

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-100, SUB 177

In the Matter of		
Rulemaking Proceeding to Implement)	REPLY COMMENTS OF
Securitization of Early Retirement of)	OF CAROLINA UTILITY
Subcritical Coal-Fired Generating)	CUSTOMERS ASSOCIATION
Facilities		

Intervenor Carolina Utility Customers Association, Inc. (“CUCA”), by and through counsel, respectfully submits 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 electricity generating facilities in accordance with House Bill 951 (S.L. 2021-165) (“HB 951”).

REPLY COMMENTS

CUCA was pleased to see that the initial comments filed in this docket are in agreement as to both the significant potential value of securitization of coal-retirement costs and the importance of carefully structuring a securitization program that produces bonds that are marketable and ensures the optimum benefit to ratepayers. Key commenters are united in their concern over the Commission’s authority to effectively fulfill the requirement of HB 951 to enact coal retirement securitization rules that are “substantively identical to the provisions of Section 1 of S.L. 2019-244 (codified as N.C. Gen. Stat. § 62-172, regarding securitization of storm recovery costs),”¹ as well as the need to address these concerns now, before a securitization process begins. In the same regard, the proposed rule

¹ S.L. 2021-165, § 5.

presented by Duke Energy Progress, LLC and Duke Energy Carolinas, LLC (collectively, “Duke Energy”) may be vulnerable to challenge in a number of regards because it (1) materially differs from Section 62-172, and (2) calls on the Commission to exert authority it may not have.

I. Commenters agree on concerns over Commission authority

Initial comments from the Public Staff, the Carolina Industrial Group for Fair Utility Rates II and III (“CIGFUR”), and the Tech Customers (Apple Inc., Google LLC, and Meta Platforms, Inc.) all share CUCA’s concerns over the enforceability of any rule enacted by the Commission in accordance with the directives of HB 951, and the need to address the issue promptly by seeking the advice of bond-industry experts.

In its initial comments, CUCA raised particular concerns whether the Commission has the authority to (1) create a property interest in coal retirement costs, (2) establish that created securities will not be governed by the Uniform Commercial Code, and (3) bind the General Assembly in a non-impairment pledge. These concerns were echoed in a number of other comments. CIGFUR expressed its concern that “the enabling language authorizing the Commission to utilize securitization as a tool to mitigate rate impacts of the early retirement of Duke’s coal fleet may be insufficient.”² The Tech Companies note that “the absence of specific enabling legislation [to securitize coal retirement costs] may call into question the integrity of any order issued thereunder.”³ Finally, the Public Staff also raises

² CIGFUR Initial Cmt., at 3

³ Tech Customers Initial Cmt., at 6.

concerns over the “sufficiency of adopting a rule pursuant to [HB 951] as it relates to [a non-impairment pledge].”⁴

Beyond these shared concerns, commenters are in agreement that action should be taken to address these issues *before* the Commission adopts a rule that could be vulnerable to legal challenge, or that could be unattractive to bond rating agencies and/or the investment community.⁵ In fact, CUCA, CIGFUR, and the Public Staff each independently recommended the Commission seek the opinion of an independent bond counsel to resolve these issues.⁶

As such, commenters are clearly in agreement over uncertainties whether the enabling language of HB 951 provides the Commission the authority to effectuate the securitization of coal retirement costs. For that reason, CUCA urges the Commission to resolve these concerns now, prior to adopting any rule, preferably through the opinion of an independent bond counsel.

II. The proposed rule offered by Duke Energy raises enforceability and oversight concerns.

Assuming that the Commission is able to resolve the foundational concerns cited above, the proposed coal-retirement securitization rule offered by Duke Energy (the “Duke Energy Rule”) provides, together with the draft statutory provisions set forth in Edition 3

⁴ Public Staff Initial Cmt., at ¶¶ 3-4.

⁵ See Tech Customers Initial Cmt., at 7 (“these questions [should] be resolved prior to the adoption of rules”); CIGFUR Initial Comments, at 3 (“[i]t is necessary for the protection of ratepayers to resolve this uncertainty now.”).

⁶ Public Staff Initial Cmt., at ¶ 4 (“The Public Staff believes it advisable to seek input from the investment community, and from independent bond counsel in particular. . . .”); CUCA, Initial Comments, at 8 (“the Commission should obtain the opinion of competent bond counsel”); CIGFUR, Initial Comments, at 3 (the Commission should direct Duke to obtain . . . at least two opinion letters from qualified bond counsel”).

of House Bill 951, a good starting-point for the Commission. However, a number of provisions may still be vulnerable to legal challenge.

On a broad level, the Duke Energy Rule may not adhere strictly enough to the enabling language of HB 951. As noted above, HB 951 requires the Commission to enact coal retirement securitization rules that are “*substantively identical* to the provisions of [N.C. Gen. Stat. § 62-172], except with respect to the purposes for which securitization may be used under that section.”⁷ The Duke Energy Rule proposes a number of deviations from the text of Section 62-172 that are unrelated to the purpose for which securitization may be used. In fact, many alterations appear designed to either give Duke Energy greater control over the securitization process or expand its ability to identify and recoup connected costs. Some examples include:

1. While Section 62-172 tacitly notes the possibility that Duke Energy could act as servicer of securitized products,⁸ the Duke Energy Rule expressly permits the utility to act as servicer, and greatly expands the definition of what can be included as a Servicing fee (and therefore eligible for securitization).⁹
2. The Duke Energy Rule establishes a Bond Advisory Team and enacts rules to govern its process. Although CUCA does not disagree with the

⁷ S.L. 2021-165, Part III (emphasis added).

⁸ N.C. Gen. Stat. § 62-172(d)(1) (requiring notice on electric bills if the public utility is acting as servicer).

⁹ See Duke Energy, Proposed Rule, at (b)26.

establishment of a Bond Advisory Team (see below, Section IV), no such advisory body is contemplated by Section 62-172.¹⁰

3. The Duke Energy Rule defines and establishes specific rules for a number of types of fees, costs, and collections not defined in Section 62-172, including Administration fees,¹¹ Up-front financing costs,¹² Ongoing financing costs,¹³ and Tail-end collections.¹⁴

Because HB 951 specifically requires the Commission to enact securitization rules “substantially identical” to Section 62-172, any rule containing these types of significant departures from Section 62-172’s language and structure would rest on dubious statutory grounds. For that reason, we caution the Commission against accepting the Duke Energy Rule as currently proposed.

It should also be noted that the Duke Energy Rule incorporates, without any commentary, key securitization elements for which the Commission might lack the authority to effectuate via a rulemaking. The proposed rule binds the State of North Carolina to a “pledge of nonimpairment,”¹⁵ it creates a property interest in “coal retirement

¹⁰ *Id.*, at (h)

¹¹ *Id.* at (b)1., (h)3.b.(vi)

¹² *Id.* at (b)31., (h)3.b.(iv)

¹³ *Id.* at (b)20., (h)3.b.(v)

¹⁴ *Id.* at (b)28., (h)3.b.(vii)

¹⁵ *Id.* at (g)1.m., (o). The Duke Energy Rule also purports to impose requirements on other state agencies and branches of government. *See, e.g., id.* at (i)2.d. (“the Secretary of State shall maintain any financing statement filed to perfect any security interest under this Rule”); *id.* at (i)2.g. (“the Superior Court of Wake County shall order the sequestration and payment to them of revenues arising from the coal retirement charges.”).

property,”¹⁶ and it exempts coal retirement based securities from the UCC.¹⁷ For that reason, CUCA urges the Commission to expeditiously resolve these concerns prior to adopting any rule, preferably through the opinion of an independent bond counsel.

III. The Commission should clarify the facilities that fall within the definition of “subcritical” facilities.

As noted in its initial comments, the statutory term “subcritical coal-fired electric generating facilities” is not defined in the securitization provision of HB 951 nor is that term used in Part I of the legislation setting out the carbon reduction requirement.

As should be obvious, Duke is incented to minimize the scope and reach of this term, with the goal of maintaining these facilities on its books and continuing to recover costs from ratepayers, including a return for shareholders at the authorized rate of return.

Consistent with this concern, Duke Energy did not seek to define that term in its proposed rules despite interjecting that terminology in the discussions concerning HB 951—leaving open the possibility of future disagreement concerning the meaning and intent of the term. In aid of these reply comments, CUCA sought clarification directly from Duke Energy of Duke’s proposed definition. On December 17, 2020, Duke’s reply, from counsel, indicated that Duke did not have a proposed definition:

Duke’s reply comments on these and many other issues are still under development, so I am unfortunately not able to provide any details at this

¹⁶ *Id.* at (i)1.a.

¹⁷ *Id.* at (i)2.a.

time, but we anticipate that we will likely address these issue [sic] in our reply comments.¹⁸

It is difficult to understand how, three days before its *reply* comment was due, Duke was still “developing”—or otherwise unwilling to share—its definition of “subcritical,” especially since this term first appeared months ago in earlier iterations of HB 951.¹⁹

Nonetheless, absent other information, CUCA would suggest that the term should be defined consistent with the legislative proceedings surrounding HB 951. There, the version of the bill passed by the House adopted the definition:

“Subcritical coal-fired generating facilities” means the remaining units of the Allen Plant located in Gaston County, Marshall Units 1 and 2 located in Catawba County, the Roxboro Plant located in Person County, Cliffside Unit 5 located in Cleveland County, and the Mayo Plant located in Person County.²⁰

On information and belief, this definition was provided by Duke and it is consistent with the stakeholder discussions at the General Assembly around these issues.

Consistent with this definition, CUCA believes that the facilities that should be defined as “subcritical” for purposes of the securitization provisions of HB 951 include:

- (1) Allen Plant, Units 1, 2, 4, and 5 (Gaston County);
- (2) Cliffside Plant, Unit 5 (Cleveland County);
- (3) Marshall Plant, Units 1 and 2 (Catawba County);
- (4) Mayo Plant, Unit 1 (Person County); and
- (5) Roxboro Plant, Units 1-4 (Person County).

¹⁸ Email from Jack Jirak to Craig Schauer (Dec. 17, 2021) (copy of email is enclosed).

¹⁹ House Bill 951 v.2 (May 12, 2021), at § 1.(b)(4), available at <https://webservices.ncleg.gov/ViewBillDocument/2021/52478/0/H951-PCS10518-RIf-28>.

²⁰ House Bill 951 v.3 (Third Edition Engrossed 7/15/21), at § 1.(b)(4)., available at <https://www.ncleg.gov/Sessions/2021/Bills/House/PDF/H951v3.pdf>.

CUCA's proposed list of subcritical coal assets is generally corroborated by Duke's "ranking of coal plants for retirement analysis," as presented in its 2020 IRPs.²¹

To the extent that Duke proposes a novel definition in reply comments, for the first time, other stakeholders should have the ability to respond. As this term is critical to the implementation of the provision—and given that Duke Energy presumably is in possession of information relevant to this term—Duke Energy should be required to identify the facilities it contends fall within this definition, and its rationale for identifying such facilities, so that stakeholders may offer meaningful comment.

IV. Specific recommendations regarding the adoption of securitization rules.

For the convenience of the Commission, CUCA notes the following issues where it is aligned with the positions of other parties to this docket, including but not necessarily limited to the following:

- CUCA supports the Public Staff's recommendation to integrate factors related to amounts and timing of securitization into the Carbon Plan development process, pending in Docket No. E-100, Sub 179, to enable the Commission to select for "the lowest present value (least-cost) of revenue requirements achievable pursuant to S.L. 2021-165,"²² as required by S.L. 2021-165.
- CUCA agrees with the Public Staff, Sierra Club, and Natural Resources Defense Council that the language providing for the securitization of retired coal assets in

²¹ See DEC 2020 IRP, Docket No. E-100, Sub 165 (Sept. 1, 2020), at 79 (Table 11-A); DEP 2020 IRP, Docket No. E-100, Sub 165 (Sept. 1, 2020), at 81 (Table 11-A).

²² Public Staff Initial Cmts., at 5.

S.L. 2021-165 should be implemented—and all open questions resolved—in the way that provides the greatest savings flowing directly to ratepayers.²³

- CUCA agrees with the Public Staff that the Commission’s rules governing coal retirement securitization should contain the Public Staff’s “Best Practices” recommendations, including:
 - (1) The formation of the Bond Advisory Team comprised of representatives of the Companies, the Commission, and the Public Staff;
 - (2) Inviting all Bond Advisory Team members to join all meetings to review and comment on all aspects of the structuring, marketing, and pricing of the bonds, timely information of which is to be provided in advance to Bond Advisory Team members;
 - (3) Requiring certifications that the structuring, marketing, and pricing of the bonds in fact resulted in the lowest charge to ratepayers consistent with market conditions at the time the bonds were priced and the terms set forth in the Commission’s Financing Orders; and
 - (4) Requiring auditing by the Public Staff of ongoing financing costs associated with the bond issuances.²⁴
- CUCA further agrees with the Public Staff’s recommendation that the Commission’s rules contain language with respect to non-impairment of coal retirement bonds financed and issued pursuant to S.L. 2021-165, in addition to the Commission’s forthcoming rules to implement the pertinent provisions of S.L. 2021-165, and the Commission’s eventual financing order preceding bond issuance.

In addition, CUCA wishes to reiterate its prior recommendations that the Commission should (a) require Duke Energy to disclose immediate information on its coal

²³ See, e.g., Public Staff Initial Cmts., at 5; Sierra Club and Natural Resources Defense Council Initial Cmts., at 5-6.

²⁴ Public Staff Initial Cmts., at 2-3.

fleet, including which plants meet the definition of “subcritical coal-fired electric generating facilities,” and (b) adopt rules modeled on the draft statutory provisions set forth in Edition 3 of House Bill 951 and S.L. 2019-244.

CONCLUSION

In summary, CUCA continues to support the efforts to create a path for securitization of coal retirement costs, but joins its fellow intervenors in encouraging the Commission to seek the opinion of independent bond counsel to resolve uncertainty over the Commission’s authority to effectuate securitization provisions necessary to meet the requirements of the bond market. Further, if such concerns are resolved, the Commission should scrutinize Duke Energy’s proposed rule for provisions not included in Section 62-172 that may leave the Commission’s rule vulnerable to legal challenge.

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

By: /s/ Craig D. Schauer
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Certificate of Service

I hereby certify that a copy of the foregoing *Reply Comments of Carolina Utility Customers Association, Inc.* 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/ Craig D. Schauer

Craig Schauer

From: Jirak, Jack <Jack.Jirak@duke-energy.com>
Sent: Friday, December 17, 2021 11:26 AM
To: Craig Schauer
Cc: Marcus W. Trathen; Richard, Kathleen Hunter
Subject: RE: [EXTERNAL] CUCA request re E-100, Sub 177

[EXTERNAL]

Craig,

Thanks for reaching out. Duke's reply comments on these and many other issues are still under development, so I am unfortunately not able to provide any details at this time, but we anticipate that we will likely address these issue in our reply comments.

If CUCA has any recommended suggestions on these topics (e.g., industry definitions of subcritical coal) that it is able to share in advance of the filing, please pass along and we would be glad to consider.

All the best,

Jack

From: Craig Schauer <CSCHAUER@brookspierce.com>
Sent: Thursday, December 9, 2021 4:53 PM
To: Jirak, Jack <Jack.Jirak@duke-energy.com>
Cc: Marcus W. Trathen <MTRATHEN@brookspierce.com>
Subject: [EXTERNAL] CUCA request re E-100, Sub 177

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Jack,

CUCA is reviewing Duke's proposed securitization rule filed in Docket No. E-100, Sub 177. In its proposed rule, Duke uses the phrase "subcritical coal-fired generating facilities." While this phrase appears in HB 951, it is not defined by the legislation. It appears Duke did not define the phrase in its proposed rule either.

Can Duke provide CUCA with a definition of this phrase as used in Duke's proposed rule? In addition, can Duke identify which coal plants would fall within that definition (and the applicable net book value of those plants)?

Many thanks,
Craig

[Craig Schauer](#)



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