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 REPLY IN SUPPORT OF ITS MOTION TO DISMISS UNDER N.C. RULE 12(b)(6)

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INTRODUCTION

The gravamen of Carrboro's dispute is with how Duke Energy and its subsidiaries generate electricity for their customers; Carrboro would change the generation fuel mix used over the past fifty-plus years to result in lower carbon emissions. But Carrboro's arguments ignore that the regulatory framework for public electric utilities in North Carolina dictates the policies and considerations that drive generation fuel mix decisions, all of which are approved by the state utilities commissions. Duke Energy does not unilaterally select its generation fuel mix; rather, that mix is expressly approved by state utilities commissions under the policy direction of legislators and the Governor. Further, the public and intervenors are permitted to and have, in fact, provided input over time on these decisions. Carrboro's lawsuit seeks to upend that framework and impermissibly pursue Carrboro's broad policy goals through tort litigation. By seeking to penalize Duke Energy for damages that allegedly arose because of those generation fuel mix choices and resulting emissions, Carrboro asks this Court to second guess the power generation decisions made by legislative and regulatory bodies in North Carolina and similarly in each state where Duke Energy subsidiaries serve customers. Carrboro's authority is subject to statutory limits and does not permit it to second guess generation fuel mix decisions determined by regulatory authorities.

Though Carrboro again attempts to recast its claims, the only path to its alleged damages arising from climate change is through interstate and cumulative global emissions. (*See, e.g.,* ECF No. 2 (Complaint) ¶¶ 24, 138, 145 (relying on global climate change and citing emissions activities in eight states)). Courts "across the

country" have found that a state cannot apply its law to claims adjudicating interstate greenhouse gas emissions. *See, e.g., Platkin v. Exxon Mobil*, No. MER-L-001797-22, 2025 WL 604846, at *3 (N.J. Super. L. Feb. 05, 2025). Here, there is no untangling Duke Energy's emissions from greenhouse gas emissions emitted and regulated beyond North Carolina's borders.

This Court should dismiss.

ARGUMENT

I. Carrboro cannot rewrite its Complaint to excise its core focus on emissions.

Carrboro accuses Duke Energy of attempting to "recharacterize this action" to center on emissions, (ECF No. 22 (Response) at 5), but there is no need to recharacterize what is explicitly alleged. Duke Energy's emissions and "investment in fossil fuels" permeate Carrboro's causes of action, theory of liability, and climate-related damage allegations. (*See, e.g.*, Compl. ¶¶ 21, 22, 24-26, 61, 110-11, 135, 137-45, 154-55, 157, 190, 210, 225, 236, 244-45, 249, 263, 265.) Indeed, Carrboro's Response still insists that "Duke's emissions may serve as a source of liability." (Resp. at 9.)

Drawing from state court cases in Hawaii and Colorado, Carrboro pivots in its Response to focus on Duke Energy's allegedly deceptive statements, which Carrboro claims "played a material role in causing the public's continued reliance upon fossil fuels" by "mislead[ing] customers into transacting business with Duke [Energy]." (Resp. at 13, 16-17.) But as utilities providing an essential public service, Duke Energy and its subsidiaries do not "market" electricity to customers in the same way

as the fossil fuel producers in the cases on which Carrboro relies. (*Cf.* Resp. at 5-6.) Unlike those cases, Carrboro's alleged damages are not tied to Duke Energy's sale of electricity, but to the way that electricity was generated (i.e., the generation fuel mix approved and used). So, Carrboro alleges that the generation fuel mix for electricity generation would have "transition[ed] away from fossil fuels" ***more quickly*** without Duke Energy's allegedly deceptive statements, and emissions would have decreased and so too Carrboro's alleged harm. (*See, e.g.*, Compl. ¶¶ 4, 8, 61.) Once again, this inquiry fundamentally relates to Duke Energy's ***emissions***. *See Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy*, 2025 WL 1363355, at *8 (Colo. 2025) (emphasizing distinction between "emitters" and "upstream producers").

Carrboro cannot disclaim the impact of asking courts to adjudicate energy policy. (*See* Resp. at 5-6.) As electric utilities, Duke Energy and its subsidiaries must follow state law and seek approval from state utilities commissions (like the North Carolina Utilities Commission ("NCUC")) for decisions relating to the generation fuel mix. *See, e.g.*, N.C. Gen. Stat. § 62-2(b); N.C. Gen. Stat. § 62-30. This process follows statutory guidance from state legislatures and is informed by the executive branch and public input. *See, e.g.*, N.C. Gen. Stat. § 62-2 (requiring the NCUC to consider issues related to reliability and affordability); N.C. Gen. Stat. § 62-73 (authorizing public participation in NCUC proceedings).

Carrboro had the opportunity to intervene in regulatory proceedings where generation fuel mix decisions were made. *See* N.C. Gen. Stat. § 62-73; NCUC R 1-9. Indeed, NC WARN (which recruited and is funding Carrboro to bring this lawsuit)

participated in hundreds of proceedings before the NCUC over the past decade, *see* Ex. 1,[1] including the NCUC's recent decision approving the current generation fuel mix plan. *See* Ex. 2.[2] Carrboro cannot now sue in tort to punish Duke Energy because it dislikes the outcome of these proceedings. *See Town of Williamston v. Atl. Coast Line R.*, 236 N.C. 271, 275 (1952) ("Courts will not undertake to control the exercise of discretion and judgment on the part of the members of a commission in performing the functions of a state agency.").

Carrboro's theory of liability depends on showing that Duke Energy somehow duped state regulators into choosing the "wrong" generation fuel mix across *decades* of proceedings in multiple states while ignoring the fact that the generation fuel mix was compliant with all applicable state law and regulation. A finding of liability against Duke Energy would penalize it for following the law and adhering to the regulatory framework. And such an exercise would convert generation fuel mix decisions from a carefully balanced process governed by state utilities commissions and legislatures to a chaotic system decided by lay juries subject to the whims of

[1] Ex. 1 is a true and accurate copy of a list of orders and related dockets from NCUC regulatory proceedings in which NC Warn participated as an intervenor, generated by the search function of the NCUC website.

[2] Ex. 2 is a true and correct copy of the most recent NCUC order approving the current generation fuel mix plan.

individual and municipal plaintiffs, and untethered from statewide policy considerations of reasonableness, reliability, and affordability.[3]

II. North Carolina tort law does not govern interstate emissions.

There is no real dispute that courts have repeatedly held that a state cannot apply its law to emissions emanating from out-of-state sources. (ECF No. 20 (12(b)(6) Brief) at 8.) In its response, Carrboro now tries to limit its focus to ***in-state*** conduct. (*See* Resp. at 9, n. 5.) But given that Carrboro's Complaint seeks damages for emissions activities in at least eight different states, (Compl. ¶ 24), Carrboro cannot recast its claims as *solely* about "deceptive marketing" in this state alone. (*See* Resp. at 10; *contra supra* Part I.) And the only path to climate change damages is through an alleged increase in cumulative emissions from around the world.[4]

Nearly every court to evaluate the applicability of state common law to climate-based tort claims on the merits has concluded that the Clean Air Act preempts state regulation of interstate greenhouse gas emissions. (12(b)(6) Br. at 10-11.) As one court explained, "federal common law applied in the first place only because state law was not fit to govern; Congress's decision to displace and replace federal common law with a statutory scheme (the Clean Air Act) did not somehow render state law competent to apply to this exclusively federal subject matter." *Platkin*, 2025 WL 604846, at *4.

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[3] Statewide policy considerations may also change over time. For instance, the North Carolina General Assembly enacted carbon reduction targets for the first time in 2021. N.C. Gen. Stat. § 62-110.9 (2021).

[4] This again sets Carrboro's claims apart from the cases it cites. *See, e.g.*, *City & Cnty. of Honolulu v. Sunoco*, 537 P.3d 1173, 1181 (Haw. 2023) ("This case concerns torts committed in Hawai'i that caused alleged injuries in Hawai'i.").

Carrboro cites to *Am. Elec. Power v. Connecticut*, 564 U.S. 410 (2011) (*AEP*), (wrongly) insisting that "the [Clean Air Act] *expressly preserves* state law claims," and that any other federal concerns are therefore irrelevant. (Resp. at 10-11.) But the CAA savings clause merely recognizes that state actors can regulate emissions (as state utilities commissions do) and that there can be state law remedies to enforce emissions standards (which Carrboro does not allege were violated). While *AEP* left open the question as to whether state law could apply to *in-state* emissions sources, the decision does not indicate that state law can govern *interstate* emissions disputes. *See* 564 U.S. at 429.

The cases that Carrboro argues held that state law may apply to climate-related claims are not persuasive. (*See* Resp. at 6-7.) Several cases Carrboro cites addressing federal preemption were ***removal*** decisions and do not bear on the merits analysis here. (Resp. at 7, n. 3 (citing cases).); *Mayor & City Council of Baltimore v. BP P.L.C.*, 2024 WL 3678699 (Md. Cir. Ct. July 10, 2024) (explaining that removal cases "analyzed federal common law preemption under the lens of removal jurisdiction where the sole consideration and focus was the doctrine of complete preemption and not the federal defense of ordinary preemption as it applied to the merits of the case"). And critically, the cases Carrboro cites are all against fossil fuel producers, not electric utilities. Carrboro ignores how the regulated electric

generation industry differs from retail sellers of fossil fuel products like gasoline to consumers.[5] *See supra* Part I.

III. Carrboro does not have authority to bring these claims against Duke Energy.

Next, Carrboro suggests that a municipal corporation's general authority to "sue and be sued" "imposes no limitations related to common law tort claims." (Resp. at 12.) That is incorrect.

First, Carrboro ignores the statutory framework detailing municipal authority and limits. *See e.g.*, *City of Asheville v. State*, 192 N.C. App. 1, 20 (2008). Duke Energy cited multiple sections of Chapter 160A and binding opinions demonstrating that Carrboro's claims here exceed its municipal authority because, among other things, they: involve extraterritorial conduct; ignore the limits placed by the General Assembly on a municipality's ability to act with respect to air pollution; are not explicitly authorized; and are far outside Carrboro's general police powers. (12(b)(6) Br. at 12-14.) Carrboro is operating outside of its authorized lane.

Second, Carrboro lacks authority to bring these claims as a vehicle to second guess the electric generation fuel mix decisions made by state regulators, as guided by the General Assembly and executive branch. *See* N.C. Gen. Stat. § 160A-4 (requiring municipal authority to be exercised consistent with state policy). Carrboro alleges that Duke Energy "played a material role in causing the public's continued

[5] Carrboro also cites to appellate decisions granting/declining review of similar issues, (Resp. at 7-8), but these decisions have no bearing on the merits of the underlying decisions. *See State of Md. v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950).

reliance upon fossil fuels" and "delayed the transition to renewable energy" by continuing to "invest[] in fossil fuels." (Resp. at 16, 17; Compl. ¶¶ 147, 150, 175, 225.) This wrongly suggests that Duke Energy and its subsidiaries are free to unilaterally change their fuel generation mix, which (as discussed in Part I, *supra*) complies with state law and is reviewed and approved in North Carolina by the NCUC with broad public participation. Carrboro cannot punish Duke Energy for its compliance with the decisions made by those authorities.

IV. Carrboro's tort claims fail for lack of but-for causation.

Next, Carrboro's own allegations establish the lack of proximate causation between Duke Energy's alleged actions and any alleged harm. Carrboro asks the Court to ignore those flaws because it asserts proximate cause is a jury question, (Resp. at 14), but courts must dismiss claims under Rule 12(b)(6) where, as here, the plaintiff has failed to allege one of the basic elements of proximate causation. *See, e.g., Mosteller v. Duke Energy*, 207 N.C. App. 1, 33-34 (2010). And the question of causation is not one for the jury where—as here—the plaintiff does not plausibly assert that the alleged conduct (deception) is the proximate cause of the harm at issue (climate change induced weather events). (*See* ECF No. 17 (12(b)(1) Brief) at 15-18.)

Under North Carolina law, proximate cause requires both (1) but-for causation; ***and*** (2) reasonable foreseeability. *See Williamson v. Liptzin*, 141 N.C. App. 1, 10 (2000) (quoting *Hairston v. Alexander Tank & Equip.*, 310 N.C. 227, 233 (1984)). Carrboro primarily argues that it has sufficiently pled that its injuries were

foreseeable, (*see* Resp. at 14-16), but that alone is not sufficient to demonstrate "proximate cause." *Id.* at 14 n.10.

Carrboro has failed to adequately allege the required proximate causation as a matter of law. (12(b)(6) Br. at 14-16.)

A. Carrboro fails to allege the requisite "superior internal knowledge."

In support of its theory of causation, Carrboro alleges that Duke Energy had superior internal knowledge of the dangers and risks of climate change such that but for Duke Energy's alleged deception, the public would have been aware of the risks. (12(b)(6) Br. at 16-17.) But, as a threshold matter, Duke Energy provided the Court with an exhibit detailing the statements at issue in the Complaint that are ***not*** attributable to Duke Energy. (*See id.* Ex. A.) And Carrboro does not point to contrary allegations, instead doubling down on only two key "statements" as evidence of "the knowledge of climate scientists or energy insiders . . . and not the general public."[6] (Resp. at 17-18.) These statements are of no help and demonstrate only the paucity of Carrboro's claims.

First, Carrboro cites to Dr. Chauncy Starr's statement in paragraph 51 of its Complaint, which is not sourced from an "internal" document, but from an article that Dr. Starr wrote for the popular science magazine, *Scientific American*.[7] (Resp. at 17-

[6] Carrboro ignores that the knowledge of "climate scientists" is available to the public.

[7] *Energy and Pernor*, 225 SCI. AM. 3, 36 (Sep. 1971), https://www.scientificamerican.com/article/energy-and-pernor/ (a true and correct copy of which is attached as Ex. 3).

18.) Carrboro's attempt to present language from a public-facing magazine article as evidence of Duke Energy's "internal" knowledge simply fails.

Second, Carrboro touts a statement predicting that greenhouse gas concentrations would reach 400 parts per million before 2014, (Compl. ¶¶ 56-59), as evidence of Duke Energy's "superior knowledge" because, according to Carrboro, the prediction tracks the real-life trajectory of atmospheric concentrations "almost to the month." (Resp. at 17.) But Carrboro has materially misquoted this "precise" prediction. The referenced quote actually says: "It seems highly likely that CO2 concentrations will exceed 400 parts per million *before the year 2025*—a level last seen more than a million years ago."[8] What's more, this prediction appeared in a 1987 publicly published EEI Bulletin, (Compl. ¶ 58), which was not written by "energy insiders," but by scientists working for Department of Energy labs and at Duke University.[9]

In short, Carrboro has not alleged facts that Duke Energy "harbored superior knowledge" regarding the alleged dangers and causes of anthropogenic climate change. Carrboro cannot claim that it was misled where its "own allegations concede that the connection between fossil fuels and climate change is public information." *City of New York v Exxon Mobil*, 226 N.Y.S.3d 863, 878-79 (N.Y. Sup. Ct. 2025). Because Carrboro's theory of causation regarding Duke Energy's "campaign of

[8] Joe Edmonds, *et al.*, *The Greenhouse Effect: Is the earth's climate going haywire?*, Electric Perspectives 23, 20-32 (Spring 1987) (a true and correct copy of which is attached as Ex. 4).

[9] *See* Ex. 4, at 20.

deception" against the public turns on the existence of a material information imbalance between the public and Duke Energy, Carrboro has failed to adequately allege but-for causation.

B. Carrboro cannot salvage its claims under a theory of concurrent causation.

Carrboro also attacks Duke Energy for "ignor[ing] the fundamental principle of concurring causation." (Resp. at 16). Carrboro misinterprets Duke Energy's argument. Duke Energy is not contending that the actions of others constitute a new, efficient intervening proximate cause of Carrboro's climate-induced injuries that supersedes Duke Energy's allegedly tortious conduct. *Cf. Muteff v. Invacare*, 218 N.C. App. 558, 562-63 (2012) (describing doctrine of insulating negligence by third-party actors). Carrboro simply has not adequately pled that Duke Energy's alleged conduct is, on its own, an efficient but-for cause of Carrboro's alleged climate-induced injuries, due to the multi-factorial, global nature of climate change and the intricate regulatory structure governing electricity generation. (*See* Resp. at 16.) This failure is fatal to each of Carrboro's claims.

Carrboro's approach to "concurrent causation"—that Duke Energy "played a material rule [sic] in causing the public's continued reliance upon fossil fuels"—is conclusory and at odds with the reality of the utility industry in which Duke Energy operates. *Supra* Part I. Members of the general public do not make individual decisions regarding the fuel source for their electric utility provider. Nor does Duke Energy. Any decision to reduce greenhouse gas emissions from the generation of electricity was, and continues to be, subject to oversight in which state regulators

have the final say. Carrboro's insistence that its harms would have necessarily been avoided had Duke Energy's "deception of the public" not prevented "substantial efforts to reduce greenhouse gas emissions [from] beg[inning] decades ago," (Resp. at 14 (quoting Compl. ¶ 147)), presumes a consumer-driven "free market" that does not exist in electricity generation. Without sufficient allegation that Duke Energy could change its emissions or fuel mix on its own, Carrboro's claims all fail for lack of causation.

V. Carrboro has not otherwise stated a claim for any of its causes of action.

Beyond the lack of causation, Carrboro inadequately pled the remaining substantive elements of its torts, and none of Carrboro's arguments to the contrary overcome this failure.

First, rather than respond to Duke Energy's arguments about the distinction between "personal" and "public" rights, Carrboro reiterates alleged damages to "its roadways, stormwater control measures, and buildings," all of which "Carrboro directly owns." (Resp. at 18-19.) But, an allegation that Duke Energy negatively affected Carrboro's use and enjoyment of its private property is not sufficient to state a claim for private nuisance where it is the apparent result of Duke Energy's alleged interference with a ***public*** right, *i.e.,* the climate. *See Priselac v. Chemours*, 2022 WL 909406, at *5, (E.D.N.C. Mar. 28, 2022).

Second, Carrboro misunderstands the "special injury" requirement for public nuisance. Carrboro argues that it suffered a "special injury" different from that of the general public because it is particularly susceptible to climate-related harms due to

its geographic location and alleged "millions of dollars in damages" to property and assets "that are especially vulnerable to the impacts of climate change." (Resp. at 19.) The fact that Carrboro is in the Piedmont region does not differentiate its injuries from those suffered by everyone else in the region, or in similar geographic locations. Moreover, its alleged "duty to repair" does not render its damages different in-kind from those suffered by any property owner whose property is, or could be, damaged by the alleged climate-related weather events. *See Priselac*, 2022 WL 909406, at *5.

Third, Carrboro's continued focus on "foreseeability" as the "touchstone" of the duty of care underlying its negligence and gross negligence claims, (Resp. at 20-21), ignores the fact that there is nothing that Duke Energy could have done to change its generation fuel mix, and "[n]o legal duty exists unless the injury to the plaintiff was foreseeable *and avoidable through due care*" by Duke Energy. *See Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328 (2006). Carrboro does not, and cannot, allege facts suggesting anything to the contrary. *See supra* Part IV. (*See also* 12(b)(6) Br. at 23-24 (addressing other arguments).)

Finally, Carrboro's insistence that trespass "may exist even where the defendant causes some other object or force to enter the property" does not overcome Carrboro's abject failure to allege that anything under Duke Energy's control entered Carrboro's property. *See BSK Enters. v. Beroth Oil*, 246 N.C. App. 1, 24 (2016) (noting that 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") (emphasis added). The cases to which

Carrboro cites to suggest that weather-related intrusions on property can support a claim for trespass are of no help to Carrboro as they involve flooding that was alleged to have been caused directly by a party, rather than indirectly via global climate changes and weather events. (Resp. at 22-23.)

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Beyond the above failures, Carrboro cannot identify a single case applying North Carolina law recognizing a cause of action for nuisance, trespass, or negligence via weather events (let alone weather events alleged to have been caused by deception). Allowing Carrboro's claims to proceed would dramatically expand the scope of tort liability in North Carolina.

VI. Carrboro's allegations make clear that the applicable three-year statute of limitations bars its claims.

Finally, Carrboro's claims are also barred by the three-year statute of limitations, given that Carrboro alleges facts demonstrating that it was not only aware of the effects of fossil fuels on the climate but actively taking steps to evaluate and mitigate them by 2014. (Compl. ¶¶ 178, 180.) And, in fact, highly publicized lawsuits involving claims similar to these were filed starting in 2008. *See, e.g.*, *Native Village of Kivalina v. ExxonMobil*, No. 4:08-cv-01138 (N.D. Cal. Feb. 26, 2008), attached as Ex. 5. Carrboro had sufficient information to put it on inquiry notice of its claims as of that time.

Carrboro claims that the limitations period "is not relevant" because "a new three-year statute of limitations applies to each invasion or interference." (Resp. at 24.) Carrboro refers to "recurring trespasses or nuisances," (*id.*) but Duke Energy's

statements are not alleged as either and cannot be recurring conduct. *See, e.g.*, *City of New York*, 226 N.Y.S.3d at *15. Furthermore, Carrboro confuses alleged continuing ill effects from Duke Energy's allegedly deceptive statements with continuing violations. The continuing wrong doctrine will only apply if a plaintiff shows "a continuing ***violation*** by the defendant that is occasioned by continual unlawful acts, *not by continual ill effects* from an original violation." *Marzec v. Nye*, 203 N.C. App. 88, 94 (2010) (cleaned up) (emphasis added). If anything remains on the merits, it is time barred.

CONCLUSION

Duke Energy requests that the Court dismiss Carrboro's lawsuit.

This the 14th day of July, 2025.

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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 3,750 words, as determined by the word count feature of Microsoft Word.

This the 14th day of July, 2025.

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