STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-100, SUB 179

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-100, Sub 179	)	
	)	
In the Matter of:	)	RESPONSIVE COMMENTS
Duke Energy Progress, LLC, and	)	OF THE ATTORNEY
Duke Energy Carolinas, LLC, 2022	)	GENERAL'S OFFICE
Biennial Integrated Resource Plans	)	
and Carbon Plan	)	

The North Carolina Attorney General's Office (AGO) respectfully submits these responsive comments about specific topics and sub-issues regarding the Carbon Plan as permitted in the Commission's *Order Scheduling Expert Witness Hearing, Requiring Filing of Testimony, and Establishing Discovery Guidelines* issued in this docket on July 29, 2022, including:

a. Commentary pertaining to procedures for the next biennial Carbon Plan update proceeding and future IRP proceedings;

b. Commentary pertaining to rule-making procedures for revisions to the Commission's IRP Rule R8-60 and related rules for certificating new generating facilities to support execution of the Carbon Plan;

c. Commentary pertaining to the Commission's authority to extend the 2030 interim 70% carbon emission reduction target pursuant to N.C.G.S. § 62-110.9(4);

d. Commentary pertaining to legality of purchasing third party-owned generation excluded from N.C.G.S. § 62-110.9(2);

e. Commentary pertaining to the proper analysis of the impacts of methane emissions from natural gas;

f. All sub-issues designated under the topic identified as "General/Other;" and

g. Any miscellaneous issues previously raised by any party but omitted from the Issues Report or not designed to the hearing track by this Order;

I. STANDARD OF REVIEW

As discussed in the AGO's initial comments, the Commission has held that the procedures in this proceeding will be based on Commission Rule R8-60, which sets out the procedures for integrated resource planning. Integrated resource planning is considered an exercise of the Commission's legislative function, as opposed to an exercise of the Commission's judicial function.[1] Integrated resource planning proceedings are similar to a legislative hearing, "wherein a legislative committee gathers facts and opinions so that informed decisions may be made at a later time."[2] Similarly, this proceeding was initiated by the Commission to gather facts and opinions to develop a Carbon Plan that will inform future decisions, such as whether to grant certificate applications for construction of generating facilities.

However, the development of a Carbon Plan is different from integrated resource planning in that the Carbon Plan proceeding is aimed at planning changes in the operations of electric utilities in order to meet the relevant carbon reduction mandates. N.C.G.S. § 62-110.9 requires the Commission to "take all reasonable steps to achieve a seventy percent (70%) reduction in emissions of carbon dioxide" from Duke's North Carolina power plants from 2005 levels by 2030 and carbon neutrality by 2050. N.C.G.S. § 62-110.9 puts the Commission at the center of the Carbon Plan process by requiring that the Commission

---

[1] Order Accepting Integrated Resource Plans, REPS and CPRE Program Plans With Conditions and Providing Further Direction For Future Planning in Docket No. E-100, Sub 165, issued November 19, 2021, at 3-4.

[2] Id. (quoting *State ex rel. Utilities Commission v. North Carolina Electric Membership Corp.*, 105 N.C. App. 136, 412 S.E.2d 166 (1992)).

develop a plan to achieve the required carbon reduction goals. By comparison, the integrated resource planning process has not been considered a forum for the Commission to issue mandatory directives that would fundamentally alter a utility's operations.[3]

Under this framework and the procedures outlined in recent scheduling orders, Duke has the burden to produce competent, material, and substantial evidence that its proposed plan, and portfolios therein, should be incorporated in whole or in part in the plan developed by the Commission, without a favorable presumption.[4] Likewise, intervenors have the burden to produce competent, material, and substantial evidence that their proposed alternative plans should be incorporated in whole or in part in the plan developed by the Commission. Other parties may provide evidence that any of the proposed plans are impacted by flawed assumptions, inputs, and/or adjustments. The Commission must then determine the weight and credibility of any such evidence in order to develop its final Carbon Plan.[5]

This understanding of the parties' respective burdens of proof is consistent with the statutory requirement in N.C.G.S. § 62-110.9(1), which directs the Commission to develop the Carbon Plan "with" Duke and "including stakeholder input." It is also consistent with N.C.G.S. § 62-110.9(4), which provides that the Commission shall "[r]etain discretion to determine optimal timing and generation

---

[3] *N.C.E.M.C.*, 105 N.C. App. at 143-44, 412 S.E.2d at 170.
[4] See N.C.G.S. § 62-94(b)(5).
[5] *See, e.g.,* Order Accepting Public Staff Stipulation in Part, Accepting CIGFUR Stipulation, Deciding Contested Issues, and Granting Partial Rate Increase, Docket Nos. E-22, Sub 562 & E-22, Sub 566 (Feb. 24, 2020); *State ex rel. Utils. Comm'n v. Stein*, 375 N.C. 870, 900, 851 S.E.2d 237, 256 (2020).

and resource-mix to achieve the least cost path to compliance with the authorized carbon reduction goals," and, in making such determinations, shall "receive and consider stakeholder input."

II. THE COMMISSION SHOULD UPDATE THE CARBON PLAN IN LIGHT OF THE RECENT ENACTMENT OF THE INFLATION REDUCTION ACT BEFORE DECIDING THE PROCESS FOR FUTURE CARBON PLANS AND INTEGRATED RESOURCE PLANS.

In its Verified Petition, Duke asks that the Commission "[a]ffirm that the first biennial Carbon Plan update proceeding should be held in 2024 and that the Companies' next biennial IRPs will be held in abeyance to 2024 to align with the Carbon Plan update[.]" While Duke's proposal was not objectionable when Duke's Verified Petition was filed in May, postponing further planning review is not appropriate given the substantial impact of the Inflation Reduction Act (IRA) on resource planning.

A key purpose of developing the Carbon Plan and Integrated Resource Plans is to assist the Commission's process when subsequent applications are made for construction of generating facilities, but the proposals now under consideration in the Carbon Plan proceeding are already out of date. As discussed in depth in the direct testimony of AGO witness Edward Burgess, important assumptions underlying proposed plans and comments need to be modified to reflect changes such as tax credits and funding that are now available. For example, a new 30% Investment Tax Credit is now available for storage facilities whether or not they are associated with solar facilities, thus reducing the cost of stand-alone storage facilities by a significant amount.

The AGO supports eventual coordination of the proceedings for Carbon Planning and Integrated Resource Planning; however, the timing fixed for regular biennial and annual updates cannot impose arbitrary schedules that limit the Commission's broad discretion to respond to important developments such as have occurred due to federal energy legislation.

The Commission's *Order Requiring Filing Of Carbon Plan and Establishing Procedural Deadlines*, issued in this docket on November 19, 2021, contemplated that the next Integrated Resource Plan (IRP) proceeding would be initiated with the filing of comprehensive plans in 2023, and the AGO does not recommend postponing the filing of an IRP to 2024 as Duke recommends unless the impact of the IRA is first addressed in conjunction with the Carbon Plan. If necessary to meet the December 31, 2022 deadline for Commission to develop its initial Carbon Plan, some aspects might be held open for further analysis of the potentially significant changes prompted by the IRA, while some resources may be identified with more certainty as "no regrets" resource options. Once the IRA's impact is evaluated and addressed in the Carbon Plan, then it would be more appropriate to sync up the timing of the Carbon Plan and the IRP proceedings.

III. THE COMMISSION SHOULD INITIATE A SEPARATE DOCKET TO EXAMINE REVISIONS TO RULE R8-60.

In its Verified Petition, Duke asks that the Commission "[d]irect the Companies and Public Staff to develop and propose for comment by January 31, 2023, revisions to the Commission's IRP Rule R8-60 and related rules for certificating new generating facilities to support execution of the Carbon Plan[.]" While revisions of the Commission's Rule R8-60 may be appropriate, the AGO does not support the abbreviated schedule Duke has suggested. Any schedule for modifying the Commission's rules should allow sufficient time for input. The AGO is particularly concerned if Duke's request extends to Rule R8-61 concerning the issuance of certificates of public necessity and convenience (CPCNs) for new generating facilities. The provisions in N.C.G.S. § 62-110.9 do not modify requirements for the consideration of CPCNs. Duke appears to seek abbreviated proceedings for CPCNs based on the determinations made in the Carbon Plan, but Duke's proposed Carbon Plan does not provide details about specific projects such as would be required for CPCN applications.

In addition, Duke's request for an order directing Duke and the Public Staff to jointly develop and propose revisions to the rules appears to exclude other engaged stakeholders without good cause. All interested parties should be encouraged to participate as in other rulemaking dockets. *See Order Requesting Comments and Proposed Rules*, Docket No. E-100, Sub 178 (Oct. 14, 2021) (allowing all parties to file proposed rules on the implementation of performance-based regulation), *Order Initiating Proceeding*, Docket No. G-100, Sub 77 (Jan. 28, 1999) (ordering the Public Staff to file proposed revisions and inviting other parties to review those revisions), *Order Initiating Rulemaking Proceeding and Requesting Comments*, Docket No. M-100, Sub 153 (Mar. 27, 2019) (proposing revisions and inviting comments on the proposal).

IV. THE COMMISSION MUST TAKE ALL REASONABLE STEPS TO ACHIEVE CARBON DIOXIDE EMISSIONS REDUCTIONS BY THE DATES SET FORTH IN THE STATUTE, AND IT IS NOT APPROPRIATE TO DEVELOP AN INITIAL PLAN THAT DOES NOT AIM TO MEET THE 70% REDUCTION BY 2030.

As discussed in the AGO's initial comments, the Commission has limited authority to extend the 2030 interim 70% carbon dioxide emission reduction target. N.C.G.S. § 62-110.9 specifically describes the ways in which the Commission may exercise its discretion. That provision holds that the Commission:

> Retain[s] discretion to determine optimal timing and generation and resource-mix to achieve the least cost path to compliance with the authorized carbon reduction goals, including discretion in achieving the authorized carbon reduction goals by the dates specified in order to allow for implementation of solutions that would have a more significant and material impact on carbon reduction; provided, however, the Commission shall not exceed the dates specified to achieve the authorized carbon reduction goals by more than two years, except in the event the Commission authorizes construction of a nuclear facility or wind energy facility that would require additional time for completion due to technical, legal, logistical, or other factors beyond the control of the electric public utility, or in the event necessary to maintain the adequacy and reliability of the existing grid.

N.C.G.S. § 62-110.9(4).

A. Compliance with the authorized carbon reductions goals means reducing carbon emissions by the amounts specified by statute by the dates specified by statute.

The first clause refers to the Commission's authority to: "determine optimal timing and generation and resource-mix to achieve the least cost path to compliance with the authorized carbon reduction goals[.]" This provision must be read together with the provision earlier in the statute that requires the Commission to "take all reasonable steps" to achieve the emission reductions by the dates specified in the statute. Accordingly, the Commission has the discretion to make determinations about when and which resources should be added in order to reach the carbon reduction goals by the dates specified in the statute. For example, this provision gives the Commission the authority to determine how much solar generation should be procured in 2026, 2027, 2028, and 2029 in order to achieve the "least cost path to compliance."

B. The Commission may exceed the dates specified by statute only under narrow circumstances.

N.C.G.S. § 62-110.9(4) lays out two scenarios where the Commission has the discretion to exceed the clear statutory deadlines: (1) "in order to allow for implementation of solutions that would have a more significant and material impact on carbon reduction," and (2) by more than two years if necessary to allow the "additional time for completion [of a wind or nuclear facility] due to technical, legal, logistical, or other factors beyond the control of the electric public utility" or "in the event necessary to maintain the adequacy and reliability of the existing grid."

Under the first scenario, the Commission may extend the 2030 deadline by up to two years in order to allow for implementation of solutions that would have a more significant and material impact on carbon reduction. Although Duke has proposed several portfolios that exceed the 2030 deadline by two or more years, Duke has not shown that the portfolios result in "more significant and material impact on carbon reduction."

Under the second scenario, the Commission may extend the 2030 deadline by more than two years if necessary to allow the additional time for completion of an authorized wind or nuclear facility due to technical, legal, logistical, or other factors beyond the control of the electric public utility. This provision offers a "safety valve" in the event that—having undertaken a path towards meeting the statutory deadlines—intervening events make achievement of the statutory deadlines impossible. The provision is conditional ("in the event") on the Commission authorizing construction of a nuclear facility or wind energy facility. At this point, such authorization has not been sought or approved and it is premature to extend the 2030 deadline.

The provision was not meant to give the Commission unlimited discretion to delay—for an indeterminate amount of time—as long as a wind or nuclear facility is included in a Carbon Plan. In interpreting N.C.G.S. § 62-110.9(4), the Commission must "give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dept. of Corrections v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009). The above erroneous reading would render much of the statutory language superfluous. This reading would have the provision read: "The Commission has the discretion to exceed the clear statutory deadlines by more than two years ~~if necessary~~ to allow the ~~additional~~ time for ~~completion of~~ a~~n~~ ~~authorized~~ wind or nuclear facility~~ due to technical, legal, logistical, or other factors beyond the control of the electric public utility~~." This reading also begs the question: Why include the interim 70% carbon emissions reduction target at all? It is axiomatic that 70% reduction will be achieved along a path to carbon neutrality. If the General Assembly's aim is to achieve 70% carbon emissions reductions at *some* point in the future, then the 2050 carbon neutrality goal would serve that purpose.

A plain reading of the statute shows that the provision was meant to allow the Commission to delay achieving the carbon reduction goals by more than two years in the event an unforeseen event makes achievement impossible. If the Commission disagrees and determines that the provision is unclear or ambiguous, principles of statutory interpretation help resolve that ambiguity. "The cardinal principle in the process is to ensure accomplishment of legislative intent." McLeod v. Nationwide Mutual Ins. Co., 115 N.C. App. 283, 288, 444 S.E.2d 487, 490, disc. review denied, 337 N.C. 694, 448 S.E.2d 528 (1994). To achieve this end, the court should consider "the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." Hayes v. Fowler, 123 N.C. App. 400, 404–05, 473 S.E.2d 442, 445 (1996) (citation omitted). "[T]he title of an act should be considered in ascertaining the intent of the legislature." Smith Chapel Baptist Church v. City of Durham, 350 N.C. 805, 812, 517 S.E.2d 874, 879 (1999).

Turning back to the statutory mandate at issue here:

> [T]he Commission shall not exceed the dates specified to achieve the authorized carbon reduction goals by more than two years, except in the event the Commission authorizes construction of a nuclear facility or wind energy facility that would require additional time for completion due to technical, legal, logistical, or other factors beyond the control of the electric public utility[.]

This provision must be interpreted in line with its plain meaning. The legislative intent behind House Bill 951, which was to quickly reduce carbon emissions from our State's electric generating facilities, requires a reading that the Commission cannot exceed the statutory deadline by more than two years unless there is an intervening event beyond the control of the public utility related to an authorized wind or nuclear facility. The Commission cannot, as Duke proposes, prospectively plan to fail to meet the statutory deadlines by more than two years.

The second scenario also grants the Commission discretion to exceed the 2030 deadline by more than two years "in the event necessary to maintain the adequacy and reliability of the existing grid." As discussed in the AGO's initial comments, Duke and other intervenors have provided the Commission a variety of portfolios that both maintain the adequacy and reliability of the existing grid and achieve the statutory deadlines. The AGO has now provided the Commission with an additional portfolio that does the same. Therefore, exceeding the statutory deadline by more than two years is not necessary to maintain the adequacy and reliability of the existing grid.

V. N.C.G.S. § 62-110.9 ALLOWS PURCHASES FROM THIRD PARTY-OWNED GENERATION.

In its July 29, 2022 order, the Commission asked for comments "pertaining to legality of purchasing third party-owned generation excluded from N.C.G.S. § 62-110.9(2)." N.C.G.S. § 62-110.9(2) requires that "[a]ny new generation facilities or other resources selected by the Commission in order to achieve the authorized reduction goals for electric utilities shall be owned and recovered on a cost of service basis by the applicable electric utility" except for new solar generation, and energy efficiency and demand-side management measures. The phrase "other resources" is broad enough to include wholesale third-party purchases.

There are a number of reasons why this provision should be read to allow selection of wholesale third-party purchases in the Carbon Plan. First, once energy is purchased from a third party, it is by definition owned by the utility and may be recovered in rates on a cost of service basis, thus complying with the plain language of the statute. Second, this interpretation conforms with historic planning practices, which have long recognized the prudency of utilizing third-party energy purchases.[6] Third, interpreting the provision in a way that disallows consideration of purchases of power as a resource is inconsistent with the State's statute governing integrated resource planning and certificates for public necessity and convenience, which requires the Commission to consider alternatives to a utility proposal for construction of generation such as the "purchase of power" or "arrangements with other electric utilities for interchange of power" when it reviews petitions for the construction of generating facilities. N.C.G.S. § 62-110.1(d). "Interpretations that would create a conflict between two or more statutes are to be avoided, and 'statutes should be reconciled with each other . . .' whenever possible." *Hunt v. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981). Finally, the AGO notes that reading the provision in this way would be consistent with the federal framework under the Public Utility Regulatory Policies Act that requires electric utilities to purchase power from qualifying facilities. See 16 U.S.C. § 824a-3.

The importance of least cost principles in the development of the Carbon Plan and concerns about limiting the consideration of wholesale power purchases as resources is a topic discussed in detail in the Tech Customers comments filed July 15, 2022, and the AGO supports the merit of those comments without further discussion here.

[6] *See* Commission Rule R8-60(d), (e), (i)(4).

For these reasons, the AGO recommends that the Commission find that N.C.G.S. § 62-110.9(2) does not prohibit the purchase of wholesale power and evaluate wholesale purchases alongside other resources for purposes of developing the Carbon Plan.

VI. LIMITING METHANE EMISSIONS IS AN IMPORTANT PUBLIC POLICY GOAL THAT THE COMMISSION SHOULD CONSIDER.

While N.C.G.S. § 62-110.9 does not require that the Commission's Carbon Plan reduce methane emissions, reduction of methane emissions is an important public policy consideration that the Commission should take into account when evaluating various alternative portfolios and deciding the extent and timing of any natural gas generation additions. N.C.G.S. § 62-2(a)(5) requires the Commission to "encourage and promote harmony between public utilities, their users and the environment." As North Carolina invests in clean energy through execution of the Carbon Plan and reduces the State's impact on climate change, it makes little sense to replace carbon dioxide-emitting coal with other fuels that emit substantial greenhouse gases driving climate change. Methane is another such greenhouse gas that, along with carbon dioxide, is defined as a pollutant under the Clean Air Act.[7] Even though natural gas fired generation does not emit large amounts of greenhouse gases compared to coal plants, natural gas production and transportation cause significant releases of methane gas, which has an impact on climate change that is over 80 times greater than carbon dioxide in the first two

[7] *See, e.g.*, Clean Air Act Sec. 132 (d)(4) and Sec. 134 (d)(4) as amended by the Inflation Reduction Act.

decades after its release, and over 25 times greater than carbon dioxide over time.[8] Studies have found that these methane releases have erased many of the climate change benefits gained by switching from coal to natural gas generation.[9]

In addition to the negative environmental impact, reliance on natural gas imposes an increasing burden on North Carolina's business and industrial community. An ongoing Securities and Exchange Commission proceeding is addressing proposed rules that would require disclosure of companies' greenhouse gas emissions, including those from purchased electricity.[10] The rulemaking may make it more difficult for Duke and companies that rely on Duke's electricity to secure favorable investment ratings. This Commission has previously acknowledged that maintaining a competitive business environment is in the public interest. See, e.g., Order Adopting Guidelines for Job Retention Tariffs, Docket No. E-100, Sub 73 (Dec. 8, 2015) ("if a large customer that would otherwise leave the system stays on the utility's system and pays its variable costs plus some contribution of the utility's fixed costs, all customers benefit in terms of paying reduced rates. All customers in the region further benefit by maintaining such large customer's revenue stream and corresponding multiplier impacts during periods of economic uncertainty.").

[8] Josie Garthwaite, Methane and Climate Change, Stanford Earth Matters (November 2, 2021), https://earth.stanford.edu/news/methane-and-climate-change#gs.4xvjca; Importance of Methane, U.S. Environmental Protection Agency (last accessed June 27, 2022), https://www.epa.gov/gmi/importance-methane#:~:text=Methane%20(CH4)%20is%20a,%2Dinfluenced)%20and%20natural%20sources.

[9] Benjamin Storrow, *Methane Leaks Erase Some of the Climate Benefits of Natural Gas*, Scientific American (May 5, 2020), https://www.scientificamerican.com/article/methane-leaks-erase-some-of-the-climate-benefits-of-natural-gas/.

[10] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 29,059 (May 12, 2022).

Therefore, it is important for the Commission to consider the impact from increased reliance on natural gas generation, not only in furtherance of good environmental policies but also based on the effect these choices have on the State's favorable business climate. Unlike "no regrets" options that would increase our reliance on solar and other renewable resources, storage, and measures to increase energy efficiency or demand-side-management, any plans to add natural gas generation should be minimized and deferred for as long as possible.

VII. CONCLUSION.

For the reasons discussed in these responsive comments, the AGO respectfully recommends that the Commission do the following:

1. Deny Duke's request to hold its next biennial IRPs in abeyance until 2024 and take prompt action to address the impact of the Inflation Reduction Act on planning;
2. Deny Duke's request to "[d]irect the Companies and Public Staff to develop and propose for comment by January 31, 2023, revisions to the Commission's IRP Rule R8-60;"
3. Hold that the Commission's discretion to delay achievement of the carbon reduction goals is limited as described in these comments and in the AGO's initial comments;
4. Decline to include in the Commission's Carbon Plan any portfolios that do not aim to meet the 70% emission reduction by 2030;
5. Hold that purchases of wholesale third-party electricity is allowed under N.C.G.S. § 62-110.9; and

6. Hold that methane emissions are an important public policy consideration and develop the Commission's Carbon Plan with that public policy consideration in mind.

Respectfully submitted this the 9th of September, 2022.

JOSHUA H. STEIN
ATTORNEY GENERAL

/s/ Margaret Force
Special Deputy Attorney General
Pforce@ncdoj.gov

/s/ Tirrill Moore
Assistant Attorney General
temoore@ncdoj.gov

N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6000
Facsimile: (919) 716-6050

CERTIFICATE OF SERVICE

The undersigned certifies that he has served a copy of the foregoing RESPONSIVE COMMENTS OF THE ATTORNEY GENERAL'S OFFICE upon the parties of record in this proceeding by email, this the 9th day of September, 2022.

/s/ Tirrill Moore
Assistant Attorney General