NORTH CAROLINA

ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24CV003385-670

THE TOWN OF CARRBORO, NORTH CAROLINA,

Plaintiff,

v.

DUKE ENERGY CORPORATION,

Defendant.

**DUKE ENERGY'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS UNDER N.C. RULE 12(b)(6)**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Rules**



**Other Authorities**

## INTRODUCTION

The Town of Carrboro ("Carrboro") seeks to use *state* common law tort to hold Defendant Duke Energy Corporation ("Duke Energy") liable for the alleged past, and theoretical future, effects of *global* climate change on Carrboro. (*See* Complaint, ECF No. 2, ¶ 3 ("Compl.").) Although Carrboro suggests that the "tortious conduct" at issue is an alleged "knowing deception campaign concerning the causes and dangers posed by the climate crisis" "to deceive the public and decision-makers" (Compl. ¶¶ 1, 3) that delayed a transition to other fuels,[1] Carrboro's Complaint remains dependent on out-of-state and global greenhouse gas emissions and interstate pollution. (*See* 12(b)(1) Motion, pp. 2, 4-6.) And Carrboro now admits that it seeks to second guess and challenge every power generation decision that was made pursuant to state law and multiple state utilities commissions. (12(b)(1) Resp. at 22.) This it cannot do. Carrboro's sweeping claims stretch North Carolina tort law well beyond its permissible scope, and the Complaint must be dismissed in its entirety under North Carolina Rule 12(b)(6).

*First*, the federal constitutional system does not permit a State (let alone a municipality) to apply its laws to create claims seeking redress for injuries allegedly caused by interstate or global emissions. *See Am. Elec. Power v. Connecticut*, 564 U.S. 410, 421-22 (2011). For this reason, "both federal and state courts across the country"

---

[1] Although Carrboro now claims to abandon allegations premised on direct emissions, the operative complaint and each and every claim raises direct emissions. And as discussed below, even Carrboro's allegations regarding deceptive statements necessarily are about whether those statements caused an increase in emissions,

have "rejected the availability of state tort law in the climate change context." *See, e.g.*, *Platkin v. Exxon Mobil*, No. MER-L-001797-22, 2025 WL 604846, at *3 (N.J. Super. L. Feb. 05, 2025). Congress enacted a comprehensive statutory framework governing air pollution, and that framework leaves no room for state common law to impose liability for out-of-state emissions. *See AEP*, 564 U.S. at 426; *Int'l Paper v. Ouellette*, 479 U.S. 481, 492 (1987); *see also* 42 U.S.C. § 7411(b)(1)(A)-(B), (d). Carrboro cannot circumvent these inherent limits on the reach of state common law to govern interstate emissions disputes. Nor can Carrboro avoid the federal statutory framework by dressing up its suit to seek damages for lawful emissions as a dispute over alleged deceptive marketing of Duke Energy's electricity.

*Second,* Carrboro's claims for nuisance, trespass, and negligence exceed the limited municipal police powers granted to it by the State. (Compl. ¶ 31.) To start, these claims explicitly target conduct that occurred outside of Carrboro's borders (*i.e.*, outside of Carrboro's authority to regulate). (*See* Compl. ¶¶ 24, 138, 145 (describing out-of-state emissions), 92-93, 107 (describing out-of-state marketing).) But, even if Carrboro could point to conduct occurring *within* its own borders, Carrboro likewise fails to state a claim. Carrboro's claims here far exceed the carefully circumscribed police powers set by the General Assembly. For example, Carrboro may not regulate local emissions outside of an approved local air pollution control program. *See* N.C. Gen. Stat. § 143-215.112. And Carrboro may only address asserted local nuisances through ordinances, (*see, e.g.,* N.C. Gen. Stat. § 160A-174), or seek to *enjoin* the nuisance. But this lawsuit does not purport to enforce any local air pollution program

or any ordinance. And Carrboro specifically disclaims any request for injunctive relief.

*Third,* even if Carrboro's nuisance, negligence, and trespass claims could proceed under state law, they fail to state a claim under any recognized theory of tort liability in North Carolina. Carrboro does not, and cannot, allege the requisite proximate cause for any claims. As Carrboro admits, climate change is a global phenomenon that implicates *worldwide conduct*, including "human-made emissions," and other sources going back over 100 years, long before any alleged conduct by Duke Energy began. (*See, e.g.*, Compl. ¶¶ 35-36, 51-52, 90.). The Complaint thus discloses facts that necessarily defeat Carrboro's claims. *See Corwin v. British Am. Tobacco*, 371 N.C. 605, 615 (2018). For example, Carrboro cannot trace its alleged harms back through a web of innumerable individual and government choices to purported conduct by Duke Energy to formulate any reasonable conception of proximate causation. Each of Carrboro's claims also suffer from a host of substantive defects.

*Fourth*, and finally, Carrboro's suit comes years too late. The Complaint alleges that the connection between fossil fuels and anthropogenic climate change has been open and obvious for at least two decades. (*See* Compl. ¶ 104 (referencing "overwhelming scientific consensus" as of 2004).) Carrboro itself has been aware of this connection since at least 2014—if not earlier—and has taken steps to address climate change effects by "reduc[ing] its emissions." (Compl. ¶ 178 (development of a Community Climate Action Plan); *id.* ¶¶ 179-189 (describing other efforts).) Yet

Carrboro waited until December 2024 to bring its claims. This otherwise meritless suit is thus time barred.

This Court should dismiss.

## LEGAL STANDARD

Duke Energy moves to dismiss the Complaint for "[f]ailure to state a claim upon which relief can be granted[.]" N. C. R. Civ. P. 12(b)(6); *Harris v. NCNB Nat'l Bank of N. Carolina*, 85 N.C. App. 669, 670 (1987). "It is well-established that dismissal pursuant to Rule 12(b)(6) is proper when (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Corwin*, 371 N.C. at 615 (cleaned up).

## STATEMENT OF THE CASE

Pursuant to this Court's February 10, 2025 Order, Duke Energy adopts and incorporates Sections I and II of the Statement of the Case set forth in its 12(b)(1) Motion to Dismiss as equally applicable here and in order to avoid repetition.

Attempting to avoid the implications of having clearly overstepped its authority, Carrboro now attempts to recast its Complaint as alleging "garden-variety common law tort claims" based on Duke Energy's alleged deceptive statements. Carrboro disavows any emissions-related allegations as merely "establish[ing] Duke's motive to deceive the public about climate change." (*See* Carrboro's Brief in Response to Motion to Dismiss Under N.C. Rule 12(b)(1), Doc. No. 18, pp. 9, 11, 16 (May 1, 2025)

("12(b)(1) Resp.").)

But emissions—including specifically allegations regarding Duke Energy's own direct emissions—pervade every aspect of Carrboro's Complaint, including every claim. (Compl. ¶¶ 209-10 (tying nuisance claim explicitly to fossil-fuel emissions and Duke Energy's continued investment in these fuels), 218 (asserting climate change impacts from investments in fossil-fuel plants), 225 (explicitly including "direct emissions" in alleged harmful conduct), 236 (tying trespass claim to investments in fossil fuels), 244 (tying negligence claim to Duke Energy's alleged failure to "invest[]in lower- or zero-carbon sources of electricity"), 245, 251 (asserting that Duke Energy owed a duty of care to *reduce its carbon emissions*), 252 (including fossil-fuel investment in conduct allegedly showing breach of duty of care), 263-264 (alleging that failure to reduce fossil-fuel emissions and continued investment in fossil fuels supported gross negligence claim).)

Carrboro's alleged injuries stem from climate effects tied to "human-made emissions." (Compl. ¶¶ 90, 192-93, 196, 198, 199, 204.) And Carrboro frequently refers to Duke Energy and its subsidiaries' emissions or investments in fossil-fuel resources throughout its Complaint. (Compl. ¶¶ 3, 24-26, 111, 137-145, 165.)

These allegations form the bedrock of the Complaint even if Carrboro now distances itself from these emissions-centered allegations. This "far-reaching effort to regulate emissions," (*see* 12(b)(1) Resp., p. 9), violates fundamental federal and state limitations on Carrboro's authority. *See infra* Part I.

But even if this Court were to accept Carrboro's invitation to strip away all of

its allegations related to Duke Energy's own emissions, and focus solely on the alleged misstatements, Carrboro's Complaint falls short.

As an initial matter, and as illustrated by Exhibit A included with this motion for the Court's convenience, Carrboro's Complaint includes few allegations as to Duke Energy's actual allegedly deceptive statements regarding climate change. Instead, the Complaint largely relies on third-party statements and scientific publications, (Compl. ¶¶ 5-6, 77-78, 85-87, 91-94, 99-109, 113-25), "greenwashing" claims that have no connection to Duke Energy's alleged concealment of climate change and its effects, (Compl. ¶¶ 132-33, 162-74), and statements regarding potential emissions control technologies, (Compl. ¶¶ 113, 115, 119.)[2]

[2] While Exhibit A includes alleged deceptive statements from the Complaint for the Court's convenience, Duke Energy does not concede the accuracy of these statements. To the contrary, several of these statements mischaracterize the referenced documents. For example, Carrboro references an August 17, 2023, press release where Duke Energy allegedly "tout[ed]" its commitment to retire Coal by 2035 and achieve carbon neutrality by 2050, without acknowledging that these measures are required by N.C. House Bill 951. (Compl. ¶ 132.) But the full statement did reference this statutory requirement—Carrboro conveniently omitted the end of the sentence. *See* Duke Energy Investor Relations - New Details, *Duke Energy files updated Carbon Plan to serve the growing energy needs of a thriving North Carolina* (Aug. 17, 2023) ("Retires coal by 2035; achieves carbon neutrality by 2050, **as required by North Carolina's clean energy law** under least-cost and reliability mandates." (emphasis added)), https://investors.duke-energy.com/news/news-details/2023/Duke-Energy-files-updated-Carbon-Plan-to-serve-the-growing-energy-needs-of-a-thriving-North-Carolina/default.aspx. Additionally, Duke Energy was not always able to locate the quoted language in the source identified by Carrboro. (*See, e.g.*, Compl. ¶ 115.)

## ARGUMENT

### I. North Carolina law cannot be constitutionally applied to Carrboro's claims seeking damages for interstate emissions and is preempted.

As a threshold matter, Carrboro's claims fail because they exceed the bounds of North Carolina common law and the authority of the State. Carrboro seeks damages for climate-related effects that are the result of decades of cumulative lawful conduct occurring across the globe. Carrboro also targets Duke Energy's own emissions occurring across multiple jurisdictions. (Compl. ¶¶ 8-10, 190-205.) These jurisdictions include at least eight different sovereign states identified in the Complaint, (*see* Compl. ¶ 24),[3] that each have their own priorities for addressing greenhouse gas emissions and regulate sources in accordance with these policies.[4]

Even viewing the allegations in the light most favorable to Carrboro, emissions remain the keystone of all their claims. The only alleged connection between alleged deceptive statements and Carrboro's alleged injuries, is increased greenhouse gas emissions resulting in accelerated climate change. (*See* Compl. ¶¶ 8, 9, 190-205.) Plaintiff asserts that either: (i) these increased emissions were the result of worldwide conduct, including "human-made emissions" and other sources going back over 100 years, (*see, e.g.*, Compl. ¶¶ 35-36, 51-52, 90), or (ii) they were the alleged

[3] While Carrboro alleges that Duke Energy "owns fossil fuel-fired electric generating facilities" in eight states, Duke Energy currently only operates in seven of these states. (Compl. ¶ 24.)

[4] Duke Energy's and its subsidiaries' activities as utility providers fundamentally differ from other regulated activities because operations are approved and prescribed by state utility commissions and relate to provision of an essential service.

result of Duke Energy's and its subsidiaries' direct emissions through continued investment in fossil fuels as a result of public and government policy decisions, (*see* Compl. ¶¶ 24, 138, 145.) Under either theory, Carrboro cannot separate its alleged harms from emissions. Carrboro's claims are governed, and foreclosed, by federal law for at least two reasons.

**A. State law does not govern disputes as to interstate emissions.**

As courts have repeatedly emphasized, a state cannot apply its law to emissions emanating from sources in other states. *Am. Elec. Power*, 564 U.S. at 421; *Ouellette*, 479 U.S. at 492; *City of Annapolis v. BP PLC*, No. C-02-CV-21-000250, 2025 WL 588595, at *6 (Md. Cir. Ct. Jan. 23, 2025). Indeed, it is fundamental that "all States enjoy equal sovereignty." *Shelby Cnty. v. Holder*, 570 U.S. 529, 535 (2013). As such, "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996).

Although Carrboro disclaims an intention to "seek any limitations on Duke's emissions or operations," (Compl. ¶ 11), it in fact seeks damages that would penalize Duke Energy for its lawful conduct across the country. Carrboro alleges that "Duke's deceptions played a material role in delaying the overall transition away from fossil fuels." (12(b)(1) Resp., p. 22.) But Duke Energy does not determine the mix of fuels for generating power in different states—state legislatures and utilities commissions do, consistent with federal law. Carrboro's suggestion that Duke Energy unilaterally influenced these decisions in favor of fossil fuels, despite broad public and government participation, defies the law and reality. To the contrary, as electric utilities, Duke

Energy and its subsidiaries are subject to a unique set of requirements that control their generation resource decisions and operations, consistent with policy choices made by state legislatures. *See, e.g.*, N.C. Gen. Stat. §§ 62-2 (requiring utility commission to consider least cost energy planning and reliable generation); 62-110 (regulating major generation resource decisions). By retroactively seeking damages for these decisions, Carrboro "would effectively regulate [Defendant's] behavior far beyond [state] borders." *City of New York v. Chevron,* 993 F.3d 81 (2d Cir. 2021); *see also Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975) (holding a State "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State").

For this reason, Courts have overwhelmingly concluded that the "basic scheme of the [federal] Constitution" bars state common law from governing disputes as to interstate emissions. *See Am. Elec. Power*, 564 U.S. at 421-22. "Global pollution-based complaints were never intended by Congress to be handled by individual states. Federal law governs disputes involving air and water in their ambient state." *Mayor & City Council of Baltimore v. BP P.L.C.,* 2024 WL 3678699 (Md. Cir. Ct. July 10, 2024); *see also Platkin*, 2025 WL 604846, at *3 (joining "both federal and state courts across the country" in "reject[ing] the availability of state tort law in the climate change context" and holding that "only federal law can govern Plaintiffs' interstate and international emissions claims"); *City of Annapolis v. BP PLC*, 2025 WL 588595, at *6; *Anne Arundel County v. BP PLC*, No. C-02-CV-21-000565, 2025 WL 588595, at *6 (Md. Cir. Ct. Jan. 23, 2025) (same).

### B. Carrboro's claims are preempted by the Clean Air Act.

Similarly, Congress "'sp[oke] directly' to emissions of carbon dioxide from the defendants' plants" in enacting the Clean Air Act, *see AEP*, 564 U.S. at 424, striking a "careful balance . . . between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other," *see City of New York*, 993 F.3d at 93. Much like the Clean Water Act, which the Supreme Court concluded preempted the application of state law against an out-of-state pollution source, the Clean Air Act authorizes EPA to engage in "pervasive regulation" of air pollution based on a "complex" balancing of economic costs and environmental benefits. *Ouellette*, 479 U.S. at 492, 494-95.

Carrboro cannot circumvent these federal legislative choices by recharacterizing its emissions allegations as a dispute over deceptive promotion and marketing of Duke Energy's products under state tort law. *See* Duke Energy's 12(b)(1) Motion, pp. 2, 4-6; *see also City of New York*, 993 F.3d at 91 ("Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions.").

Nearly every court to evaluate the applicability of state common law to climate-based claims has concluded that the Clean Air Act preempts state regulation of interstate greenhouse gas emissions. *See, e.g.*, *City of New York*, 993 F.3d at 96 ("[T]he Clean Air Act displaces the City's common law damages claims. As we already determined, the City's claims, if successful, would operate as a de facto regulation on

greenhouse gas emissions . . . . Congress has already 'spoken directly to th[at] issue' by 'empower[ing] the EPA to regulate [those very] emissions' (citations omitted)."); *City of Annapolis*, 2025 WL 588595, at *7 ("The Federal Clean Air Act as Justice Ginsburg points out in [*AEP*] clearly prescribes a specific statutory means to seek limits on emissions"); *Mayor & City Council of Baltimore,* 2024 WL 3678699; *Platkin*, 2025 WL 604846 .

In the face of this extraordinary compilation of authority, it would be imprudent and ill-advised to indulge Carrboro's suggested innovation to North Carolina common law. Federal law controls and precludes Carrboro's claims.[5]

## II. Carrboro's claims are not authorized as an exercise of its local police power.

If anything is left of Carrboro's Complaint, the State has not granted Carrboro the authority to bring the claims asserted in this suit. Carrboro alleges this action is an authorized exercise of its municipal police powers. It is not.

Indeed, if Carrboro were to enact an ordinance attempting to regulate Duke Energy's extraterritorial emissions or statements about the environmental effect of

[5] Reinforcing these holdings, the United States recently filed a Complaint seeking to prevent the State of Hawaii from bringing state law claims "to extract large sums of money from fossil fuel companies for purportedly causing climate change impacts to Hawaii." Complaint, *United States v. Hawaii*, No. 1:25-cv-00179 (Apr. 30, 2025, D. Haw.), ¶ 14. The United States maintains that the Clean Air Act preempts these state law claims "because they impermissibly regulate out-of-state greenhouse gas emissions and obstructs the Clean Air Act's comprehensive federal-state framework and EPA's regulatory discretion," emphasizing that "Congress delegated to EPA the authority to determine whether and how to regulate greenhouse gas emissions." *Id.* ¶¶ 31, 33. The federal government filed a similar suit against Michigan. Complaint, *United States v. Michigan*, No. 1:25-cv-00496 (Apr. 30, 2025, W.D. Mich.).

its operations (and those of its subsidiaries), that ordinance would far exceed the limited authority the General Assembly granted Carrboro. *See Domestic Elec. Serv. v. Rocky Mount*, 285 N.C. 135, 144 (1974). Carrboro cannot accomplish through state tort law what it could not via ordinance or bring claims that exceed its limited municipal authority

### A. Carrboro lacks extraterritorial authority to regulate Duke Energy's alleged misstatements or emissions.

Carrboro asserts that its municipal police power allows it "to prevent injuries" and "to prevent and abate nuisances" and "to prevent and abate hazards." (Compl. ¶ 31.) But Carrboro cannot impose extraterritorial liability for primarily out-of-state activities and out-of-state emissions.

Municipal police powers have inherent limits. *See Stillings v. City of Winston-Salem*, 63, N.C. App. 618, 623 (1983). The "function of a municipal corporation is to provide local government *within its limits* and authorized services to its inhabitants." *Domestic Elec. Serv.*, 285 N.C. at 144 (emphasis added). When the General Assembly extends a municipality's jurisdiction beyond the municipal borders, it does so explicitly and through "local act on a city-by-city basis." *Town of Boone v. State*, 369 N.C. 126, 128 (2016). And if the General Assembly so delegates, it defines the extraterritorial authority narrowly to avoid "shifting the political authority over certain subjects from one local government to another." *Town of Boone*, 369 N.C. at 127; *see also, e.g.*, N.C. Gen. Stat. §§ 160A-193 (limiting extraterritorial application of authority to abate public health nuisances to *one mile* of city limits); 160A-176

(similarly limiting extraterritorial application of any city ordinance to "property and rights-of-way belonging to the city and located outside the corporate limits").

By identifying Duke Energy's alleged misstatements and/or Duke Energy's own emissions as the starting point of its injuries, (*see, e.g.,* Compl. ¶¶ 210-11), Carrboro effectively seeks to regulate (e.g., prevent, abate) the conduct of Duke Energy and its subsidiaries throughout the state and the country. Carrboro lacks the power to do so.

Here, Carrboro does not allege whether *any* of Duke Energy's conduct giving rise to this suit took place within its municipal boundaries. There are no electric generating resources within the Carrboro municipal limits, and Carrboro does not allege otherwise. Indeed, Carrboro explicitly seeks damages for conduct that occurred outside of Carrboro's borders and throughout the United States. (*See, e.g.*, Compl. ¶ 24 (citing to emissions activities in at least eight different states)); ¶ 6 (citing to marketing campaign in Kentucky).) Carrboro's charter or general police powers do not give Carrboro authority to exercise its police powers to regulate conduct beyond its own borders.

### B. Carrboro's police powers similarly would not cover conduct had Carrboro alleged claims originating within its borders.

To the extent Carrboro is alleging injurious conduct within its borders (which it does not), its exercise of municipal police power is still dictated by the authority granted to it by the State. Carrboro's claims extend far beyond this limited authority.

When a municipality uses its police power to address nuisances, it must do so through ordinances. *See, e.g.*, N.C. Gen. Stat. § 160A-174 ("A city may *by ordinance*"

address nuisances (emphasis added)). Had Carrboro enacted an ordinance, municipal police power cannot conflict with state or federal law. N.C. Gen. Stat. § 160A-174(b). Relevant here, a municipality cannot "purport[] to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation[.]" N.C. Gen. Stat. § 160A-174(b)(5).

The General Assembly already defined specific means through which a municipality may regulate air pollution within its boundaries. N.C. Gen. Stat. § 143-215.112 (local air pollution control programs); *see also id.* §§ 143-215.112(c)(4), (d)(1) (allowing municipalities to "adopt any ordinances, resolutions, rules or regulations" necessary in support of such programs). Carrboro does not allege it acted pursuant to these authorities, likely because these authorities do not confer an authority to ignore carefully interwoven federal and state statutory schemes to regulate via judicial fiat.

## III. Each of Carrboro's claims otherwise fail to allege facts sufficient to state a claim.

Beyond these global flaws, Carrboro's allegations otherwise fail to state a claim upon which relief may be granted for public and private nuisance, trespass, negligence, and gross negligence. *See Harris*, 85 N.C. App. at 670; *Corwin*, 371 N.C. at 615 ("[D]ismissal pursuant to Rule 12(b)(6) is proper when . . . the complaint discloses some fact that necessarily defeats the plaintiff's claim.").

### A. Carrboro fails to adequately allege causation.

Carrboro fails to show, and cannot show, a foundational element of each of its tort claims of nuisance, trespass, and negligence—that Duke Energy's acts or

omissions proximately caused Carrboro's alleged injuries. *See Braswell v. Colonial Pipeline*, 395 F. Supp. 3d 641, 652 (M.D.N.C. 2019) (proximate cause is an element in nuisance, trespass, and negligence claims). A proximate cause is a "natural and continuous sequence, unbroken by any new and independent cause." *Williamson v. Liptzin*, 141 N.C. App. 1, 10 (2000) (quoting *Hairston v. Alexander Tank & Equipment*, 310 N.C. 227, 233 (1984)). That cause must "produce[] the plaintiff's injuries" and those injuries "would not have occurred" without that cause. *Id.* Finally, a proximate cause is "one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed." *Id.*

Accordingly, a cause cannot be considered proximate if there are intervening causes or the relationship between cause and effect is too attenuated. *See Williamson*, 141 N.C. App. at 10-11; *McGehee v. Norfolk & S. Ry.*, 147 N.C. 142 (1908). Where a plaintiff fails to allege proximate cause or cannot show proximate cause as a matter of law, dismissal is warranted. *See, e.g.*, *Lamb v. Styles*, 263 N.C. App. 633, 645-46 (2019).

In its Complaint, Carrboro's causal chain relies on disjointed assertions about alleged deceptive statements and general climate effects from increased emissions. Carrboro asserts, in conclusory fashion that Duke Energy's alleged statements have "materially delayed the critical transition away from fossil fuels." (Compl. ¶¶ 3, 5, 8-9, 67, 150, 190-205.) That chain is as follows:

(1) Duke Energy made alleged deceptive statements regarding the causes and dangers of anthropogenic climate change;

(2) which in turn facilitated the public's and government decision-makers' continued reliance on fossil fuels;

(3) which in turn caused worldwide greenhouse gas emissions, including Duke Energy's own emissions, to "continue unabated;"

(4) which in turn caused or exacerbated global climate change;

(5) which in turn caused extreme weather events to occur in Carrboro more than they otherwise would have;

(6) which in turn resulted in the injuries of which Carrboro complains.

(Compl. ¶¶ 5, 8-9, 67, 150, 190-205.)

This does not qualify as proximate cause for at least three reasons.

**1. Carrboro fails to allege that its climate-induced injuries would not have occurred but-for Duke Energy's statements.**

Carrboro has not alleged that its purported climate-induced injuries occurred solely as a result of Duke Energy's alleged misleading statements (i.e., "but-for"). *See Williamson*, 141 N.C. App. at 10. In fact, many of the alleged misstatements are not even attributable to Duke Energy. *See* Exh. A. And Carrboro has not alleged that the public or the government "decision-makers" would have acted differently had *Duke Energy* made different *statements.*

Carrboro admits that its claims hinge on the public and the government moving away from fossil fuels: "Duke's deceptions played a material role in delaying the overall transition away from fossil fuels." (12(b)(1) Resp., p.22.) But Duke Energy

does not determine the mix of fuels for generating power in different states—legislatures and utilities commissions do. Carrboro cannot show that any federal or state decision would have gone a different route absent Duke's alleged actions.

**2. Carrboro's assertion that Duke Energy harbored superior knowledge is contradicted by its admission that it and the public have known about the dangers and causes of anthropogenic climate change for decades.**

Several factual allegations contradict Carrboro's conclusory assertion that Duke Energy possessed superior "internal knowledge" about the causes and dangers of anthropogenic climate change. (*See, e.g.,* Compl. ¶ 243 (citing to the "international scientific community" as one of the alleged sources of Duke Energy's "internal knowledge.").) Carrboro's allegations about Duke Energy's "internal knowledge" are not clear—and sometimes inconsistent—regarding which of the alleged statements are "internal" and which were made publicly. For example, Carrboro cites to the "1987 EEI Bulletin" as evidence of the "precise *internal knowledge* of the industry" regarding the rate at which atmospheric concentrations of $CO_2$ will increase, (Compl. ¶ 58 (emphasis added)), but then presents a different edition of the very same "industry-wide" publication as an example of a deceptive statement made to mislead the public about the seriousness of fossil fuel emissions and climate change. (Compl. ¶¶ 77-79; *see also* Compl. ¶ 100.)

Besides that, Carrboro's theory of causation would require the Court to assume that but-for Duke Energy's failure to disclose its "internal knowledge" about climate change, policy makers and the public would not have continued to rely on fossil fuels. But Carrboro does not allege how Duke Energy's alleged statements duped anyone,

much less the government actors responsible for setting emission limits and energy priorities. Nor could it, because Carrboro's own Complaint admits that the public and governments the world-over have known for at least two decades of the causes and dangers of anthropogenic climate change. (*See, e.g.,* Compl. ¶¶ 49, 51, 53.)

Carrboro "cannot have it both ways," and this contradictory theory of causation was rejected in a similar lawsuit against fossil-fuel producers. *See City of New York v. Exxon Mobil*, 226 N.Y.S.3d 863, 879 (2025).

**3. Carrboro fails to allege that Duke Energy's own emissions constitute proximate cause.**

Carrboro fails to allege that Duke Energy's own *emissions* are a but-for cause of its injuries.[6] There are no allegations that the extreme weather events Carrboro complains of would not have happened if Duke Energy had ceased providing power. Nor are there allegations that the public or government decision-makers would have changed their reliance on fossil fuels had Duke Energy requested further accelerate the transition of its portfolio to carbon-free generation. Rather, Carrboro's allegations attribute the alleged harms to global climate change, and Carrboro admits that numerous parties not before the Court contributed to global climate change. (Compl. ¶¶ 53, 71-72, 80, 139, 142-43.)

[6] As previously noted, *supra* fn.1, Carrboro now claims to abandon allegations premised on direct emissions, but emissions pervade every aspect of Carrboro's Complaint. *See supra,* Statement of the Case.

As explained *supra* Part I.A, Duke Energy's generation portfolio is controlled by state law and state utilities commissions, and Duke Energy cannot unilaterally decide to change its power mix.

***

In short, Carrboro failed to allege any cognizable theory of proximate cause, which is fatal to all its claims. Beyond the lack of proximate cause, each of Carrboro's claims fail for independent reasons.

### B. Carrboro fails to state claims for public and private nuisance.

To start, Carrboro avers that Duke Energy caused or exacerbated "climate-related harms" that interfered with its municipal property and certain public rights, and on that basis brings claims for both public and private nuisance. (Compl. ¶¶ 207, 227.) A private nuisance is "any substantial nontrespassory invasion of another's interest in the private use and enjoyment of land," *Morgan v. High Penn Oil*, 238 N.C. 185, 193 (1953). A public nuisance exists "wherever acts or conditions are subversive of public order, decency, or morals, or constitute an obstruction of public rights." *State v. Everhardt*, 203 N.C. 610, 617 (1932). Carrboro's allegations fail to state either type of nuisance.

#### 1. Private nuisance law applies to personal, not universal rights.

Carrboro has not stated a private nuisance claim for the simple reason that the right Duke Energy purportedly invaded is *not* a private one. A private nuisance lies only "where the nuisance results from violation of private rights and are such as to constitute a private wrong by injuring property or health." *Barrier v. Troutman*,

231 N.C. 47, 49-50 (1949). "[D]istinguishing the private and public nuisance 'is not simply a matter of tallying the number of people affected . . . [but] depends on the *nature of the interest* affected by the defendant's conduct.'" *Priselac v. Chemours*, No. 7:20-CV-190-D, 2022 WL 909406, *5 (E.D.N.C. March 28, 2022) (emphasis added) (quoting *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 96 (4th Cir. 2011)).

Carrboro does not allege what interest Duke Energy invaded but pleads injuries that purportedly resulted from Duke Energy's alleged contributions to climate change—apparently, money Carrboro spent to respond to, and anticipate, climate-induced weather events. (Compl. ¶¶ 227-28.) Whether the interest alleged to be invaded is a more stable climate or fewer climate-induced weather events, Carrboro shares its interest equally with the global public. Thus, the claim for private nuisance fails. *See Priselac*, 2022 WL 909406, *5 (denying private nuisance claim in toxic discharge case because plaintiff "shares her interest in clean water from the utility company equally with members of the general public who also get their water from the Cape Fear Public Utility Authority"). That Carrboro's claimed damages relate to its stewardship of certain municipal property does not render the "nature of the interest" a private one. *See Priselac*, 2022 WL 909406, *3, *5 (plaintiff's individualized damages, *i.e.,* need for diagnostic testing and medical monitoring due to contamination of public water source, do not support a private nuisance claim); *Rhodes*, 636 F.3d at 96 ("The fact that the water eventually was pumped into private homes did not transform the right interfered with from a public right to a private right."). Carrboro cannot proceed via private nuisance.

### 2. Carrboro cannot seek damages for a public nuisance claim because it has not suffered a "special injury."

Next, Carrboro's claim for public nuisance fails because it has not suffered a special injury. Although municipalities have the authority to bring actions for public nuisance to seek certain, limited *injunctive relief*, when it comes to monetary damages—the sole remedy sought by Carrboro here—special damages must be alleged. (*See also* Rule 12(b)(1) Motion, at pp. 28-29.)

Carrboro asserts that Duke Energy's statements, by allegedly causing or contributing to climate change, created a public nuisance that interfered with certain rights of the public at large. (Compl. ¶¶ 207, 214-15.) But "no [public nuisance] action lies in favor of an individual in the absence of a showing of unusual and *special damages*, differing from that suffered by the general public." *Barrier*, 231 N.C. at 49 (emphasis added). Carrboro attempts to satisfy this requirement by alleging that it is specially injured because it has certain "duties" to repair infrastructure or provide services to the public, or because it possesses certain municipal property and assets. (Compl. ¶ 216.) But none of these alleged damages—which are all costs purportedly associated with responding to or anticipating the effects of global climate change—are unusual or special compared to those suffered by anyone subject to the same weather events *See Prilselac*, 2022 WL 909406, *5 (holding that plaintiff's costs associated with responding to discharge of chemicals into public water supply are "not unusual or special damage[s] compared to other members of the public who also get their water from the public utility"). Given the lack of special damages, Carrboro's claim for public nuisance fails.

### C. Carrboro fails to state a claim for negligence or gross negligence.

Carrboro's claims for negligence and gross negligence likewise fail. To state an actionable negligence claim, Carrboro must adequately allege duty, breach, proximate cause, and injury. *A.G. v. Fattaleh*, 614 F. Supp. 3d 204, 217 (W.D.N.C. 2022) (citing *Estate of Long v. Fowler*, 270 N.C. App. 241, 251 (2020)). Gross negligence further requires that the alleged "act or … is done purposely and with knowledge that such act is a breach of duty to others, *i.e.,* a conscious disregard of the safety of others." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 13 (2012) (quoting *Yancey v. Lea*, 354 N.C. 48, 53 (2001)). Beyond proximate cause, Carrboro fails to allege duty, breach, or cognizable injury.

The threshold question is whether Carrboro sufficiently alleged that Duke Energy owed it a legal duty—if not, the negligence claims must be dismissed. *See Cassell v. Collins*, 344 N.C. 160, 163 (1996), *overruled on other grounds by Nelson v. Freeland*, 349 N.C. 615 (1998). Carrboro asserts that Duke Energy owed a duty of care to (1) take reasonable steps to reduce its carbon emissions; (2) honestly communicate its knowledge about anthropogenic climate change; (3) not encourage the public to continue to rely on fossil fuels; and (4) avoid making deceptive statements about fossil fuel emissions and climate science. (Compl. ¶¶ 245-48.) But "[n]o legal duty exists unless the injury to the plaintiff was foreseeable *and avoidable through due care*" by the defendant. *Stein v. Asheville City Bd. Of Educ.*, 360 N.C. 321, 267 (2006) (citing *Estate of Mullis v. Monroe Oil*, 349 N.C. 196, 205)) (emphasis added).

Here, Carrboro's alleged injury is "substantially exacerbated climate-related harms," which in turn purportedly caused Carrboro to spend additional money responding to or anticipating these harms. (Compl. ¶¶ 253-54.) Regardless of whether Carrboro's climate-related injuries were foreseeable, they were certainly not avoidable through due care by Duke Energy alone. By Carrboro's own admission, climate change is a global phenomenon traceable to greenhouse gas emissions from "human activities" occurring all over the planet for over 100 years. (Compl. ¶¶ 35-36, 67, 139, 142, 145.) Carrboro does not—and cannot—adequately allege that Duke Energy's participation in the alleged "campaign of deception" caused people across the world to choose, and continue to choose, fossil fuels as their energy source.

Moreover, Duke Energy has no duty to protect Carrboro against harms caused by third persons (*see* Exh. A (summarizing alleged misstatements by third parties)) unless Carrboro pleads a recognized exception based on limited types of special relationships between the parties. *King v. Durham Cnty. Mental Health Dev. Disabilities & Substance Abuse Auth.*, 113 N.C. App. 341, 345 (1994). Carrboro asserts that it had a "special relationship" with Duke Energy because Carrboro "transacts business with Duke Energy." (Compl. ¶¶ 250-51.) But an arms-length business relationship is not one of the limited specially recognized relationships that would expand Duke Energy's duty of care to include prevention of harms by others. *See King*, 113 N.C. App. at 346 (identifying recognized special relationships). Carrboro has not alleged that Duke Energy has control over every other emitter of

greenhouse gases or that it had the opportunity to prevent the alleged weather-related harms—nor can it. *See id.*

Other statements fall even further afield of any recognized duty. Carrboro also fails to state sufficient facts to hold Duke Energy vicariously liable for the statements of any of the trade organizations and advocacy groups in the Complaint. Carrboro avers generally that these entities were "controlled by Duke and similarly situated companies," (Compl. ¶ 73), but that is insufficient to establish control as a matter of law. *See, e.g., Estate of Rivas by and through Soto v. Fred Smith Constr.*, 258 N.C. App. 13, 15 (2018) (listing elements needed to prove alter ego relationship).

Additionally, Carrboro's claims are barred—on the face of the Complaint alone—as a result of its own contributions to its own alleged injuries because "failure to exercise due care by a plaintiff operates as a complete bar to recovery." *In re Abrams & Abrams, P.A.*, 605 F.3d 238, 246 (4th Cir. 2010) (citing *Cameron v. Canady*, 577 S.E.2d 700, 701 (2003)). Carrboro admits to continuing to contract with Duke Energy to purchase electricity and natural gas services, (Compl. ¶ 250), despite the "overwhelming scientific consensus" regarding the connection between fossil fuels and climate change as of 2004. (Compl. ¶ 104.) Thus, Carrboro itself has known for decades about the connection between fossil fuel emissions and climate change but premises liability on Duke Energy's failure to exercise due care by contributing to climate change. Carrboro does not allege that it was unaware of the "overwhelming scientific consensus" since 2004, and, despite this understanding, Carrboro continues to rely on Duke Energy as one of its "principal electricity providers." (Compl. ¶ 201.)

Given its own contributions to emissions and global climate change, Carrboro cannot maintain an action for negligence or gross negligence for those same injuries here.

**D. Carrboro fails to state a claim for trespass.**

Finally, Carrboro alleges that Duke Energy is liable for trespass because Duke Energy "cause[d] or contribute[d]" to climate change, and climate change in turn caused "flood waters, precipitation, wind, extreme temperatures, and other substantial forces to enter and damage [Carrboro's] property." (Compl. ¶ 234.) But North Carolina has not recognized a trespass-by-weather tort.

"[T]respass is a wrongful invasion of the possession of another." *Singleton v. Haywood Elec. Membership*, 357 N.C. 623, 627 (2003) (quoting *State ex rel. Bruton v. Flying "W" Enters.*, 273 N.C. 399, 415 (1968)). To state a claim of trespass, a plaintiff must adequately allege: "(1) possession of the property by plaintiff when the alleged trespass was committed; (2) an unauthorized entry by defendant; and (3) damage to plaintiff." *Id.* (quoting *Fordham v. Eason*, 351 N.C. 151, 153 (1999)). Carrboro fails to state a claim of trespass for at least three reasons.

First, Carrboro has not identified the specific municipal *property* that Duke Energy entered. Rather, Carrboro avers generally that it "owns, occupies, and/or is otherwise in lawful possession of extensive real and personal property" including "roads whose useful life has been reduced," "stormwater protection infrastructure," and "public buildings" that required increased cooling. (Compl. ¶¶ 233-34, 237.) The Court cannot determine whether Carrboro adequately alleges *any* of the primary elements of a trespass without allegations linking both the actual property entered and the date(s) of entry. *Cf. Fordham v. Eason*, 131 N.C. App. 226, 229 (1998) ("Since

[the plaintiff] cannot show that it was the owner of the land, it cannot maintain a cause of action for trespass."), *rev'd on other grounds*, 351 N.C. 151 (1999)).

Second, Carrboro fails to plead that Duke Energy, or something under its control, *entered* Carrboro's property without authorization. Trespass based on entry by object or substance requires that "the defendant himself, *or an object under his control*, voluntarily entered, *caused to enter*, or remained present upon plaintiff's property." *BSK Enters. v. Beroth Oil*, 246 N.C. App. 1, 24 (2016) (emphasis added).

Carrboro avers that "flood waters, precipitation, wind, extreme temperatures, and other substantial forces" have entered and damaged its property. (Compl. ¶ 234.) But Duke Energy does not control these "substantial forces," nor is it alleged to. The Complaint admits that *climate change*, not Duke Energy, caused weather events, which caused water, wind, temperate, and other "substantial forces" to enter municipal property that caused Carrboro's alleged damages. (*See* Compl. ¶ 234.)

Similarly, Carrboro cannot recover damages under common law trespass for anticipated future invasions by climate-induced weather, (Compl. ¶ 234), allegedly caused by Duke Energy's past emissions and statements because a claim based on the threat of future trespasses sounds in nuisance, not trespass. *See Rudd v. Elextrolux*, 982 F. Supp. 355, 370 (M.D.N.C. 1997).

Third, Carrboro insists that Duke Energy is nonetheless liable for climate invasions because Duke Energy "intentionally engaged in conduct" that caused climate change. (Compl. ¶ 234.) But this is simply too attenuated to constitute a trespassory invasion under the control of Duke Energy. *See Forest City Cotton v.*

*Mills*, 219 N.C. 279, 279 (1941) (no trespass where there were too many steps between defendant's decision to dam a portion of a river and plaintiff's inability to drain land bordering one of the river's tributaries).

This Court should not be the first to "torture old remedies to fit factual patterns not contemplated when those remedies were fashioned." *In re Paulsboro Derailment Cases*, Nos. 13-784, 12-7586, 13-410, 13-721, 2013 WL 5530046, at *8 (D.N.J. Oct. 4, 2013) (internal quotation marks omitted) (emphasizing that, for this very reason, "modern courts do not favor trespass claims for environmental pollution").

## IV. Carrboro's claims are barred by the applicable statute of limitations.

Finally, Carrboro's claims are subject to and defeated by a three-year statute of limitations. *See* N.C. Gen. Stat. §§ 1-52 (3) & (5); *Wilson v. McLeod Oil*, 327 N.C. 491, (1990).[7] North Carolina runs the limitations period from "when the plaintiff first becomes aware of facts and circumstances that would enable him to discover the defendant's wrongdoing in the exercise of due diligence." *Doe v. Roman Cath. Diocese of Charlotte*, NC, 242 N.C. App. 538, 543 (2015). Based on Carrboro's own admissions, this was, at the latest, 2017, nearly seven years before this suit was filed in December 2024. (*See* Compl. ¶¶ 104, 178, 180.)

The Complaint itself reveals that not only was Carrboro aware of the effects of fossil fuels on the climate, but the Town was actively taking steps to evaluate and

[7] Carrboro does not dispute that it is bringing these claims in a proprietary capacity. (*See* 12(b)(1) Resp., pp. 8, 20 n.5 (emphasizing that "Carrboro's damages are to the property that it owns as a municipal corporation" and that the "damages are not derivative or part of Carrboro's representative role on behalf of its residents").)

mitigate them at least by 2014. (Compl. ¶¶ 178, 180 (describing the Town's Community Climate Action Plan adopted in May 2014 and Energy and Climate Protection Plan adopted in January 2017 to address emissions)). *See also supra*, Part III.C. Thus, at a minimum, Carrboro was required to file this suit by 2017, which it failed to do by seven years.

## CONCLUSION

For the foregoing reasons, Duke Energy respectfully requests that the Court grant its Rule 12(b)(6) motion and that all Carrboro's claims be dismissed.

This is the 9th day of May, 2025.

SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P.

By: /s/ Christopher G. Smith
Christopher G. Smith
N.C. State Bar No. 22767
H. Hunter Bruton
N.C. State Bar No. 50601
Amelia L. Serrat
N.C. State Bar No. 49508
David A. Pasley
N.C. State Bar No. 52332
Shameka C. Rolla
N.C. State Bar No. 56584
Noel F. Hudson
N.C. State Bar No. 59776
Post Office Box 2611
Raleigh, NC 27602-2611
Ph: (919) 821-1220
Fax: (919) 821-6800
csmith@smithlaw.com
hbruton@smithlaw.com
aserrat@smithlaw.com
dpasley@smithlaw.com
srolla@smithlaw.com
nhudson@smithlaw.com

**A.**

Sterling A. Marchand
(*admitted pro hac vice*)
Sterling.Marchand@bakerbotts.com
Kent Mayo
(*admitted pro hac vice*)
Kent.Mayo@bakerbotts.com

BAKER BOTTS L.L.P.
700 K Street N.W.
Washington, D.C. 20001
Telephone: 202.639.7700
Facsimile: 202.639.7890

*Attorneys for Defendant*

## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with Rule 7.8 of the North Carolina Business Court Rules in that it (excluding the caption, any index, table of contents, or table of authorities, signature blocks, and required certificates) contains no more than 7,500 words, as determined by the word count feature of Microsoft Word.

This the 9th day of May, 2025.

SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P.

By: /s/ Christopher G. Smith
Christopher G. Smith
N.C. State Bar No. 22767
Post Office Box 2611
Raleigh, NC 27602-2611
Ph: (919) 821-1220
Fax: (919) 821-6800
csmith@smithlaw.com

*Attorneys for Defendant*

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served electronically via the North Carolina Business Court's e-filing system on all counsel of recording, including the following:

James A. Roberts
Matthew D. Quinn
LEWIS & ROBERTS, PLLC
jimroberts@lewis-roberts.com
mdq@lewis-roberts.com

*Counsel for Plaintiff*

This the 9th day of May, 2025.

SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P.

By: /s/ Christopher G. Smith
Christopher G. Smith
N.C. State Bar No. 22767
Post Office Box 2611
Raleigh, NC 27602-2611
Ph: (919) 821-1220
Fax: (919) 821-6800
csmith@smithlaw.com

*Attorneys for Defendant*