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	)))))	SUPPLEMENTAL REPLY COMMENTS OF OF CAROLINA UTILITY CUSTOMERS ASSOCIATION

Intervenor Carolina Utility Customers Association, Inc. ("CUCA"), by and through counsel, respectfully submits these supplemental reply comments pursuant to the Commission's January 4, 2022 Order Granting, In Part, Motion for Leave.

SUPPLEMENTAL REPLY COMMENTS

CUCA wishes to draw the Commission's attention to three issues raised in the reply comments filed in this docket. First, Duke's indifference as to whether its proposed rules would be legally effective underscores the importance of resolving this threshold issue. Second, it is questionable whether the General Assembly, in using the term "subcritical coal-fired electric generating facility," intended the highly technical definition proposed by Duke and the Public Staff. Third, consistent with the overwhelming consensus of commenting parties and apparent legislative intent, the Commission should calculate the costs to be securitized in a manner that maximizes ratepayer savings.

I. Duke's disinterest in the leading concern of commenting parties—that the General Assembly failed to empower the Commission to securitize coal-retirement costs—underscores the importance of resolving this threshold issue.

Nearly every participant in this docket has expressed concern that Session Law 2021-165 did not to endow the Commission with the authority needed to issue

securitization bonds that will be recognized by the financial community at the desired ratings level.[1] The lone party to be untroubled by this problem is Duke.

Duke admits that it is "necessary to obtain AAA-equivalent credit ratings" in order "to maximize the benefits from securitization for customers."[2] According to Duke, in order to obtain a AAA-equivalent credit rating, the securitization process must include "a true sale of the [coal-retirement] property to a bankruptcy-remote issuer" and "a statutory pledge that neither the State nor the Commission may impair the rights of storm recovery bond holders."[3] As CUCA (and others) pointed out in its Initial Comments, there is a serious doubt that these two elements—which Duke itself claims are "necessary" for a successful securitization—are possible in light of the language of Session Law 2021-165.[4]

Duke does not care. Duke offers no suggestion of disagreement with the serious concerns raised by stakeholders; rather, Duke did not bother to "reach[] a position" on them.[5] That is, having been the driving force behind Session Law 2021-165, Duke now chooses to not "fully evaluate[] the arguments" and to remain ignorant about whether the securitization provisions of its bill could be successful.[6] Duke elected to pursue the strategy

[1] *See* CIGFUR Reply Cmts., at 1–2; Public Staff Reply Cmts., at 2; Sierra Club & NRDC Reply Cmts., at 3; NCSEA Reply Cmts., at 3; CUCA Reply Cmts., at 3; NCRMA Reply Cmts., at 1–2; Tech Customers Reply Cmts., at 2–4.

[2] Duke Reply Cmts., at 3.

[3] *See* Duke Reply Cmts., at 3 (quoting the Companies' Joint Application for Financing Order for storm costs).

[4] CUCA Initial Cmts., at 5–7.

[5] Duke Reply Cmts., at 5.

[6] Duke Reply Cmts., at 5.

of pushing ahead with a proposed rule based on the assumption "that the Commission possess the requisite authority"[7]—a perilous assumption that everybody else has rejected.

Duke's deliberate apathy towards this threshold issue is suspect. One can speculate that Duke's disinterest is driven by a preference that securitization fails and the stranded assets remain in rate base where they, potentially, will continue to earn return at the regulated rate for its investors.[8] Thus, Duke's offer to "dialogue" with other parties to "explore" the issue[9] provides cold comfort of a genuine commitment to resolve the problem. Duke's disregard for its customers' interests only highlights the need for strong and clear action by the Commission to require that (1) Duke actively work to resolve the legal cloud over securitization and (2) Duke's shareholders bear the risk of an ineffectual securitization effort.[10]

II. The definition of "subcritical" coal plants is dictated by the General Assembly's intent.

Session Law 2021-165 does not define the central phrase "subcritical coal-fired electric generating facilities." In its Initial Comments, CUCA sought to ensure the Commission had the information needed to adopt informed rules and, therefore, insisted that Duke, prior to reply comments, propose a definition to this central term and identify

[7] Duke Reply Cmts., at 5.

[8] Duke's preference is a risky gamble. The Commission may well disallow recovery of such costs to the extent that that they are not associated with assets that are used and useful and are unable to be securitized due to ineffectual legislation driven by Duke.

[9] Duke Reply Cmts., at 6.

[10] Duke's lack of incentive to ensure the securitization process is yet another justification for requiring Duke to indemnify ratepayers for the cost of a failed securitization effort. *But see* Duke Reply Cmts., at 6 n.11 (opposing the recommendation of indemnification). If the Commission were to align the financial interests of Duke's shareholders with the financial interests of Duke's ratepayers, then Duke would likely join the chorus of parties expressing concerns regarding the Commission's authority to implement securitization bonds.

the targeted coal facilities and remaining book values.[11] Duke, though, waited until its Reply Comments to propose a definition. Having reviewed Duke's definition (and the Public Staff's definition), CUCA offers the following observations regarding the term "subcritical" as used in Session Law 2021-165.

As a threshold matter, because the General Assembly did not define the word "subcritical," it falls to the Commission to interpret the statutory term. "Statutory interpretation begins with [t]he cardinal principle of statutory construction . . . that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish."[12]

The plain language of the Session Law 2021-165 suggests that "subcritical" refers to any coal plant that is no longer necessary to meet Duke's load. The Meriam-Webster Dictionary defines the word "critical" as, among other things, "indispensable, vital,"[13] and the prefix "sub" is defined as, among other things, "under, beneath, below."[14] The term "subcritical" is defined by Meriam-Webster as "less or lower than critical in respect to a specified factor."[15] In sum, the plain meaning of "subcritical" is *less than indispensable*.

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[11] CUCA Initial Cmts., at 9.

[12] *Benton v. Hanford*, 195 N.C. App. 88, 92, 671 S.E.2d 31, 34 (2009) (citation and quotation marks omitted). *See also* Duke Reply Cmts., at n. 11.

[13] Meriam-Webster Dictionary (2022), available at https://www.merriam-webster.com/dictionary/critical.

[14] Meriam-Webster Dictionary (2022), available at https://www.merriam-webster.com/dictionary/sub.

[15] Meriam-Webster Dictionary (2022), available at https://www.merriam-webster.com/dictionary/subcritical. The dictionary also defines "subcritical as "of insufficient size to sustain a chain reaction" or "designed for use with fissionable material of subcritical mass." These alternative definitions, presumably referring to nuclear reactions, do not appear to be relevant here.

For purposes of securitization, a coal plant that is "subcritical" would be a coal plant that ceases to be indispensable to Duke's generation needs. Indeed, Session Law 2012-156 speaks of the "early retirement" of such subcritical—i.e., dispensable—coal plants because they are no longer needed.[16]

Interpreting the term "subcritical" to mean less than indispensable would also be consistent with both "the spirit of [Session Law 2021-165]" and "what it seeks to accomplish."[17] The General Assembly explicitly tied securitization to the Carbon Plan's retirement of coal plants: Section 5 of the Session Law states that securitization is to occur for all subcritical coal plants "to be retired to achieve the authorized carbon reduction goals set forth in Section 1 of this act," i.e., the Carbon Plan.[18] It goes without saying that in order to reduce carbon emissions, Duke must retire and replace its coal plants. As the generation of the carbon-producing coal plants is replaced by new generation, the coal plants transition from being indispensable or "critical" to being *dispensable* or "*subcritical*." In other words, in using the phrase "subcritical coal-fired electric generating facilities," the General Assembly was referring to any coal plant that Duke retires and replaces to accomplish the State's carbon-reduction goals.

In contrast to this plain interpretation of "subcritical," Duke and the Public Staff proffer an interpretation that is based on a highly technical definition, with Duke citing to an industry treatise for its definition derived from specific technology relating to steam

[16] *See* S.L. 2021-165, § 5.

[17] *Benton*, 195 N.C. App. at 92, 671 S.E.2d at 34.

[18] *See* S.L. 2021-165, § 5.

pressure.[19] Although CUCA does not dispute that *thermodynamic engineers* might read the term "subcritical" to reference precise temperature and pressure levels, it is unlikely that *the General Assembly* understood the term to mean such. There is no evidence that legislators shared this technical definition of the term: "subcritical" is absent from Chapter 62 of the General Statutes, the Commission's rules, and Duke's own IRP filings that identify to-be-retired coal facilities.

Notably, Duke, rather than offering a technical definition of such a central term with its original proposed rules, admitted that it had to "develop[]" its definition in response to an inquiry from CUCA.[20] If an electric utility—with its expert resources to draw upon—did not have such a technical definition on hand in drafting its own proposed rules, then the Commission should have zero confidence that the members of the General Assembly understood "subcritical" to carry such a technical meaning. Our elected representatives, when enacting a law to retire and securitize stranded coal plants, understood the term "subcritical" to refer to a facility that was no longer indispensable to satisfy energy demand—not to a facility with "boiler(s) where constant temperature boiling water cools the furnace enclosure," with "flow circuits [that] are designed to accommodate a two-phase steam-water flow and boiling phenomena," and with "pressure near 2400 psi (16.5 MPa) with superheat and reheat steam temperatures ranging from 1000 to 1050F."[21]

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[19] Duke Reply Cmts., at 12 & n.24; Public Staff Reply Cmts. (Proposed Rule R8-[_](b)(20)).

[20] Email from Jack Jirak to Craig Schauer (Dec. 17, 2021) (copy of email is enclosed with CUCA's Reply Comments); *see also* Duke Motion for Leave to File Supplemental Reply Cmts., at 4 n.2.

[21] Duke Reply Cmts., at 12.

The difference between the two interpretations could be significant in the future. Depending on how the Carbon Plan unfolds and coal-fueled generation evolves, a technical definition could unduly limit the Commission's ability to securitize retired assets. For example, if the Commission were to adopt the technical definition of "subcritical" advanced by Duke, the definition would not capture all of Duke's coal fleet. Specifically, CUCA is under the belief that Belews Creek 1 & 2, Marshall 3 & 4, and Cliffside/Rogers 6 might not fall under the technical definition of "subcritical." As such, the coal plants, hypothetically, could be retired to accomplish Session Law 2021-165's carbon goals yet, paradoxically, ineligible for securitization under the same law. However, if the Commission adopted a definition that comports with the General Assembly's intent in enacting Session Law 2021-165—i.e., retiring and securitizing carbon-emitting coal plants—then the Commission would allow for all of Duke's coal fleet to be eligible for securitization.

Should the Commission adopt a technical definition of "subcritical," however, CUCA asks the Commission to adopt the Public Staff's definition (with slight modification) instead of Duke's definition. Duke's proposed definition opens with a very detailed description of a plant's design: it references "boiling water," "constant temperature," cooling of "the furnace enclosure," "flow circuits," and "two-phase steam-water flow and boiling phenomena."[22] Although boiling water would appear to be a component of a technical definition of "subcritical," it is not clear whether Duke's additional design components are essential *or optional* characteristics of such coal plants. In addition, Duke's definition continues to fail to identify the coal facilities that Duke

[22] Duke Reply Cmts., at 12.

would include within securitization—despite CUCA's request they do so[23] and despite the fact that CUCA, CIGFUR, and the Public Staff all managed to identify a minimum list of facilities to be included within the definition.[24]

Should the Commission adopt a technical definition of "subcritical," CUCA recommends the Commission make the following two modifications to the Public Staff's definition:

> Subcritical coal-fired plant. - A plant that utilizes pulverized coal combustion technology in which the steam pressure within the boiler is below 3200 pounds per square inch and the temperature is below ~~1025~~ 1050 degrees Fahrenheit (550 degrees Celsius) ~~and has a conversion of the energy in the coal to electricity of no greater than 37%~~. The following shall be subcritical coal-fired plants for purposes of this Rule: Allen Plant Units 1, 2, 3, 4, 5; Cliffside Plant Unit 5 at Rogers Energy Complex; Marshall Plant Units 1 and 2; Mayo Plant Unit 1; and Roxboro Plant Units 1, 2, 3, 4.

The first modification aligns the temperature to the full range recognized in the treatise cited by Duke.[25] The second modification eliminates a conversion-rate threshold. It does not appear that a specific conversion-rate threshold is a core component of the technical definition of "subcritical." Moreover, it seems possible that, with advancements in technology, a utility might be able to operate a "subcritical" coal plant at a conversion rate above 37%, and doing so would exclude the coal plant from possible securitization.

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[23] Email from Jack Jirak to Craig Schauer (Dec. 17, 2021) (copy of email is enclosed with CUCA's Reply Comments).

[24] *See* CIGFUR Reply Cmts., at 7-8; Public Staff Reply Cmts. (Proposed Rule R8-[_](b)(20)); CUCA Reply Cmts., at 7.

[25] *See* The Babcock & Wilson Company, *Steam: Its Generation and Use* (42d edition 2015), at 26-1, 26-4.

III. Session Law 2021-165 invites the Commission to craft a rule that determines the costs to be securitized in a manner that favors ratepayers.

The General Assembly made clear that the Commission was to determine how to calculate the costs to be securitized for the coal plants retired to achieve the Carbon Plan.[26] While the statute dictates that the Commission must securitize 50% of the net book value of the plants, the language otherwise leaves the Commission discretion to determine securitized costs.

Duke's proposed rule seeks to shave off some of the value of its coal plants to be securitized. The statute explicitly states that the costs to be securitized are "*at fifty percent (50%)* of the remaining net book value" of its to-be-retired plants. Duke admits that it seeks to "qualify" the statute's express language by saying that "*up to* fifty percent (50%)" of the net book value of its to-be-retired plants will be securitized.[27] Session Law 2021-165 required 50% of net book value to be securitized—no more *and no less*. CUCA agrees with the Sierra Club and the Natural Resources Defense Council that the Commission should reject a rule that contemplates anything less than 50% of the plants' net book value being securitized.[28]

CUCA reiterates its support for the Public Staff's recommendation that, in determining the net book value of coal plants to be securitized, the Commission should determine the securitized costs by selecting "the approach that produces the greatest savings for customers."[29] CUCA agrees the Public Staff's recommendation covers the

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[26] S.L. 2021-165, § 5 ("[T]he Commission shall develop rules to determine costs to be securitized[.]").

[27] Duke Reply Cmts., at 11.

[28] Sierra Club & NRDC Reply Cmts., at 4–5.

[29] Public Staff Initial Cmts., at 4–5.

question of whether net book value is calculated based on each individual facility or all facilities in the aggregate.[30] CUCA believes this recommendation should also extend to the date at which the Commission would calculate a plant's net book value. Duke insists that the net book value to be securitized must be driven by a plant's yet-to-be-determined retirement date.[31] Section 5 of Session Law 2012-165 speaks of securitizing the remaining net book value of all coal plants "*to be retired*" to accomplish the Carbon Plan's goals. The statute references retirement to identify *what* facilities will be securitized, not to dictate *when* the net book value of those facilities will be calculated. The statute does not mandate that net book value be determined at the time of a plant's retirement.

Finally, CUCA shares the concerns of the North Carolina Retail Merchants Association that Duke's proposed rule appears to allow Duke to recover a return different than Duke's weighted average cost of capital.[32] The final rules should not create any opportunities for Duke to reap extra earnings through the securitization process.

CONCLUSION

CUCA supports securitization of coal retirement costs as a means of reducing the financial burden of the Carbon Plan. As such, CUCA (and all the stakeholders) ask the Commission to seek the opinion of independent bond counsel to resolve uncertainty over the Commission's authority to effectuate securitization. CUCA also appreciates the Commission's consideration of recommendations regarding the definition of "subcritical" and how best to determine the costs to be securitized.

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[30] *See* Public Staff Initial Cmts., at 4–5.

[31] Duke Reply Cmts., at 9–10, 15.

[32] NCRMA Reply Cmts., at 2 (citing subsection(h)3.D.viii(1) of Duke's proposed rule).

Respectfully submitted, this 12th day of January, 2022.

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Certificate of Service

I hereby certify that a copy of the foregoing *Supplemental 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 12th day of January, 2022.

BROOKS, PIERCE, MCLENDON,
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