STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-100, SUB 177

In the Matter of Rulemaking Proceeding to Implement Securitization of Early Retirement of Subcritical Coal-Fired Generating Facilities	))))	INITIAL COMMENTS OF OF TECH CUSTOMERS

Intervenors Apple Inc., Meta Platforms, Inc., and Google LLC (collectively, "Tech Customers"), by and through counsel, respectfully submit these initial comments pursuant to the Commission's Order Requesting Comments and Proposed Rules issued on October 14, 2021, regarding the adoption of rules to implement the securitization of early retirement of subcritical coal-fired generating facilities in accordance with House Bill 951 (S.L. 2021-165) ("HB 951").

INTRODUCTION

In Part I of HB 951, the Commission is directed to "take all reasonable steps to achieve a seventy percent (70%) reduction in emissions of carbon dioxide (CO_2) emitted in the State from electric generating facilities owned or operated by [Duke Energy Progress, LLC and Duke Energy Carolinas, LLC (collectively, "Duke Energy")] from 2005 levels by the year 2030 and carbon neutrality by the year 2050." This carbon reduction is to be implemented by the Commission through approval, on a biennial basis, of Carbon Plans based on "least cost" principles considering, at a minimum, "power generation, transmission and distribution, grid modernization, storage, energy efficiency measures, demand-side management, and the latest technological breakthroughs."

In Part III of HB 951, the Commission is directed, among other things, to adopt rules "for securitization of costs associated with early retirement of subcritical coal-fired electric generating facilities." Specifically, the Commission is directed to:

> develop rules to determine costs to be securitized at fifty percent (50%) of the remaining net book value of all subcritical coal-fired electric generating facilities to be retired to achieve the authorized carbon reduction goals set forth in Section 1 of this act, with any remaining non-securitized costs to be recovered through rates. Rules, procedures, obligations, and protections adopted for securitization of costs associated with retirement of subcritical coal-fired generating facilities shall be substantively identical to the provisions of Section 1 of S.L. 2019-244, except with respect to the purposes for which securitization may be used under that section.

See S.L. 2021-165, at Part III (Sec. 5).

On October 14, 2021, the Commission issued its *Order Requesting Comments and Proposed Rules*, seeking requesting comment on securitization of coal retirement costs. The Tech Customers offer these brief initial comments for the Commission's consideration.

INITIAL COMMENTS

The Tech Customers are devoted to the highest of corporate sustainability goals, and have consistently advocated for the development of green energy solutions that support these goals and that help achieve carbon reductions in the utilities industry generally. They are also significant consumers of utility services in North Carolina and, therefore, are mindful of cost of these reforms for the State's ratepayers. The Tech Customers view securitization of coal-retirement costs as an opportunity to accomplish its dual objectives of transitioning to clean energy in a cost-effective manner. Through this lens, the Tech Customers offer the following observations concerning proposed securitization rules in North Carolina.

(1) Properly Used, Securitization Can Be An Important Tool That Helps Facilitate the Transition Away From Carbon-Emitting Generation Facilities.

The Tech Customers are supportive of securitization as a tool to help facilitate the transition from carbon-emitting generating facilities such as coal plants to non-carbon emitting generating resources.

As the Commission has seen with its implementation of securitization for storm recovery costs as authorized by S.L. 2019-244, the securitization of coal-retirement costs, if successful, could significantly mitigate some of the costs associated with North Carolina's transition to clean energy. For this reason, securitization is a recognized tool in use in other states for this purpose.[1]

While the yet-to-be-adopted Carbon Plan may yield different results, in its 2020 IRP, for the most economic case, Duke Energy recommended the retirement of 11 of 18 units by 2030, even without securitization. For the earliest practicable retirement case, Duke Energy identified that all coal units could be retired by 2030, with one unit converted to natural gas. The estimated undepreciated balances of Duke Energy's coal plans as of the date of retirement is in the billions of dollars. To the extent that these balances continue to be charged to ratepayers—even after the facilities are shuttered—this rate impact will be magnified by the need to simultaneously pay for new generation to replace the retired coal plants.

[1] As the Commission is aware, the 2020 NC Energy Regulatory Process (NERP) sponsored stakeholder discussions on the use of securitization as tool to transition away from coal burning facilities and recommended the adoption of legislation authorizing the same. *See Securitization for Generation Asset Retirement,* 2020 NC Energy Regulatory Process, *available at* https://deq.nc.gov/media/17685/download. This report discusses and compares state legislation in place as of that time supporting the retirement of uneconomic plant (Colorado, Montana, New Mexico, and Michigan). Since the issuance of the report, in 2021 similar legislation was adopted in Indiana (S. Bill No. 386) and Missouri (H. Bill 734).

If the Commission is able to implement securitization of these "stranded" costs, the ratepayers' burden can be significantly reduced. Duke Energy has estimated that, as a result of the securitization of storm costs under N.C. Gen. Stat. § 62-172, ratepayers could see a reduction of approximately 33% of the financial burden of storms—totaling $71 million ($32 million on NPV basis) for DEC ratepayers and $270 million ($199 million on NPM basis) for DEP ratepayers.[2] These significant savings, if achieved for costs associated with stranded coal assets, will help mitigate the financial burden of transiting to a carbon-neutral generation portfolio. For this reason, use of securitization—if implemented properly—is much preferable to simply allowing stranded costs to remain on the books and be charged to ratepayers at the utility's rate of return.

(2) Serious Questions Are Raised Concerning the Scope of the Commission's Authority Under Its Authorizing Legislation—Which Questions May Impair the Marketability of any Bonds Issued.

In order for the securitization to be successful, and yield material benefits for ratepayers, the bonds enabled through securitization must be fully marketable and attractive to financial investors. The more attractive the financial instrument, the greater demand from investors—and, in turn, the lower the yield paid by North Carolina ratepayers.

As Duke Energy made clear in its Joint Application seeking issuance of a storm recovery financing order:

> To maximize the benefits from securitization for customers, it is necessary to obtain AAA-equivalent credit ratings for the storm recovery bonds and, if applicable, the SRB Securities. Necessary elements for such credit ratings

[2] *See* Duke Energy Joint Petition for Financing Orders, Docket Nos. E-7, Sub 1243 and E-2, Sub 1262 (Oct. 26, 2020) ("Joint Petition"), at 1. *See also* Direct Testimony of Thomas J. Heath, Jr. for Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, Docket Nos. E-7, Sub 1244; E-2, Sub 1262 (Oct. 26, 2020), at 15.

> include, but are not limited to: (1) the nonbypassability of the storm recovery charges pursuant to N.C. Gen. Stat. § 62-172(b)(3)b.4; (2) a true sale of the storm recovery property to a bankruptcy-remote issuer, which will be each utility's respective [Single Purpose Entity ("SPE")]; (3) a mandatory periodic formula-based true-up mechanism to adjust storm recovery charges to ensure that storm recovery bond debt service and ongoing financing costs are paid on time as scheduled; (4) the requirement that the Commission will not amend, modify, or terminate the Financing Orders or otherwise adjust the storm recovery charges, except for the periodic true-ups, as required by N.C. Gen. Stat. §§ 62-172(b)(3)e. and (k); (5) the pledge to the holders of storm recovery bonds of the SPE collection accounts established for timely remittances of storm recovery charges; (6) a statutory pledge that neither the State nor the Commission may impair the rights of storm recovery bond holders; (7) provisions for successor servicers and related fees; and (8) demonstration that the proposed transaction structures are designed to satisfy specified rating agency stress case cash flow scenarios.

Joint Application, at ¶ 48. Thus, the securitization transactions must be "carefully structured to provide these assurances to the rating agencies and thus to permit the storm recovery bonds to achieve AAA-equivalent credit ratings, which is essential in optimizing the customer benefits of securitization." *Id.*, at ¶ 49.

Here, in contrast to the extensive enabling provisions set forth in S.L. 2019-244, the authorizing statute here, HB 951, merely directs the Commission to promulgate rules that are "substantially identical to the provision of Section 1 of S.L. 2019-244." HB 951, at Sec. 5. The Tech Customers are unaware of any state that has sought to effectuate securitization in such a fashion. To the contrary, as acknowledged by Duke Energy in its storm recovery costs Joint Petition, the securitization formalities are highly standardized and dictated by the needs of the investment community. *See* Joint Application, at ¶ 49. *See also* Ron Lehr and Mike O'Boyle, "Comparing 2019 Securitization Legislation in Colorado, Montana, and New Mexico," Energy Innovation (Sept. 2020) ("Since the bond creation, issuance, and repayment provisions are standardized to meet Wall Street rating agency requirements to obtain least-cost financing, the three new state laws—and most of the other existing laws on the books across the country—are quite similar. As such, these provisions in the new state laws do not offer comparative lessons, and each provides a model to satisfy rating agency requirements.").[3]

In this regard, the absence of specific enabling legislation here may call into question the integrity of any order issued thereunder. For example:[4]

- Is the Commission authorized, through the exercise of its rulemaking authority, to establish the necessary property interest in "costs associated with early retirement of subcritical coal-fired generating facilities" such that the interest may be transferred, pledged and other otherwise securitized?
- Assuming that the Commission possesses the necessary authority to create a new "property interest" in coal retirement costs, would the establishment of a security interest in this property be subject to the state Uniform Commercial Code or would the Commission have the necessary statutory authority to exempt such interest from the application of the UCC and, instead, adopt rules governing the security interest?
- Does the Commission possess the necessary authority to commit the State (in a binding pledge that would be recognized by Wall Street) not to take any action to impair the value of the securitization property or revenues associated therewith until the bond obligations have been paid in full?

[3] *Available at* https://energyinnovation.org/wp-content/uploads/2020/09/Securitization-Brief_September-2020.pdf.

[4] Given the novelty of these issues, there are almost certainly other significant legal issues that may call into question the marketability of the securities and the validity of any action taken by the Commission respecting such securities.

Given the magnitude of the financing in issue and the likelihood that the issues regarding the Commission's authority could either result in time consuming and expensive litigation[5] and/or impair the willingness of the financial community to underwrite the securities at the preferred rating, it would be highly preferable that the Commission act with the backstop of express enabling legislation, at a minimum, along the lines adopted in S.L. 2019-244. Questions about the security's underlying authorization could lead potential investors to either declining to purchase any resulting bonds or insisting on a risk premium that siphons off any ratepayer benefit.

At a minimum, the Commission should seek to resolve these threshold legal issues. Administrative efficiency would counsel that these questions be resolved prior to the adoption of rules given that, if it is determined that further legislation is required, such legislation will likely impact the rules, if any, that need to be adopted.

(3) The Commission Should Consider Broader Uses of Securitization.

Finally, to the extent that the Commission concludes that it possesses the necessary authority to implement securitization to facilitate coal facility retirements, the Commission should also consider adoption of other related criteria that might enhance the value of the underlying security to potential investors.

The utility of securitization for utility cost financing can be maximized by allowing for the inclusion of Environmental, Social and Governance ("ESG") criteria. ESG criteria are operational standards—such as environmental commitments—that make a potential

[5] *E.g., Florida Utility Debt Securitization Auth. v. State of Florida, et al.,* 2018 WL 6422144 (Fla. Cir. Ct. 2018) (challenge to issuance of securitized utility revenue bonds); *City of Corpus Christi v. Public Utility Commn. of Texas, et al.,* 51 S.W.3d 231 (Texas S. Ct. 2001) (challenge to PUC's financing order on utility's recovery of stranded costs during transition to competitive market).

investment more attractive to socially conscious investors. Indeed, public companies, mutual funds, and brokerage firms are increasingly employing ESG criteria—e.g., issuing "green bonds," which are corporate debt accompanied by environmental commitments. Here, for example, the Commission could require Duke Energy's security instrument to be a "green bond" that includes a commitment by Duke to replace a meaningful percentage of the retired coal-plant capacity with solar, wind, energy storage, demand-side management, or other carbon-free capacity.

Green bonds are a very attractive investment in today's markets; as a recent example, just last week, a European shipping company issued a green bond that "received a strong reception from broad investor universe and was several times oversubscribed with a final order book of €3.7bn. The transaction priced at coupon of 0.75%, the lowest coupon ever for Maersk."[6] Enacting rules that allow for, or even require, the security instrument to employ ESG criteria, such as with a green bond, should enhance the instrument's attractiveness—to the benefit of ratepayers.

CONCLUSION

The Tech Customers respectfully request that the Commission consider the foregoing initial comments. The Tech Customers look forward to reviewing the initial comments and proposed rules offered by other stakeholders and offering further comment as may be appropriate and constructive to the Commission's decision making.

[6] "Maersk issues first green bond to fund first green methanol vessels," Press Release (Nov. 19, 2021), *available at* https://www.maersk.com/news/articles/2021/11/19/maersk-issues-first-green-bond-to-fund-first-green-methanol-vessels. *See also* Christian Wienberg, World's Biggest Shipping Company Makes History With Green Bond, Bloomberg News (Nov. 19, 2021) (emphasis added), available at https://www.bloomberg.com/news/articles/2021-11-19/world-s-biggest-shipping-company-makes-history-with-green-bond.

Respectfully submitted, this 22nd day of November, 2021.

TECH CUSTOMERS

By: ______________________________

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Certificate of Service

I hereby certify that a copy of the foregoing *Initial Comments of Tech Customers* has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

This the 22nd day of November, 2021.

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