs play in the registrant's climate-related business strategy"[23] and "to disclose their Scopes 1 and 2 emissions."[24] Making false or misleading statements related to emissions reduction under this proposed rule would potentially open up the Companies and customers to liability.[25]

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[20] *Order Granting Optima's Request for Declaratory Relief*, Docket No. E-100, Sub 113 at 19 (Dec. 20, 2022).
[21] *Id.* at 20.
[22] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Red. 21,334 (Apr. 11, 2022).
[23] 87 Fed. Reg. at 21,355
[24] 87 Fed. Reg. at 21,377.
[25] *See, e.g.,* 15 U.S.C. §§ 78j, 78r(a).

The only way to avoid potentially misleading customers via double counting emissions reduction benefits is to ensure that the CEEAs used under the Programs are generated by renewable resources that are not being used to satisfy any other emissions reduction goal—whether it be the Companies' corporate carbon emission reduction goal or the requirements of N.C.G.S. § 62-110.9. The Companies have claimed that the FTC has rejected a similar "additionality" requirement under 16 C.F.R. Part 260, but that is inaccurate.[26] In support of that position, the Companies cited the FTC's Proposed Revisions to Guidelines, Guides for the Use of Environmental Claims in Marketing, 75 Fed. Reg. 63,552, 63,595-97 (Oct. 15, 2010). In that proposal, the FTC acknowledged that many aspects of the "additionality" policy debate were beyond its purview; however, it specifically addressed regulatory additionality and held:

> When consumers purchase carbon offsets, they expect that they are supporting a reduction in greenhouse gas emissions. If the law mandates a particular emission reduction, however, that reduction will occur whether or not someone buys an offset for the activity. In other words, if a company sells an offset based on a mandatory emission reduction, the purchaser is essentially funding that company's regulatory compliance activities. Therefore, in such situations, the proposed Guides advise marketers that offset sales are deceptive.[27]

Therefore, the Commission should order the Companies to propose revisions to the Programs that ensure that CEEAs sold are derived from renewable generation that has not been used to satisfy regulatory compliance requirements or to meet corporate carbon emission reduction goals.[28]

[26] Duke Response to GSA Choice Public Staff Data Request 2-3.
[27] 75 Fed. Red. 63,597 (Oct. 15, 2010).
[28] *See also* Regulatory Surplus, United States Environmental Protection Agency (Feb. 5, 2023), https://www.epa.gov/green-power-markets/regulatory-

II. THE PROGRAMS ARE CONTRARY TO THE PUBLIC POLICY OF THE STATE.

Even if the Commission does not agree that the Programs have the potential to mislead customers, the applications should be denied as they are contrary to the public policy of the State. N.C. Const. Art. XIV, § 5 establishes that it is the policy of the State to "conserve and protect its lands and waters for the benefit of all its people" and, to that end, requires the State to "control and limit the pollution of our air and water." Further, it is the policy of the State that utility programs "encourage and promote harmony between public utilities, their users and the environment."[29] To that end, House Bill 951 was passed by the General Assembly with bipartisan support and signed by Governor Cooper on October 13, 2021. Section 1 of House Bill 951, codified as N.C.G.S. § 62-110.9, established multiple carbon dioxide emissions reduction targets for electric utilities through 2050.

Recognizing the continued need for our State to address greenhouse gas emissions outside of the power sector, Governor Cooper signed Executive Order No. 246 on January 7, 2022 (E.O. 246). E.O. 246 set a policy goal to reduce statewide greenhouse gas emissions by 50 percent by 2030 and to reach net-zero emissions by 2050. Together, these actions reflect a recognition that the reduction of greenhouse gases, including carbon dioxide, is an issue of critical importance to our State. As they are currently designed, the Programs do not lead to additional carbon emissions reductions and may in fact hamper that goal.

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surplus#:%7E:text=This%20is%20referred%20to%20as,renewable%20energy%20certificates%20(RECs).

[29] N.C.G.S. § 62-2(5).

The Companies' position is that N.C.G.S. § 62-110.9 regulates "direct emissions from electric generation facilities through actual measurements at the stack [rather than] through [RECs] or environmental attributes."[30] The question of how compliance with N.C.G.S. § 62-110.9 is measured is an open question of law. However, that is a question that the Commission need not answer in this proceeding nor is this the appropriate docket to address an issue of such critical importance. Instead, the Commission should deny the Companies' applications as filed because the Programs do not meaningfully advance the State's policy of reducing carbon emissions.

Finally, section 5, subsection 4 of House Bill 951 requires, "that customers that do not participate in such arrangements are held harmless, and neither advantaged nor disadvantaged, from the impacts of the renewable energy procured on behalf of the program customer, and no cross-subsidization occurs." As the Programs are currently designed, non-participating customers may be disadvantaged. As CEEAs are purchased under the Programs, the characteristics of the Companies' system will—or at least should—change to reflect that the carbon emissions attributes have been retired. Because the carbon emissions attributes are removed from the Companies' systems, non-participating customers will now be purchasing energy that is more carbon intensive than they would otherwise have been purchasing. As discussed above, these types of changes have material impacts for customers with reporting requirements or corporate carbon emissions reductions goals.

[30] AGO Exhibit 1; AGO Exhibit 2.

III. CONCLUSION

The AGO supports expanding access to clean energy to help advance our State's decarbonization efforts; however, the proposed Programs have the potential to mislead customers while not meaningfully supporting the adoption of clean energy. Therefore, the Commission should deny the Companies' applications and order the Companies to design, and file for approval, programs that allow customers to purchase CEEAs that are additional to those required under the Companies' approved Carbon Plan and corporate carbon emission reduction goals.

Respectfully submitted this the 25th of April, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies that he has served a copy of the foregoing COMMENTS OF THE ATTORNEY GENERAL'S OFFICE upon the parties of record in this proceeding by email, this the 25th day of April, 2023.

/s/ Tirrill Moore
Assistant Attorney General