

169 FERC ¶ 61,232
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Duke Energy Corporation

Docket No. AC19-75-000

ORDER GRANTING ACCOUNTING REQUEST

(Issued December 19, 2019)

1. On March 13, 2019, Duke Energy Corporation, on behalf of its six utility operating companies¹ (collectively, Duke), filed an accounting request for approval to treat its Cybersecurity Informational Technology-Operational Technology Program (Cybersecurity Program) as a single project for purposes of calculating Allowance for Funds Used During Construction (AFUDC). For the reasons discussed below, we grant Duke's accounting request.

I. Background

A. The Commission's AFUDC Policy

2. In establishing cost-based rates, the Commission traditionally has included only costs relating to utility plant that is "used and useful" in providing utility service.² Additionally, the Commission recognizes that jurisdictional companies incur financing costs for the funds invested in construction projects prior to the time that facilities are placed in or ready for service. Accordingly, the Commission permits jurisdictional companies to recover the debt- and equity-related financing costs associated with construction of new utility plant by accruing AFUDC as a cost of the constructed asset.³ When the utility plant is placed in service, the cost of the construction, along with the accrued AFUDC, is transferred from a construction work in progress account to a utility

¹ The six utility operating companies include Duke Energy Carolinas, LLC; Duke Energy Progress, LLC; Duke Energy Florida, LLC; Duke Energy Ohio, Inc.; Duke Energy Kentucky, Inc.; and Duke Energy Indiana, LLC.

² See, e.g., *S. Natural Gas Co.*, 130 FERC ¶ 61,193, at P 30 (2010).

³ See 18 C.F.R. pt. 101 Electric Plant Instruction No. 3(17) (2019) (defining AFUDC as a component of construction cost that is properly includible in the electric plant accounts).

plant in service account. The utility plant balance is then used in developing rates, as it is used and useful in the provision of utility service. The jurisdictional company recovers the construction costs, which include the accrued AFUDC, through approved depreciation rates over the useful life of the utility plant. The jurisdictional company also earns a rate of return on the remaining undepreciated balance of utility plant through rate base.⁴

3. The Commission historically has relied on the guidance issued by the Commission's Chief Accountant in Accounting Release No. 5 (AR-5) (Revised), Capitalization of AFUDC (Accounting Release No. 5), to address when a jurisdictional company begins and ends its accrual of AFUDC, i.e., the duration of the construction period. Accounting Release No. 5 states, in relevant part:

The capitalization period for AFUDC shall begin when two conditions are present: (1) capital expenditures for the project have been incurred; and (2) activities that are necessary to get the construction project ready for its intended use are in progress. AFUDC capitalization shall continue as long as these two conditions are present. . . . Capitalization of AFUDC stops when the facilities have been tested and are placed in, or ready for, service. This would include those portions of construction projects completed and put into service although the project is not fully completed.⁵

4. The instructions for AFUDC, in the Commission's Uniform System of Accounts, also state, in relevant part:

When a part only of a plant or project is placed in operation or is completed and ready for service but the construction work as a whole is incomplete, that part of the cost of the property placed in operation or ready for service, shall be treated as *Electric Plant in Service* and [AFUDC] thereon as a charge to construction shall cease. [AFUDC] on that part of the cost of the plant which is incomplete may be continued as a charge to construction until such time as it is placed in operation or is ready for service⁶

⁴ See, e.g., *S. Natural Gas Co.*, 130 FERC ¶ 61,193 at P 30 (describing the rationale underlying the Commission's AFUDC policy).

⁵ *Accounting Release No. 5 (AR-5) (Revised), Capitalization of Allowance for Funds Used During Construction*, Docket No. AI11-1-000 (Feb. 16, 2011) (delegated order).

⁶ 18 C.F.R. pt. 101 Electric Plant Instruction No. 3(17) (2019).

II. Duke's Accounting Request

5. Duke requests approval to treat its Cybersecurity Program as a single project for purposes of determining the accrual period for AFUDC and the in-service date for those assets constructed as part of the Cybersecurity Program. Duke seeks confirmation that it may continue to accrue AFUDC on all of the Cybersecurity Program's costs until all of the deliverables have been tested, found to be used and useful by Duke's Operations Council, and placed in service after the completion of the entire Cybersecurity Program.⁷

6. Duke states that it will make over \$137 million in capital investments as part of its Cybersecurity Program over the next 36 to 42 months across its generation, transmission, and distribution assets to address the increasing threat of cyberattacks.⁸ Duke explains that the Cybersecurity Program is designed based on the National Institute of Standards and Technology's *Framework for Improving Critical Infrastructure Cybersecurity*, which consists of five core functions—identify, protect, detect, respond, and recover.⁹ According to Duke, it will make capital investments and deploy hardware and software to address each of these core functions on an enterprise-wide basis. Duke states that the focus areas of the Cybersecurity Program include safety systems critical to protect customer's and employee's safety, reliability systems critical to reliably operate the platforms, and security systems critical to protecting assets and operations as well as to detecting security anomalies across the platforms.¹⁰

⁷ Duke Accounting Request at 2.

⁸ *Id.* Attachment C of Duke's accounting request includes a summary of the Cybersecurity Program's expected capital costs by jurisdiction, function, and year. Duke states that the planning and analysis for the Cybersecurity Program began in 2018, and that those costs were expensed as incurred. *Id.* at 8.

⁹ *Id.* at 2 & n.3 (citing Nat'l Inst. of Standards & Tech., *Framework for Improving Critical Infrastructure Cybersecurity Version 1.1* (Apr. 16, 2018), <https://nvlpubs.nist.gov/nistpubs/CSWP/NIST.CSWP.04162018.pdf>) (NIST Cybersecurity Framework). Duke states that the NIST Cybersecurity Framework encompasses broader cybersecurity measures than the North American Electric Reliability Corporation's (NERC) Critical Infrastructure Protection (CIP) requirements and can be applied to assets beyond the bulk electric system, including distribution assets. *Id.* at 5. Duke states that it will not use any of the Cybersecurity Program's hardware and software to demonstrate compliance with NERC CIP standards, but when completed, the Cybersecurity Program's tools, methods, hardware, software, and procedures may complement and support its NERC CIP compliance. *Id.* at 8.

¹⁰ *Id.* at 5.

7. Duke explains that the Cybersecurity Program deliverables include: (1) automated asset identification and management hardware and software; (2) protection and detection hardware and software; and (3) response and recovery hardware, software, and procedures.¹¹ Duke describes the automated asset identification and management deliverables as providing for the automatic identification, enumeration, and documentation of key asset features, and also identification of the unauthorized addition or removal of assets. As for the protection and detection deliverables, Duke describes these as providing for the detection and blocking of known and emerging cyberattacks. Lastly, the response and recovery deliverables, according to Duke, establish what Duke needs to rapidly respond to, limit the scope of, and reduce recovery time from cyberattacks.¹²

8. Duke states that the Commission's AFUDC policy in Accounting Release No. 5 could be read to deny AFUDC accrual during the construction of the entire Cybersecurity Program because the constituent hardware and software elements of the Cybersecurity Program will be deployed over shorter timeframes.¹³ Duke asserts that, although the constituent parts of the Cybersecurity Program will be deployed over shorter timeframes, the Cybersecurity Program's intended use and benefits—to optimize cybersecurity protection across all lines of business—cannot be achieved until the entire Cybersecurity Program is complete.¹⁴ Duke contends that the construction of the cybersecurity assets will be interdependent and continuous over the duration of the Cybersecurity Program, and no singular asset or deliverable will be ready for service or provide protection value until the completion of the entire Cybersecurity Program.¹⁵

9. Duke states, for example, that the automated asset identification provides no cybersecurity value if there are no means to accurately and timely detect cybersecurity events, and protection and detection schemes cannot mitigate cybersecurity risks if there are no means to contain the impact of an event and restore systems to normal operations.¹⁶ Although Duke states that the hardware and software for the automated asset identification management system is only expected to take 15 to 30 days to test and install per location, Duke asserts that the “intended cybersecurity benefits do not accrue

¹¹ *Id.* at 6.

¹² *Id.*

¹³ *Id.* at 2, 12.

¹⁴ *Id.* at 2, 7, 12.

¹⁵ *Id.* at 1, 12.

¹⁶ *Id.* at 5–6.

until the entire [Cybersecurity] Program is implemented” and that these assets alone “provide no incremental service or protection value.”¹⁷ Duke argues that the Cybersecurity Program will be used and useful when deliverables to address all functions (i.e., automated asset identification and management, protection and detection, and response and recovery) are complete and in-service across all functional areas from generation to customer delivery.¹⁸ On this basis, Duke asks that the Commission permit it to continue to accrue AFUDC on all of the Cybersecurity Program’s costs until the entire Cybersecurity Program is complete.

10. Duke argues that its interpretation of the application of the Commission’s AFUDC policy to interdependent cybersecurity assets would be consistent with the application of the Commission’s AFUDC policy to other electric plant. For example, Duke points to the construction of a transmission line, asserting that the towers are constructed and in place before the wires are strung, but the towers are not placed in, or ready for, service until the wires are also strung and the transmission line is energized. Duke asserts that, much like the transmission towers holding up de-energized wires, the hardware and software in the Cybersecurity Program will not be ready for service or capable of performing their intended use until all of the installations in the Cybersecurity Program for each of the core functions are complete and collectively ready for service.¹⁹

11. Duke contends that approval of the Cybersecurity Program as a single project for AFUDC purposes is needed to provide clarification and updated guidance on how to apply the Commission’s AFUDC policy to cybersecurity projects such as this one. Duke states that the AFUDC policy, when adopted, did not expressly contemplate the types of large cybersecurity investments that utilities must make to protect against today’s cyber threats.²⁰ Duke asserts that, just as the Commission’s AFUDC policy needed to be adapted in 2010–2011 to reflect changes in the natural gas pipeline industry,²¹ the

¹⁷ *Id.* at 7.

¹⁸ *Id.*

¹⁹ *Id.* at 13.

²⁰ *Id.* at 9–12.

²¹ *See id.* at 10–11 (citing *Accounting Release No. 5 (AR-5) (Revised), Capitalization of Allowance for Funds Used During Construction*, Docket No. AI11-1-000 (Feb. 16, 2011) (delegated order); *S. Nat. Gas Co.*, 130 FERC ¶ 61,193; *Fla. Gas Transmission Co. LLC*, 130 FERC ¶ 61,194 (2010)) (explaining that the Commission concluded that the certificate application date was no longer an appropriate milestone for determining when to begin the accrual of AFUDC since many natural gas pipelines had

Commission's AFUDC policy also needs to be adapted to align with the cybersecurity investments that utilities make today to protect against the threat of increasingly sophisticated cyberattacks.²²

12. Duke argues that its interpretation of the application of the Commission's AFUDC policy to the Cybersecurity Program is consistent with Generally Accepted Accounting Principles (GAAP). Duke points to section 835-20-25-5 of the GAAP Accounting Standards Codification (ASC) for "Capitalized Interest," which states that "[t]he capitalization period shall end when the asset is substantially complete and *ready for its intended use.*"²³

13. Duke claims that its single project approach will result in incrementally lower rates for Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's²⁴ wholesale power and transmission formula rate customers in the near-term because the Cybersecurity Program would not be included in formula rates until after the Cybersecurity Program is deemed complete and in-service and the AFUDC accrual period ends.²⁵ Duke calculates that the total cost to these customers would be slightly higher under its approach than if the component parts of the Cybersecurity Program were placed in service on a rolling basis without accruing AFUDC for the duration of the construction of the entire Cybersecurity Program.²⁶ According to Duke, the transmission rate impact to Duke Energy Indiana, LLC's, Duke Energy Ohio, Inc.'s, and Duke Energy Kentucky, Inc.'s²⁷ wholesale customers would be extremely small—less than a 0.1

been participating in the pre-filing process and had incurred significant project-related costs prior to filing a certificate application with the Commission).

²² *Id.* at 11–12.

²³ *Id.* at 13.

²⁴ Duke Energy Carolinas, LLC and Duke Energy Progress, LLC generate, transmit, distribute, and sell electric power in portions of North Carolina and South Carolina. *Id.* at 3.

²⁵ *Id.* at 13–14.

²⁶ *Id.* at 14.

²⁷ Duke Energy Indiana, LLC; Duke Energy Ohio, Inc.; and Duke Energy Kentucky, Inc. generate, transmit, distribute, and sell electric power in portions of Indiana, Ohio, and Kentucky, respectively. *Id.* at 3–4.

percent increase in rate base.²⁸ Duke explains that Florida state rules will not permit AFUDC accrual for Duke Energy Florida, LLC²⁹ given the small size of the Cybersecurity Program's capital costs in Florida compared to Duke Energy Florida, LLC's Electric Plant in Service, so Duke does not seek AFUDC accrual for Duke Energy Florida, LLC in this accounting request.³⁰

14. Duke requests Commission action on its request on or before December 19, 2019.³¹ Duke states that, at the end of 2019, it will need to determine whether to record AFUDC for capital costs incurred for the Cybersecurity Program in 2019 and it plans to record AFUDC consistent with its interpretation of the Commission's AFUDC policy in the absence of clarification or guidance from the Commission.³²

III. Notice of Accounting Request and Responsive Pleadings

15. Notice of Duke's accounting request was published in the *Federal Register*, 84 Fed. Reg. 10,819 (2019), with interventions and protests due on or before April 2, 2019. North Carolina Eastern Municipal Power Agency and North Carolina Eastern Municipal Power Agency Number 1 (collectively, NCEMPA); North Carolina Electric Membership Corporation (NCEMC); and Public Citizen, Inc. (Public Citizen) filed timely motions to intervene. The North Carolina Utilities Commission filed a notice of intervention. NCEMC and Public Citizen filed timely protests. On April 16, 2019, Duke filed an answer.

A. Protests

1. NCEMC

16. NCEMC asserts that Duke's proposal to treat its Cybersecurity Program as a single project is not consistent with the Commission's AFUDC policy. NCEMC contends that the Commission's AFUDC policy envisions that projects may involve construction of multiple useful assets and that certain components of a project may be

²⁸ *Id.* at 14.

²⁹ Duke Energy Florida, LLC generates, transmits, distributes, and sells electric power in the central portion of Florida. *Id.* at 3.

³⁰ *Id.* at 14 & n.19.

³¹ Duke October 22, 2019 Filing at 2.

³² *Id.*

constructed and ready for service prior to the completion of the entire project.³³ NCEMC asserts that Duke has indicated that the Cybersecurity Program involves the same multi-asset, fragmented construction where components of the Cybersecurity Program will be constructed and tested intermittently over the duration of the Cybersecurity Program, as contemplated by Accounting Release No. 5 and the instructions for AFUDC in the Commission's Uniform System of Accounts.³⁴ NCEMC points out, for example, that Duke stated that work to install hardware and software related to the automated asset identification management system will require only 15 to 30 days per location.³⁵ NCEMC explains that under the Commission's AFUDC policy, a newly constructed facility must stop accruing AFUDC when it is either "ready for service" or "placed in service;" the requirements do not hinge on whether the originally intended benefits of the newly constructed facility have been realized.³⁶

17. NCEMC asserts that Duke has not provided sufficient information to identify whether any of the component parts of the Cybersecurity Program will be ready for some type of service before the completion of the Cybersecurity Program.³⁷ NCEMC contends that Duke's claim that the component parts of the Cybersecurity Program will "provide no incremental service or value" in cybersecurity until all component parts of the Cybersecurity Program are in place does not necessarily mean that the component parts will not be ready for service when completed, or will not provide other benefits to Duke and its customers.³⁸

18. According to NCEMC, long-standing Commission precedent affirms the requirement that AFUDC should stop accruing when a facility is placed in, or ready for, service. NCEMC explains that, in *Kentucky Utilities Co.*, the Commission did not allow AFUDC accrual on a generating plant that was completed and operational.³⁹ NCEMC contends that, even when a facility is not operational, the Commission does not allow

³³ NCEMC Protest, Wilcox Aff. ¶¶ 7–8.

³⁴ *Id.* ¶ 9.

³⁵ *Id.*

³⁶ *Id.* ¶¶ 10–11.

³⁷ NCEMC Protest at 4, 8.

³⁸ *Id.* at 8–9.

³⁹ *Id.* at 5 (citing *Ky. Utils. Co.*, 24 FERC ¶ 63,045, at 65,060, *aff'd*, 25 FERC ¶ 61,287 (1983), *order on reh'g*, 26 FERC ¶ 61,025 (1984), *petition denied sub nom. Ky. Utils. Co. v. FERC*, 760 F.2d 1321 (D.C. Cir. 1985)).

AFUDC accrual if construction has been completed and the project is ready for service.⁴⁰ NCEMC notes, for example, that in *Trunkline LNG Co.*, the Commission found a facility ready for service although the facility was not operational because the testing of the facility was delayed due to uncontrollable delays in shipments needed for the testing.⁴¹ NCEMC therefore asserts that the Commission's test for whether a project is "ready for service" depends on whether the asset is capable of being operated, regardless of whether the asset is actually operated.⁴²

19. NCEMC argues that Duke's facts are very similar to the facts in *Northwest Pipeline Corp.*⁴³ NCEMC states that in *Northwest Pipeline Corp.*, the Commission affirmed that certain computer hardware that was part of a larger financial software program and that would not achieve the benefits of the financial software program until the entire project was in service was used and useful and should be treated as plant in service.⁴⁴ NCEMC contends that the component parts of Duke's Cybersecurity Program, like the component parts of the financial software program at issue in *Northwest Pipeline Corp.*, will be completed in advance of the entire program, so the component parts of Duke's Cybersecurity Program should be treated as ready for service and cease AFUDC accrual as the plant is completed.⁴⁵

20. NCEMC asserts that the fact that the entire industry must take steps to protect the electric grid from cyberattacks does not justify Duke's departure from the Commission's long-standing AFUDC policy. NCEMC claims that such an argument could be made about any industry-wide response to any emerging system threat, including solar and

⁴⁰ *Id.* (citing *In re Chelan Elec. Co.*, 1 FPC 91, at 97 (1933); *In re Safe Harbor Water Power Corp.*, 1 FPC 230, at 249–51, 265 (1935), *order on reh'g*, 1 FPC 367 (1937)).

⁴¹ *Id.* at 5–6 (citing *Trunkline LNG Co.*, 45 FERC ¶ 61,256, at 61,779 (1988), *order on reh'g*, Opinion No. 319-A, 48 FERC ¶ 61,182 (1989), *remanded on other grounds sub nom. Trunkline LNG Co. v FERC*, 921 F.2d 313 (D.C. Cir. 1990)).

⁴² *Id.* at 6.

⁴³ *Id.* (citing *Nw. Pipeline Corp.*, 82 FERC ¶ 63,012, at 65,069 (1998), *aff'd*, 87 FERC ¶ 61,266 (1999), *order on reh'g*, 92 FERC ¶ 61,287 (2000), *denying in part & dismissing in part sub nom. Can. Ass'n of Petroleum Producers v. FERC*, 308 F.3d 11 (D.C. Cir. 2002)).

⁴⁴ *Id.*

⁴⁵ *Id.*

geomagnetic disturbances, hurricanes, and other natural phenomena.⁴⁶ NCEMC argues that, contrary to Duke's assertions, the Commission's change in its AFUDC policy in 2010–2011 to reflect developments in the natural gas pipeline industry does not support Duke's requested AFUDC treatment because the Commission continued to apply its existing AFUDC policy as to when AFUDC accruals should cease.⁴⁷ NCEMC also asserts that Duke is not similarly situated to the natural gas pipeline industry in 2010–2011 because natural gas pipelines would not have recovered all of their significant pre-filing construction costs but for a change in the Commission's existing AFUDC policy. NCEMC explains that, in contrast, Duke's subsidiaries will recover their costs from wholesale customers each year as the individual component parts of the Cybersecurity Program are completed and placed into rate base, regardless of whether the Commission changes the existing AFUDC policy. NCEMC asserts that there is no harm to Duke that would justify a change in how the existing AFUDC policy is implemented.⁴⁸

21. Moreover, NCEMC contends that wholesale customers would be harmed by a departure from the Commission's AFUDC policy because the total cost of the Cybersecurity Program would be higher under Duke's approach. NCEMC asserts that wholesale customers would have to pay not only the return on Duke's investment in the facilities, but also a return on all of the AFUDC accrued during the three-year (or more) delay before these facilities are placed in rates.⁴⁹ NCEMC therefore asserts that Duke's proposed AFUDC treatment would produce unjust and unreasonable rates for wholesale customers. NCEMC also argues that Duke's proposal would have a disproportionate and discriminatory effect on Duke Energy Carolina, LLC's and Duke Energy Progress, LLC's customers in North Carolina and South Carolina, while there would be no rate impact or *de minimis* rate impact on the wholesale customers of Duke's other affiliates.⁵⁰

22. NCEMC asserts that there is no merit to Duke's argument that GAAP ASC 835-20-25-5 supports its accounting request.⁵¹ NCEMC explains that GAAP ASC 835-20-25-5 applies to non-regulated utilities, and GAAP ASC 980-835 applies to regulated

⁴⁶ *Id.* at 7.

⁴⁷ *Id.* at 11.

⁴⁸ *Id.* at 12.

⁴⁹ *Id.* at 9.

⁵⁰ *Id.* at 14–15.

⁵¹ *Id.* at 12 (citing Duke Accounting Request at 13).

utilities, like Duke.⁵² NCEMC states that GAAP ASC 980-835 only permits AFUDC accrual if AFUDC recovery is allowed or likely to be allowed by the utility's regulator, which is not the case here because Duke's proposal is inconsistent with the Commission's existing AFUDC policy.⁵³

23. Finally, NCEMC asserts that Duke's accounting request could raise serious tax and book timing differences in the depreciation for the component parts of the Cybersecurity Program. NCEMC argues that if the Commission grants Duke's accounting request and Duke takes depreciation for tax purposes when the plant is completed, the Commission and wholesale customers should have knowledge of that election so that the Commission can ensure that Duke will track and address any potential book and tax timing differences associated with these facilities, and appropriate rate adjustments are reflected in wholesale rates.⁵⁴

2. Public Citizen

24. Public Citizen asserts that Duke should be required to: (1) identify the Commission's order or authorization that permits Duke to recover \$137.4 million for the Cybersecurity Program from customers before Duke moves onto secondary issues, such as AFUDC treatment; and (2) explain why ratepayers, rather than shareholders, should pay these costs. Public Citizen also requests that Duke provide information concerning all of its communications with customers, state regulators, and statutory public/consumer advocates in connection with Duke's seeking \$137.4 million in rate recovery for the Cybersecurity Program.⁵⁵

25. Public Citizen asserts that there is a relationship between Duke's accounting request and a recent, record \$10 million Notice of Penalty by NERC to an unidentified electric utility for 127 cybersecurity violations between 2015 and 2018. Public Citizen requests that the Commission require Duke to provide information that details the relationship between the cybersecurity mitigation program outlined in the NERC Notice of Penalty and the Cybersecurity Program, and urges the Commission to disallow cost recovery of any aspect of the Cybersecurity Program that involves components of the mitigation program outlined in the NERC Notice of Penalty.⁵⁶ Public Citizen also asserts

⁵² *Id.*

⁵³ *Id.* at 12–13.

⁵⁴ *Id.* at 13–14.

⁵⁵ Public Citizen Protest at 3.

⁵⁶ *Id.* at 4–5 (citing Public Citizen, Motion to Intervene and Request for the Commission to Direct the Public Release of the Violator, Docket No. NP19-4-000 (filed

that the fact that NERC predicts that there will be additional instances of noncompliance raises questions as to whether ongoing noncompliance concerns threaten the effectiveness of Duke's Cybersecurity Program and whether ratepayers should be paying for the Cybersecurity Program.⁵⁷ Public Citizen further requests that the Commission determine in this proceeding that the Cybersecurity Program investments that are directly related to the NERC Notice of Penalty mitigation plan shall not qualify for incentive rate treatment.⁵⁸

B. Duke's Answer

26. Duke states that it seeks confirmation that the Commission's existing AFUDC policy permits AFUDC accrual for the Cybersecurity Program as a single project, and does not seek a re-interpretation or revision of that policy.⁵⁹ In response to NCEMC's assertions that Duke's accounting request represents a departure from the Commission's AFUDC policy, Duke asserts that NCEMC misunderstands the nature of its Cybersecurity Program and accounting request.⁶⁰

27. Duke contends that it submitted its accounting request because there is no Commission precedent on how the Commission would apply its AFUDC policy to a cybersecurity infrastructure project like the Cybersecurity Program. In response to the three cases that NCEMC cites, Duke points out that these three cases do not concern cybersecurity investments and they primarily concern more traditional plant investment.⁶¹ Duke argues, for example, that *Trunkline LNG Co.* and *Kentucky Utilities Co.* addressed AFUDC accrual on a liquefied natural gas facility and a generating facility, respectively,

Feb. 19, 2019); Duke Accounting Request at 8; NERC, Notice of Penalty, Docket No. NP19-4-000, at 12 (Jan. 25, 2019)).

⁵⁷ *Id.* at 6 (citing NERC, Notice of Penalty, Docket No. NP19-4-000, at 12 (Jan. 25, 2019)).

⁵⁸ *Id.* (citing Duke Accounting Request at 12 n.14).

⁵⁹ Duke Answer at 2–3.

⁶⁰ *Id.* at 3. Duke also asserts that NCEMC's two arguments—that Duke must demonstrate harm from being denied AFUDC accrual and that Duke does not meet the GAAP ASC 980-835 requirement that the AFUDC recovery is allowed or likely to be allowed by the utility's regulator—are based on NCEMC misconstruing Duke's accounting request as a departure from the Commission's existing AFUDC policy. *Id.* at 5 n.15 (citing NCEMC Protest at 7, 12–13).

⁶¹ *Id.* at 6 (citing NCEMC Protest at 5–6).

where there are clear in-service dates based on when the facility is ready to receive liquefied natural gas shipments or to generate energy. According to Duke, it is unclear how this precedent would apply to cybersecurity investments like the Cybersecurity Program—i.e., where the individual components of the Cybersecurity Program cannot provide the intended cybersecurity protections until the completion of the entire Cybersecurity Program.⁶²

28. Moreover, Duke asserts that these three cases show that Duke's request is consistent with the Commission's existing AFUDC policy. With regard to *Kentucky Utilities Co.*, Duke argues that it does not challenge whether AFUDC can be recovered for operational plant—according to Duke, the Cybersecurity Program will provide no service or protection value until the entire Cybersecurity Program is complete, so it would be appropriate to consider it a single project that is not operational or ready for service until all aspects of the NIST Cybersecurity Framework are addressed.⁶³ As for *Trunkline LNG Co.*, Duke claims that it is not seeking authorization to accrue AFUDC while testing is delayed; Duke will test the Cybersecurity Program immediately following completion of the construction of the Cybersecurity Program's assets.⁶⁴ And in response to the discussion of *Northwest Pipeline Co.*, Duke contends that case expressly avoided questions about AFUDC and the issue was whether a new server system was “used and useful” during the test period for the proposed rate, so the case has no precedential value here.⁶⁵

29. Duke further asserts that its accounting request does not have a disproportionate or discriminatory effect on NCEMC.⁶⁶ Duke contends that the cost allocated to wholesale customers for the Cybersecurity Program is proportionate to the amount of investment required for Duke Energy Carolina, LLC's and Duke Energy Progress, LLC's production plant as part of the Cybersecurity Program.⁶⁷ Duke also disagrees with NCEMC that approval of Duke's accounting request may create tax and book timing differences,

⁶² *Id.*

⁶³ *Id.* at 7 (citing *Ky. Utils. Co.*, 24 FERC at 65,059–60).

⁶⁴ *Id.* at 7–8 (citing *Trunkline LNG Co.*, 45 FERC at 61,778).

⁶⁵ *Id.* at 8–10 (citing *Nw. Pipeline Corp.*, 82 FERC ¶ 63,012).

⁶⁶ *Id.* (citing NCEMC Protest at 14–15).

⁶⁷ *Id.* (citing Duke Accounting Request at 14).

explaining that the Cybersecurity Program would be deemed in-service on the same date for both book and tax purposes.⁶⁸

30. In response to Public Citizen, Duke explains that its accounting request is not a request to implement a rate for cost recovery of the Cybersecurity Program.⁶⁹ Duke states that because its wholesale power and transmission customers have Commission-jurisdictional formula rates, the cost of the Cybersecurity Program, including any approved AFUDC, will be recovered through those formula rates, which have been previously approved by the Commission.⁷⁰ Duke contends that, for this reason, its accounting request described the potential rate impact on wholesale power and transmission customers of approving accrual of AFUDC for the Cybersecurity Program.⁷¹

IV. Discussion

A. Procedural Matters

31. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁷² the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

32. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest unless otherwise ordered by the decisional authority.⁷³ We accept Duke's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

33. As discussed below, we grant Duke's accounting request to treat its Cybersecurity Program as a single project for purposes of calculating AFUDC, based on Duke's representations that the component parts of the Cybersecurity Program are interdependent

⁶⁸ *Id.* at 12 (citing NCEMC Protest at 13–14).

⁶⁹ *Id.* at 10 (citing Public Citizen Protest at 2–3).

⁷⁰ *Id.*

⁷¹ *Id.* at 10–11 (citing Duke Accounting Request at 13–14, attachment B).

⁷² 18 C.F.R. § 385.214 (2019).

⁷³ 18 C.F.R. § 385.213(a)(2) (2019).

and that the assets will not be ready for service until the completion of the entire Cybersecurity Program.

34. Under the Commission’s existing AFUDC policy in Accounting Release No. 5, AFUDC may continue to accrue on a project as long as two conditions are present: “(1) capital expenditures for the project [continue to be] incurred; and (2) activities that are necessary to get the construction project ready for its intended use are in progress.”⁷⁴ Accounting Release No. 5 states that “[c]apitalization of AFUDC stops when the facilities have been tested and are placed in, or ready for, service,” which includes “those portions of construction projects completed and put into service although the project is not fully completed.”⁷⁵ The instructions for AFUDC in the Commission’s Uniform System of Accounts also state that:

When a part only of a plant or project is placed in operation or is completed and ready for service but the construction work as a whole is incomplete, that part of the cost of the property placed in operation or ready for service, shall be treated as *Electric Plant in Service* and [AFUDC] thereon as a charge to construction shall cease. [AFUDC] on that part of the cost of the plant which is incomplete may be continued as a charge to construction until such time as it is placed in operation or is ready for service⁷⁶

35. Consistent with the Commission’s AFUDC policy, Duke explains that it has assessed whether capital expenditures for the Cybersecurity Program continue to be incurred and activities that are necessary to get the construction project ready for its intended use are in progress for the duration of construction of all of the Cybersecurity Program’s assets. Duke states that, under its Cybersecurity Program, it “will incur a continuous and steady stream of construction activity expenses” through early 2022.⁷⁷ According to Duke, the deliverables for each of the NIST Cybersecurity Framework’s five core functions—identify, protect, detect, respond, and recover—involve complementary, interrelated and interdependent technologies and, “[t]o be effective, all the interdependent hardware and software must be implemented across the entire

⁷⁴ *Accounting Release No. 5 (AR-5) (Revised), Capitalization of Allowance for Funds Used During Construction*, Docket No. AI11-1-000 (Feb. 16, 2011) (delegated order).

⁷⁵ *Id.*

⁷⁶ 18 C.F.R. pt. 101 Electric Plant Instruction No. 3(17) (2019).

⁷⁷ Duke Accounting Request at 8 & attachment C.

enterprise, which will take the duration of the Program.”⁷⁸ Duke asserts that, although the constituent parts of the Cybersecurity Program will be deployed over shorter timeframes, the Cybersecurity Program’s intended use and benefits—to optimize cybersecurity protection across all lines of business—cannot be achieved until the entire Cybersecurity Program is complete.⁷⁹ Duke further declares that “no singular Program asset or deliverable will be ready for service or provide protection value until the completion of the entire Program.”⁸⁰

36. Based on Duke’s representations that the component parts of the Cybersecurity Program are interdependent and that the assets will not be ready for service until the completion of the entire Cybersecurity Program, we grant Duke’s accounting request.⁸¹ As a result, Duke may treat its Cybersecurity Program as a single project for purposes of calculating AFUDC and accrue AFUDC on the incurred costs of the Cybersecurity Program until the entire Program is placed in, or ready for, service.

37. We note that the cases to which NCEMC and Duke cite to support their positions are inapposite because the projects and circumstances at issue in those cases are not similar to the Cybersecurity Program and the circumstances at issue here.⁸² Two of the cited cases involve types of projects that have much clearer “ready for service” dates than

⁷⁸ *Id.* at 7. We note that no party challenges Duke’s representations regarding the NIST Cybersecurity Framework’s five core functions and the interdependent nature of the hardware and software that must be implemented to address each of these core functions.

⁷⁹ *Id.* at 2, 7, 12.

⁸⁰ *Id.* at 1.

⁸¹ We emphasize that this order does not conclude that all component parts of the Cybersecurity Program will not be ready for service until the completion of the entire Program. Our determination is based on Duke’s representations regarding its Cybersecurity Program. If there is a material change in facts regarding Duke’s Cybersecurity Program, Duke has a continuing obligation to ensure that it remains in compliance with the Commission’s AFUDC policy. Consistent with Commission practice, the expenditures associated with Duke’s Cybersecurity Program are subject to AFUDC compliance review.

⁸² *See supra* PP 11, 18–20, 27–28 (summarizing NCEMC’s and Duke’s arguments concerning prior Commission precedent).

a multi-faceted cybersecurity program like the one at issue here.⁸³ The other cases involve the Commission's change to its AFUDC policy to reflect changes in the natural gas pipeline industry.⁸⁴ Unlike the circumstances at issue in this proceeding, the changes to the Commission's AFUDC policy in these cases were necessary to allow natural gas pipelines to fully recover the substantial increases in natural gas pipeline investments that were occurring before a pipeline certificate was filed at the Commission. Here, no changes to the Commission's AFUDC policy are necessary to allow Duke to recover its costs because the existing AFUDC policy allows Duke to continue to accrue AFUDC on the Cybersecurity Program until construction is complete and the assets are ready for service. And in the final cited case, the administrative law judge expressly avoided questions about AFUDC, which was not challenged before the Commission.⁸⁵ We therefore do not find these cases to be on point.

38. With respect to protesters' other arguments that do not concern the AFUDC accounting treatment of the Cybersecurity Program, we note that this proceeding is limited to consideration of Duke's accounting request to treat its Cybersecurity Program as a single project for purposes of determining the accrual period for AFUDC and the in-service date for those assets. Therefore, we find that the rate recovery issues raised by NCEMC and Public Citizen, as well as the additional issues raised in Public Citizen's protest, are beyond the scope of this proceeding and we need not address them.

⁸³ See *Ky. Utils. Co.*, 24 FERC at 65,059–62 (disallowing continued AFUDC accrual for a generating plant that was completed and operational); *Ky. Utils. Co. v. FERC*, 760 F.2d at 1324 (affirming that “[n]o less than fifty years of agency precedent” supports denying AFUDC accrual after a generating plant becomes operational); *Trunkline LNG Co.*, 45 FERC at 61,779 (disallowing continued AFUDC accrual for a liquefied natural gas facility that was completed and ready for service, but for which testing was delayed due to unavailability of liquefied natural gas product).

⁸⁴ See *Accounting Release No. 5 (AR-5) (Revised), Capitalization of Allowance for Funds Used During Construction*, Docket No. AI11-1-000 (Feb. 16, 2011) (delegated order) (changing the AFUDC accrual start date for natural gas pipeline projects); *S. Nat. Gas Co.*, 130 FERC ¶ 61,193 at PP 33–36 (same); *Fla. Gas Transmission Co. LLC*, 130 FERC ¶ 61,194 at PP 22–25 (same).

⁸⁵ See *Nw. Pipeline Corp.*, 82 FERC at 65,069 (stating that AFUDC issues should be considered in a future proceeding with a fully developed record).

The Commission orders:

Duke's accounting request is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Duke Energy Corporation

Docket No. AC19-75-000

(Issued December 19, 2019)

GLICK, Commissioner, *dissenting*:

1. Today, the Commission grants Duke Energy Corporation's (Duke) accounting request to treat its Cybersecurity Informational Technology-Operational Technology Program (Cybersecurity Program) as a single project for purposes of calculating Allowance for Funds Used During Construction (AFUDC).¹ The Commission allows Duke to continue to accrue additional AFUDC costs for components of its Cybersecurity Program for the entire time the program is under development, even though Duke acknowledges that elements of the program have or will be deployed before the program is completed. In doing so, the Commission permits Duke to inflate the cost of its Cybersecurity Program, and not only charge customers for these costs but also to earn a return on the inflated cost. The Commission's existing accounting and ratemaking methodologies already allow Duke to fully recover its costs to finance the development of the Cybersecurity Program, and Duke has demonstrated no need to alter the Commission's AFUDC policy here. I dissent from today's order because it is a blatant departure from the Commission's accounting rules—and a mistake that will needlessly burden consumers with significant additional cost.²

2. Traditionally, the Commission permits utilities to charge customers the costs of utility assets, including new utility plant, when those assets become "used and useful."³ When the new utility plant is ready for service or placed in service, the cost of the construction, along with the accrued AFUDC, is used in developing rates (added to rate base), as it is used and useful in the provision of utility service. At this point, the utility may begin to recover both the costs of the investment (including the accrued AFUDC),

¹ *Duke Energy Corp.*, 169 FERC ¶ 61,232 (2019) (Order Granting Accounting Request).

² See North Carolina Electric Membership Corporation Protest, 9-11 (estimating that "the incremental rate effect of the requested treatment on NCEMC's bills" will be "\$590,000 . . . over the first fourteen years of the service lives of these facilities").

³ See Order Granting Accounting Request, 169 FERC ¶ 61,232 at P 2 (citing *S. Nat. Gas Co.*, 130 FERC ¶ 61,193, at P 30 (2010)).

and a return on that investment. The Commission's Regulations and historical accounting guidance reflect this process, specifically providing that a utility may accrue AFUDC on an investment, including an individual component of a project only until it is placed in, or ready for, service, *even where construction on the project, as a whole, is ongoing*.⁴

3. It is unclear from the record before us when each individual component part of the Cybersecurity Program should be considered placed in, or ready for, service. That said, Duke's statements are clear: "constituent parts of the Cybersecurity Program will be deployed" before the program is completed.⁵ From this alone, the Commission can easily conclude that at least some parts of its Cybersecurity Program will be placed in, or ready for, service before the program as a whole is complete. Moreover, Duke specifies components of the project that will be in operation, such as the automated asset identification management hardware and software, which Duke expects will only take 15-30 days to test and install per location. There is no reason to believe that once tested and installed, it is not ready for service. In fact, the identification of assets at risk for cyberattack is expected to provide value while the rest of the program is being implemented. Therefore, based on the record, there is no support to treat Duke's entire Cybersecurity Program as one project for the purposes of accruing AFUDC and instead, the Commission today should provide guidance that Duke should stop accruing AFUDC on these assets as the assets are placed in, or read for, service.

4. The cybersecurity of the energy sector is one of the most important priorities for the Commission and area of focus that my colleagues and I agree requires vigilance. But the importance of cybersecurity cannot be used to intentionally violate our accounting principles. If there is an interest in providing additional incentives for cybersecurity

⁴ See 18 C.F.R. Pt. 101 Electric Plant Instruction No. 3(17) (2019) (providing, in relevant part:

When a part only of a plant or project is placed in operation or is completed and ready for service but the construction work as a whole is incomplete, that part of the cost of the property placed in operation or ready for service, shall be treated as *Electric Plant in Service* and [AFUDC] thereon as a charge to construction shall cease. [AFUDC] on that part of the cost of the plant which is incomplete may be continued as a charge to construction until such time as it is placed in operation or is ready for service);

see also Accounting Release No. 5 (AR-5) (Revised), Capitalization of Allowance for Funds Used During Construction, Docket No. AI11-1-000 (Feb. 16, 2011) (delegated order).

⁵ Order Granting Accounting Request, 169 FERC ¶ 61,232 at P 34.

investment, that is a discussion we should have – but I cannot support an intentional misreading of a record, or an expansion of AFUDC policy simply to reward cybersecurity with an inflated rate base.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner