

**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)	REPLY COMMENTS OF
Subcritical Coal-Fired Generating)	OF TECH CUSTOMERS
Facilities)	

Intervenors Apple Inc., Google LLC, and Meta Platforms, Inc. (collectively, “Tech Customers”), by and through counsel, respectfully submit these reply 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”).

REPLY COMMENTS

The Tech Customers view securitization of coal-retirement costs as an opportunity to advance their shared objective of transitioning to clean energy in a least-cost manner. This view is shared by other intervenors and the Public Staff who all share the expectation that securitization, properly executed, will result in meaningful cost savings for ratepayers. The Tech Customers are concerned, therefore, about the marketability of such bonds given the lack of clear statutory authorization—a concern that is shared by others. The Tech Customers are also troubled by some of the language in Duke’s proposed rule that could result in less-than-optimal outcomes for ratepayers. The Tech Customers ask the Commission to craft rules that ensure ratepayers receive nothing short of the full intended benefits of securitization of coal-retirement costs.

(1) Several Commentators Share Serious Concerns about the Marketability of Bonds Issued under the Securitization Statute as Currently Written.

The statutory language calling for the securitization of coal-retirement costs simply directs the Commission to adopt rules that are “substantively identical” to the statute enabling the securitization of storm costs.¹ The Public Staff, CUCA, and CIGFUR join Tech Customers in expressing doubt as to whether this statutory language is sufficient to empower the Commission to establish marketable securitization bonds.

As Tech Customers cautioned in its initial comments, it is unlikely that the Commission has the power to bind the State and other agencies.² The Public Staff shares this doubt, noting that a “non-impairment pledge” is central to a successful securitization effort, and asking the Commission to “seek input from the investment community” and independent bond counsel on the adequacy of the Commission’s powers to adopt such rules.³ CUCA raised this issue as a “threshold matter,” commenting on the limitations of the Commission’s powers and asking that this issue be remedied before addressing other questions raised by securitization.⁴ CIGFUR expressed the same concern, asking the Commission to direct Duke to file two opinion letters from qualified bond counsel that address the sufficiency of the Commission’s securitization powers.⁵

In contrast, Duke did not raise this issue, but instead tendered a proposed rule that appears to run headlong into this problem. For example, Subsection (o) of Duke’s proposed securitization rule includes an “[o]bligation of nonimpairment” and states that the “*State*

¹ S.L. 2021-165, § 5.

² Tech Customers Initial Cmt., at 4–7.

³ Public Staff Initial Cmt., at ¶ 4.

⁴ CUCA Initial Cmt., at 3–8.

⁵ CIGFUR II & III Initial Cmt., at 3.

and its agencies, including the Commission, *pledge and agree* with bondholders, the owners of the coal retirement property, and other financing parties that the State and its agencies will not take any action listed in this subdivision.”⁶ Notably, in Section 62-172, it was the General Assembly’s legislation—and not the Commission’s rule—that imposed a binding obligation on the State and other agencies.⁷ Duke has not identified a clear legal basis for the Commission to enact a rule that could effectively bind the State and its agencies.

Subsection (q) of Duke’s proposed rule highlights this problem. Duke proposes that the securitization rule declare that if “*there is a conflict between this Rule and any other law regarding the attachment, assignment, or perfection, or the effect of perfection, or priority of, assignment or transfer of, or security interest in coal retirement property, this Rule shall govern.*”⁸ Tech Customers are not aware of a North Carolina court decision recognizing the Commission’s power to enact a rule that supersedes state law. In fact, CUCA noted that courts have held the opposite.⁹ Again, with the securitization of storm costs, it was the General Assembly that superseded state law.¹⁰

⁶ Duke Proposed Rule, § (o).

⁷ See N.C. Gen. Stat. § 62-172(k).

⁸ Duke Proposed Rule, § (q).

⁹ See CUCA Initial Cmt., at 6 (citing *State ex rel. Com'r of Ins. v. Integon Life Ins. Co.*, 28 N.C. App. 7, 11, 220 S.E.2d 409, 412 (1975) (“An administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law.”)).

¹⁰ See N.C. Gen. Stat. § 62-172(m) (“Conflicts. – If there is a conflict between this section and any other law regarding the attachment, assignment, or perfection, or the effect of perfection, or priority of, assignment or transfer of, or security interest in storm recovery property, this section shall govern.”).

Admittedly, House Bill 951 directs, and presumably empowers, the Commission to adopt rules “substantively identical” to Section 62-172. Thus, the Tech Customers acknowledge a possible basis for the Commission exerting, through its rulemaking power, the authority to bind the State and supersede state law. However, it is clear there is doubt about the Commission’s authority to enable the securitization of coal-retirement costs—and the *simple existence of such doubt* threatens the marketability of the resulting bonds. The Tech Customers join with others in asking the Commission to engage reputable and qualified bond counsel to opine on the Commission’s authority to establish viable securitization through its rulemaking powers. Alternatively, the Commission should make clear in its rules that Duke bears the risk of marketability and that it will not be permitted to recover from ratepayers any amounts greater than would have been recoverable through a properly implemented securitization of coal retirement costs.

(2) *Duke’s Proposed Rule Creates Certain Concerns.*

Duke’s proposed rule includes several provisions that raise questions about the costs to be securitized and the appropriate amount of utility discretion over the securitization process.

The first question relates to the costs to be securitized. In Subsection (b)(10)(a) of Duke’s proposed rule, Duke includes the following definition of “coal retirement 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 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.¹¹

Notably, for the first part of this definition, Duke copied the language of House Bill 951 with little embellishment.¹² By mimicking the language “fifty percent (50%) of the remaining net book value of all subcritical coal-fired electric generating facilities,” Duke’s proposed rule leaves unanswered two key questions. First, what constitutes a “subcritical” coal facility? (For example, does this include the two Allen units for which Duke recently decided to accelerate retirement?¹³) Duke’s rule offers no guidance. Second, as the Public Staff commented, it is unclear whether the coal-retirement costs capture fifty percent of the net book value of (a) each retired plant or (b) the plants in aggregate.¹⁴ Duke’s rule does not give an answer. The Tech Customers agree with the sentiment of the Public Staff that the correct answers to such questions must maximize the possible savings for ratepayers.¹⁵ Notably, House Bill 951 states that the Commission “shall develop rules *to determine costs to be securitized . . .*” It is squarely within the Commission’s statutory authority to resolve such questions about retirement costs in favor of ratepayers.

The second part of Duke’s definition seems unnecessary for purposes of this rule. Although House Bill 951 states only that non-securitized retirement costs will “be

¹¹ Duke Proposed Rule, § (b)(10)(a).

¹² See S.L. 2021-165, § 5 (“[T]he Commission shall 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[.]”).

¹³ Duke Energy Carolinas, LLC Update to Allen Units 2 and 4 Retirement Date, Docket No. E-100, Sub 165 (Dec. 3, 2021).

¹⁴ Public Staff Initial Cmt., at ¶ 6.

¹⁵ See Public Staff Initial Cmt., at ¶ 6.

recovered through rates,”¹⁶ Duke embellishes the statute to say that non-securitized costs shall be recovered through rates “that are appropriate for recovery from existing and future retail customers receiving transmission or distribution service from such public utility.”¹⁷ In a rule for handling costs *to be securitized*, there seems no need to address how to handle the costs that will not be securitized.

Second, later in the definition of “coal retirement costs,” Duke adds that such costs include “repurchasing equity or retiring any existing indebtedness relating to the early retirement of a subcritical coal-fired electric generating facility.”¹⁸ It is unclear (a) why Duke would be compelled to repurchase equity or retire debt upon the retirement of coal facilities, (b) what additional costs would be associated with such refinancing, and (c) why Duke would undertake such refinancing if it imposed any additional costs on ratepayers. The Tech Customers ask the Commission to be cautious of empowering Duke, as a matter of unyielding rule, to securitize such vague costs. Further vetting of this issue is required.

Third, Duke’s proposed rule appears to leave the timing of the securitization of coal-retirement costs to the utility’s discretion. Duke’s rule initiates the securitization process upon the filing of a petition by a utility.¹⁹ Although the rule says “[a] public utility *shall* file a petition,” the rule provides no guardrails as to when. Nor does the proposed rule allow the Commission, the Public Staff, or a stakeholder to petition to initiate securitization—even though it is peculiarly to the ratepayers’ benefit that securitization be

¹⁶ See S.L. 2021-165, § 5.

¹⁷ Duke Proposed Rule, § (b)(10)(a).

¹⁸ Duke Proposed Rule, § (b)(10)(b).

¹⁹ Duke Proposed Rule, § (b)(10)(b).

initiated in a timely fashion. The Tech Customers ask the Commission to adopt rules that create some safeguard to ensure a utility seeks securitization in a timely manner.

Fourth, Duke proposes that a utility be required to seek review of its coal-retirement costs only 90 days before it files for a financing order, and that parties have only 60 days for discovery.²⁰ Given the novelty and magnitude of the costs to be securitized, additional time for discovery is warranted. This is especially true given Duke's proposal that, upon petition for a financing order, the Commission must issue an order within 135 days. To ensure that the coal retirement costs to be incorporated in a financing order are adequately reviewed and determined, the Tech Customers ask that a utility be required to seek review of its coal-retirement costs 180 days before seeking a financing order, and that parties have 120 days for discovery.

Fifth, Duke proposes that the petition for a financing order include a "comparison between the net present value of the costs to customers that are estimated to result from the issuance of coal retirement bonds" versus traditional rate-based financing.²¹ Such a comparison could be one of the most telling components of the utility's petition; however, it might not tell a complete story. The maturity of a bond influences the net present value calculation of the bond, both in terms of altering the time period and interest rate used for the net present value calculation. Tech Customers support the recommendation of the Sierra Club and the Natural Resources Defense Council that Duke's petition include an analysis of the costs saved by ratepayers based on different bond maturities.²² Such an

²⁰ Duke Proposed Rule, § (c)(1)(a) & (b).

²¹ Duke Proposed Rule, § (f)(2)(a)(v).

²² See Sierra Club & NRDC Proposed Rule, § 5(b)(2) ("The electric utility's petition shall contain, at a minimum, the following . . . (2) The best estimate of the proposed term in years of the securitization bonds and a sensitivity analysis showing various bond lengths versus savings for

analysis would help the Commission ensure the chosen bonds maximize savings for ratepayers.

Sixth, in Subsection (g)(4) of its proposed rule, Duke asks that, after the issuance of a financing order, the utility retain “sole discretion” as to whether and when to transfer coal retirement property or cause bonds to be issued.²³ It appears Duke’s proposal would allow a utility to secure a financing order and then indefinitely table an issuance without any recourse by the Commission or stakeholders. A utility should not have such unfettered discretion in consummating the securitization process.

CONCLUSION

The Tech Customers respectfully request that the Commission consider the foregoing reply comments in crafting rules to govern the securitization of Duke’s coal retirement costs.

ratepayers. The proposed bond term shall be no less than the remaining regular depreciation schedule and may be longer to increase ratepayer savings.”).

²³ Duke Proposed Rule, § (g)(4) (“Subsequent to the transfer of coal retirement property to an assignee or the issuance of coal retirement bonds authorized thereby, whichever is earlier, a financing order is irrevocable and, except for changes made pursuant to the formula-based mechanism authorized in this Rule, the Commission may not amend, modify, or terminate the financing order by any subsequent action or reduce, impair, postpone, terminate, or otherwise adjust coal retirement charges approved in the financing order. After the issuance of a financing order, the public utility retains sole discretion regarding whether to assign, sell, or otherwise transfer coal retirement property or to cause coal retirement bonds to be issued, including the right to defer or postpone such assignment, sale, transfer, or issuance.”)

Respectfully submitted, this 20th day of December, 2021.

TECH CUSTOMERS



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Certificate of Service

I hereby certify that a copy of the foregoing *Reply 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 20th day of December, 2021.

BROOKS, PIERCE, MCLENDON,
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/s/ Marcus Trathen
