

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-100, SUB 177

|                                      |   |                            |
|--------------------------------------|---|----------------------------|
| In the Matter of:                    | ) |                            |
|                                      | ) | REPLY COMMENTS OF SIERRA   |
| Rulemaking Proceeding to             | ) | CLUB AND NATURAL RESOURCES |
| Implement Securitization of Early    | ) | DEFENSE COUNCIL            |
| Retirement of Subcritical Coal-Fired | ) |                            |
| Generating Facilities                | ) |                            |
|                                      | ) |                            |

PURSUANT TO the North Carolina Utilities Commission’s (“Commission”) October 14, 2021 Order Requesting Comments and Proposed Rules, the Sierra Club and the Natural Resources Defense Council (“NRDC”) respectfully submit the following reply comments in the above-captioned docket. In these comments, the Sierra Club and NRDC will first highlight those issues on which they are aligned with other parties, and then will offer proposed revisions to the proposed rule filed by Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (together, “Duke”).

**Reply to Initial Comments of the Tech Customers, CIGFUR, CUCA, and the Public Staff**

The Sierra Club and NRDC generally support the comments of the Tech Customers, Carolina Industrial Group for Fair Utility Rates II & III (“CIGFUR”), Carolina Utility Customers Association (“CUCA”) and the Public Staff, subject to additional recommendations, as follows:

- As an overarching matter, the Sierra Club and NRDC agree with CIGFUR that “the successful securitization of the maximum amount of coal

retirement-related costs allowable by law will serve the public interest[.]”<sup>1</sup> Accordingly, the Commission’s focus in this proceeding should be on promulgating rules that will deliver maximum savings to ratepayers.

Like the Public Staff, the Sierra Club and NRDC favor the approach that produces the greatest savings for customers.<sup>2</sup> The question raised by the Public Staff regarding whether the statute’s reference to “fifty percent (50%) of the remaining net book value of all subcritical coal-fired electric generating facilities to be retired” should be read at the individual plant level, or in the aggregate, should be resolved in favor of ratepayers. Resolution of this question will require a determination of the maximum amount that can be securitized under each approach.

- NRDC and the Sierra Club agree with the Tech Customers, CIGFUR, and CUCA that the Commission should resolve the threshold legal issues relating to the Commission’s authority under S.L. 2021-165, Sec. 5.<sup>3</sup> To maximize ratepayer savings, any ratepayer-backed bonds created by the Commission through a financing order must meet the Wall Street rating agency standards for a AAA rating. To meet those standards, rating agencies must be confident in the Commission’s legal authority to create the ratepayer-backed bonds. To aid in resolving this threshold legal issue

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<sup>1</sup> Initial Comments of Carolina Industrial Group for Fair Utility Rates II and II at 1.

<sup>2</sup> Initial Comments of the Public Staff at 5.

<sup>3</sup> Initial Comments of Tech Customers at 4-7; Initial Comments of Carolina Utility Customers Association, Inc. at 3-8; Initial Comments of Carolina Industrial Group for Fair Utility Rates II and II at 2-4. Although we agree with CIGFUR’s concern, we believe the focus should be not on bond underwriting companies, but rather on Wall Street rating agencies, the entities that evaluate bond offerings and provide the ratings investors look to when considering purchase of bonds.

regarding the Commission’s authority, we support the recommendations of CIGFUR and CUCA that the Commission obtain (or require Duke to obtain) the opinion of competent bond counsel regarding the sufficiency of the securitization language set forth in S.L. 2021-165. In addition, however, the Sierra Club and NRDC recommend that the Commission obtain (or require Duke to obtain) an opinion from a nationally recognized law firm with expertise in North Carolina law and qualified to give an opinion on the Commission’s authority under S.L. 2021-165 that is acceptable to the nationally recognized statistical rating organizations, also known as Wall Street rating agencies or credit rating agencies, to achieve the top credit ratings on the securitized bonds from such agencies (i.e. AAA-rated or equivalent) and therefore the possibility of achieving the lowest cost of debt for any given maturity. In a similar vein, the Sierra Club and NRDC support Public Staff’s recommendation that the Commission obtain input from the investment community about the sufficiency of S.L. 2021-165 as the basis for issuing AAA rated securitized bonds.

- The Sierra Club and NRDC support CUCA’s recommendation that the Commission require Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC) (together with DEP, Duke) to disclose information regarding its coal fleet, including which plants meet the statutory term “subcritical coal-fired electric generating facilities” as well as the current and projected net book value of the subcritical coal facilities. Although it

is too late for this information to inform intervenors' reply comments, it would still be valuable information for the Commission as it implements the securitization provisions of S.L. 2021-165.

### **Proposed Revisions and Additions to Duke's Proposed Rule**

The Sierra Club and NRDC hereby reiterate and incorporate by reference herein the proposed rule they filed in this docket on November 22, 2022. In addition, they offer revisions and additions to Duke's proposed rule, shown in redline below, with commentary in italics.

#### (b) Definitions

*The bond advisory team is a key to ensuring bonds are issued at the lowest cost to ratepayers.*

4. Bond advisory team.<sup>4</sup> An advisory body of representatives from the public utility, Commission, and Public Staff established by the Commission's ~~discretion to~~ with an active role to provide input, and advice, and recommendations to the public utility regarding the public utility's decisions on structuring, marketing, and pricing of the coal retirement bonds.

...

*Maximizing the amount of subcritical coal-fired electric generating facility plant balances to be securitized will minimize ratepayer costs, a directive of Session Law 2021-165.*

10. Coal retirement costs (a.)<sup>5</sup> Fifty percent (50%) of the remaining net book value, as of the date on which Session Law 2021-165 was enacted, of subcritical coal-fired electric generating facilities retired to achieve the authorized carbon reduction goals set forth in Section 1 of S.L. 2021-165. Coal retirement costs include removal costs, restoration costs, and transition costs. ~~Up to fifty percent (50%) of the remaining net book value of all of a public utility's subcritical coal fired electric generating facilities retired~~

<sup>4</sup> Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, Proposed Coal Retirement Securitization Rule at 1.

<sup>5</sup> Id. at 2

~~early or to be retired early to achieve the authorized carbon reduction goals set forth in Section 1 of House Bill 951, with any remaining non-securitized costs to be recovered through rates, that are appropriate for recovery from existing and future retail customers receiving transmission or distribution service from such public utility.~~

...

*To minimize ratepayer costs, the servicing fee should be for actual costs incurred by the public utility. Documentation should be provided.*

26. Servicing fee.<sup>6</sup> In consideration for its servicing responsibilities, reimbursement a periodic fee paid to the servicer (which may be the public utility) of an issuing entity to be recovered~~ed~~ through coal retirement charges. To support bankruptcy analysis necessary to achieve the highest credit rating, the servicing fees must be on arm's length terms ~~and~~ at market-based rates and shall be reimbursement for actual expenses incurred. Such servicing responsibilities will include, without limitation: (i) billing, monitoring, collecting and remitting securitization charges, (ii) reporting requirements imposed by the servicing agreement, (iii) implementing the true-up mechanism, (iv) procedures required to coordinate required audits related to the public utility's role as servicer, (v) legal and accounting functions related to the servicing obligation, and (vi) communication with rating agencies. Documentation of reimbursable expenses shall be provided to the Commission on a schedule to be determined by the Commission.

...

*S.L. 2021-165 provides that its carbon reduction goals are to be achieved at least cost to ratepayers. Section 5 recognizes the importance of early retirement of subcritical coal-fired electric generating facilities in achieving the carbon reduction goals. The definition of "statutory cost objectives" should be consistent with the General Assembly's directive that the statute's carbon reduction goals are to be achieved at least cost to ratepayers.*

27. Statutory cost objectives.<sup>7</sup> The objectives that: (i) a proposed issuance of coal retirement bonds and the imposition of coal retirement charges will provide maximum net present value quantifiable benefits to customers as compared to the costs that would have been incurred absent the issuance of coal retirement bonds; and (ii) the structuring,

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<sup>6</sup> Id. 4.

<sup>7</sup> Id.

marketing, and pricing of coal retirement bonds that will ~~are reasonably expected to~~ result in the lowest coal retirement charges consistent with market conditions at the time the coal retirement bonds are priced and the terms set forth in a financing order.

(c) Procedure for Coal Retirement Securitization Proceeding<sup>8</sup>

*The procedural schedule for the coal retirement cost review should be established by the Commission in accordance with its preferred timeframe. We recommend the addition of a post-financing order – pre-bond issuance process schedule to ensure adequate time for the Bond Advisory Team and, specifically, the Advisor to the Commission, to participate fully and in advance on all matters related to the structuring, marketing and pricing of the bonds and to do independent review and evaluation of the public utility’s proposed issuance advice letter. An independent opinion describing the findings of the advisor’s independent review should be provided to the Commission with adequate lead time to allow the Commission to decide whether or not the company’s structuring, marketing and pricing will result in the maximum net present value savings to customers under market conditions at the time of pricing of the bonds.*

...

(f) Petition for approval of financing order (2)(a).(v.)<sup>9</sup>

*S.L. 2021-165 specifies achieving its carbon reduction goals at least cost to ratepayers. We recommend strengthening this filing requirement to provide the Commission with key information necessary to achieve least costs for ratepayers in its financing order decision making process.*

*Proposed Revision:*

v. A comparison between the net present value of the costs to customers that are estimated to result from the issuance of coal retirement bonds and the costs that would result from the application of the traditional method of financing and recovering coal retirement costs from customers. The comparison should demonstrate that the issuance of coal retirement bonds and the imposition of coal retirement charges are expected to

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<sup>8</sup> Id. at 5.

<sup>9</sup> Id. at 7.

provide maximum net present value ~~quantifiable~~ benefits to customers. For purposes of this comparison, the traditional method of financing and recovering net book value of coal plants upon retirement shall mean the establishment of a regulatory asset and recovery of the amortization expenses over a period to be determined by the Commission plus a return on the unamortized balance at the public utility's weighted average cost of capital, as defined in its most recent base rate case proceeding before the Commission.

*Proposed Additions:*

- (1) An estimate of the public utility's total proposed qualified costs, together with descriptions and schedules of the proposed qualified costs to be subject to the securitization, including linking or mapping the proposed qualified costs to the costs currently included in utility rates, as applicable. Any Excel worksheets shall also be submitted with the formulas intact.
- (2) Schedule(s) comparing the net present value of the total of the proposed securitization charges with the net present value of the recovery of the qualified costs through traditional ratemaking. Such schedules shall identify the assumption(s) utilized in the net present value analysis and include evidence supporting the assumption(s). Any Excel worksheets shall also be submitted with the formulas intact.
- (3) Schedule(s) and supporting assumptions and documentation comparing the net present value of savings from securitized bonds of various lengths, highlighting the bond length (tenor) that provides maximum net present value savings, calculated using the utility's weighted average cost of capital ("WACC") from its most recent general rate case as the discount rate.
- (4) Description of the proposed mechanism to reduce the public utility's base rates and charges upon assessment of the securitization charges on customer bills, so as to remove any costs associated with the qualified costs that are reflected in the public utility's retail rates at the time the petition is filed.
- (5) Tariffs for:
  - (A) securitization charges; and
  - (B) any credits or rate reductions required to remove qualified costs from existing rates.

Work papers utilized in determining such tariffs shall be submitted to the commission and provided to participating parties.

(6) Description of current and anticipated market conditions and expected bond structure, including how the proposal maximizes net present value savings for customers and contemplates a sensitivity analysis for changes in interest rates.

(7) Evidence of the anticipated costs incurred to issue and maintain the securitization bonds.

(8) A description of

(A) any debt or equity securities to be refinanced or retired, and estimated redemption premiums, in any, including previously issued securitization bonds; and

(B) the use of bond proceeds and the cost of such refinancing or retirement.

(9) A copy of any contract, agreement, or arrangement that is proposed or has been made, or examples of, for the sale of the securitization bonds proposed to be issued, which includes but is not limited to bond indenture, servicing agreement, administration agreement, establishment of the limited liability company, the underwriting agreement for the sale, and other pertinent documents to the securitization transaction.

...

*S.L. 2021-165 specifies achieving its carbon reduction goals at least cost to ratepayers. We recommend strengthening the findings statements below to confirm the Commission had adequate information to maximize savings to ratepayers in its financing order decision making process.*

(g) Financing order. (1)(b)<sup>10</sup>

*Proposed Revision:*

A finding that the proposed issuance of coal retirement bonds and the imposition and collection of a coal retirement charge are expected to provide maximum net present value quantifiable benefits to customers as compared to the costs that would have been incurred absent the issuance of coal retirement bonds.

(g) Financing order. (1)(c)<sup>11</sup>

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<sup>10</sup> Id. at 8.

<sup>11</sup> Id.



*Proposed Revision:*

A finding that the structuring, marketing and pricing of the coal retirement bonds will ~~are~~ ~~reasonably expected to~~ result in the lowest coal retirement charges consistent with market conditions at the time the coal retirement bonds are priced and the terms set forth in such financing order.

(g) Financing order. (1)(f)<sup>12</sup>

*Coal retirement property should only be used to repay the coal retirement bonds and relate financing costs.*

*Proposed Revision:*

The coal retirement property that is, or shall be, created in favor of a public utility or its successors or assignees and that shall be used solely to pay or secure coal retirement bonds and all financing costs.

...

(h) Post-financing order pre-bond-issuance review process (1)(a)<sup>13</sup>

*The post-financing pre-bond issuance order process is the key to achieving maximum net present value savings for ratepayers by issuing competitive well-priced bonds, ensuring the lowest transaction costs and financing costs. The Commission's oversight through the use of an independent qualified financial advisor will result in the best outcome for ratepayers.*

*Proposed Revisions:*

If the Commission determines that it is necessary to achieve the statutory cost objectives and the terms of the financing order, in the a financing order and through the pre-bond issuance review process, in which it the Commission shall ~~may~~ establish a bond advisory team:

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<sup>12</sup> Id.

<sup>13</sup> Id. at 10.

(1)(a)(iii)<sup>14</sup>

The bond advisory team ~~shall~~ ~~may~~ be present during communications with underwriters, credit rating agencies, and investors, the public utility shall ~~include-use reasonable means to invite~~ bond advisory team ~~in~~ ~~to~~ such communications; the public utility shall ~~include~~ ~~vite~~ members of the Bond advisory team ~~in~~ ~~to~~ ~~join~~ bond advisory team meetings to review and comment on material aspects of the structuring, pricing, and marketing of the coal retirement bonds, including without limitation the following: the selection and retention of underwriters and other transaction participants; the terms of all transaction documents; the length of the bond terms; the interest rates of the bonds (including whether the interest rate is floating or fixed); the capitalization of the bonds; the transaction structure; the issuance strategy; appropriate credit enhancements; and the credit rating process. The company on a timely basis shall provide to each member of the Bond Advisory Team all information such member reasonably needs to fulfill its obligations under the Financing Order. The Commission's Advisor should participate in advance on all matters relate to the structuring, marketing and pricing of the bonds. The Advisor should provide the Commission with an independent opinion that does not solely rely upon information provided to them by the company or underwriters without appropriate due diligence and verification.

...

(2) Issuance advice letter process<sup>15</sup>

*In the (c) Procedure for Coal Retirement Securitization Proceeding section above, we recommended the addition of a Post-financing order pre-bond issuance process schedule to ensure adequate time for the Bond advisory team and, specifically, the Advisor to the Commission, to do independent review and evaluation of the public utility's proposed structuring, pricing and marketing of the bonds. We recommend re-writing this section to reflect the post-financing order pre-bond issuance process schedule which is determined by the Commission. As written, this section currently does not allow adequate time for ratepayers to benefit from an independent opinion describing the findings of the independent review provided to the Commission or allow adequate lead*

<sup>14</sup> Id.

<sup>15</sup> Id. at 11.

*time for the Commission to provide the public utility with recommendations which may result in additional savings to ratepayers prior to a final bond proposal being prepared by the public utility.*

***Proposed Addition:***

A draft of the company's proposed issuance advice letter shall be delivered to the bond advisory team at least 2 (two) weeks prior to the submission dates with the certifications required by the financing order of the company of the bookrunning underwriters.

No later than 5:00 p.m. Eastern time on the second business day following pricing, the Commission's financial advisor shall deliver to the Commission an independent opinion letter as to whether the structuring, marketing and pricing of the bonds achieved: 1) the statutory cost objectives; (2) the lowest charges consistent with the prevailing market at the time of pricing, terms and conditions of the Financing Order, and other applicable law; and (3) the greatest possible customer protections. That opinion letter shall include a report of any action or inaction which the Commission's financial advisor believes might have caused the transaction not to achieve the statutory cost objectives, the lowest charges, and/or the greatest possible customer protections. The report of any such action or inaction which the Commission's financial advisor believes might have caused the transaction not to achieve the statutory cost objectives, the lowest charges, and/or the greatest possible customer protections, shall be treated as a material qualification to the opinion letter of the Commission's financial advisor.

The Commission retains discretion to allow the transaction to be completed if, after taking into account the opinion letter, if any, of the financial advisor, the views of other members of the bond advisory team and any other facts and circumstances, except for a change in market conditions after the moment of pricing, the Commission determines that the Statutory Objectives and the Financing Order have been satisfied.

***Proposed Addition:***

Notice to the Commission, Public Staff and anticipated intervenors

(a) The public utility shall provide notice at least 90 days prior to filing its petition to the Commission by sending a letter to the secretary of the Commission.

(b) The public utility shall, prior to the filing of its petition, provide notice and

meet with (upon request):

- (1) the Public Staff; and
- (2) other anticipated intervenors.

Notice to customers

(a) No later than thirty (30) days after the filing of its petition, the public utility shall provide notice to its customers by:

- (1) posting notice on the public utility's website; and
- (2) publishing notice through an advertisement in a newspaper of general circulation in each county served by the public utility.

(b) The notice shall state:

- (1) That the public utility has filed with the Commission a petition for securitization financing order and authority for a finance subsidiary to issue securitization bonds;
- (2) The estimated total amount of the securitization bonds requested, including an itemization of counsel fees by function and other fees and expenses, as well as the basis for those estimated fees and expenses;
- (3) The proposed securitization charges, including any ongoing costs included in the charges, and the number of years it will be collected in accordance with the date on which the principal of the bonds is expected to be paid;
- (4) The estimated net impact on customer rates and bills in the first year after the securitization is completed compared to existing rates and bills;
- (5) That interested persons may send comments to the Public Staff; and
- (6) The mailing and website addresses and toll-free telephone numbers for the

Public Staff and the Commission.

The Sierra Club and NRDC appreciate the opportunity to file these reply comments, and respectfully request that the Commission consider these reply comments in adopting rules to implement the securitization provisions of S.L. 2021-165.

Respectfully submitted this 20th day of December, 2021.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Comments of the Sierra Club and Natural Resources Defense Council as filed today in Docket No. E-100, Sub 177 has been served on all parties of record by electronic mail or by deposit in the U.S. Mail, first-class, postage prepaid.

This 20th day of December, 2021.

s/Gudrun Thompson  
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