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 CUCA

Carolina Utility Customers Association, Inc. ("CUCA"), by and through counsel, respectfully submits 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).

BACKGROUND

On October 13, 2021, the Governor signed into law House Bill 951 ("HB 951"), which requires the Commission to adopt rules authorizing the securitization of costs associated with early retirement of subcritical coal-fired electric generating facilities ("coal retirement costs") owned by Duke Energy Progress, LLC and Duke Energy Carolinas, LLC (collectively, "Duke Energy"). *See* S.L. 2021-165, Part III. Although HB 951 itself does not set forth specific enabling statutory provisions, it directs the Commission to adopt rules "substantively identical to the provisions of Section 1 of S.L. 2019-244," which adopted a mechanism for securitization of storm recovery costs. *Id.* Consistent with S.L. 2021-165, on October 14, 2021, the Commission issued its Order Requesting Comments and Proposed Rules in the above-referenced proceeding requesting comment, generally, on securitization of coal retirement costs.

INITIAL COMMENTS

Consistent with the Governor's Clean Energy Plan goals, HB 951 directs the Commission 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] from 2005 levels by the year 2030 and carbon neutrality by the year 2050." *See* S.L. 2021-165, Part I. The achievement of these goals will require closure of a substantial portion of Duke Energy's existing coal fleet, the details of which are to be established by the Commission through adoption of a Carbon Plan, the first of which is to be established by December 31, 2022.

HB 951 could not be more clear that the Carbon Plan must be considered based on "least cost" principles which, among other things, requires efforts to minimize adverse impacts on ratepayers. In this regard, HB 951 sought to mandate use of a tool—securitization—to help minimize adverse rate impacts on ratepayers.

CUCA supports securitization as a tool, among others, to mitigate adverse impacts on ratepayers. However, CUCA has significant concerns about the manner in which securitization is being implemented here.

1. Securitization, If Properly Implemented, Offers Significant Ratepayer Benefits.

As noted by Duke Energy in connection with its Joint Petition for Financing Orders under N.C. Gen. Stat. § 62-172 (storm recovery costs), securitization has been used by utilities at least sixty-six times since the mid-1990s to recover authorized costs in a manner designed to produce significant customer savings.[1] With the "appropriate statutory

[1] *See* Direct Testimony of Charles N. Atkins II. for Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, Docket Nos. E-7, Sub 1244; E-2, Sub 1262 (Oct. 26, 2020), at 7-8.

framework and a carefully crafted financing order," the use of securitization benefits ratepayers by offering a significantly lower cost of capital (through low-risk bonds) as compared to traditional investor-owned utility rates of return.[2]

To achieve the carbon emission reductions called for by S.L. 2021-165, Duke Energy will be required to develop and implement a plan to retire a significant portion (if not all) of its coal-fired power plants within North Carolina. This process will result in significant stranded assets remaining on Duke Energy's books, which—in the absence of disallowance, securitization, or some other regulatory treatment—will likely be passed through to ratepayers at the utility's rate of return notwithstanding that the assets are no longer "used and useful."

The implementation of securitization as a vehicle for recovering these stranded costs has the potential to significantly reduce the cost burden borne by ratepayers. By comparison, when seeking Commission approval to issue bonds related to storm recovery costs, pursuant to N.C. Gen. Stat. § 62-172, Duke Energy estimated that the relative savings to Duke Energy customers of securitization would be 32-33% when compared to traditional storm cost recovery methods.[3] Assuming similar savings, securitization of coal plant stranded costs could save ratepayers billions.

2. <u>The Commission Should Determine, as a Threshold Matter, Whether It Possesses the Necessary Statutory Authority to Effectuate Securitization Rules Enacted in Accordance with S.L. 2021-165</u>.

In spite of the potential benefit of securitization, there is a risk that the Commission lacks legal authority to enforce portions of the rules it has been called upon to enact. If

[2] *Id.*

[3] *See* 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 14–15.

doubts persist about the Commission's power to create the intended security instruments, then investors might not be willing to purchase the resulting bond or will do so only at a premium[4]—preventing ratepayers from obtaining the intended benefits of S.L. 2021-165.

To alleviate such concerns, CUCA encourages the Commission to engage bond counsel to issue an opinion concerning the enforceability of the interests underlying the securitization in issue and the marketability (including any impairment thereof) of any bonds issued under authority of Commission rulemaking.

As a statutorily created administrative body, the Commission "'is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislature grant of authority.'" *Beason v. North Carolina Dept. of Secretary of State*, 226 N.C. App. 222, 229, 743 S.E.2d 41, 46 (2013) (quoting *Boston v. N.C. Private Protective Servs. Bd.,* 96 N.C. App. 204, 207, 385 S.E.2d 148, 150–51 (1989)). Moreover, the legislature may not delegate its legislative power to an agency, though it is permitted to transfer "adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers." *Adams v. N.C. Dept. of Nat. and Econ. Res.*, 295 N.C. 683, 696-97, 249 S.E.2d 402, 410 (1978); *see also State ex rel. Utils. Comm'n v. Empire Power Co.*, 112 N.C. App. 265, 273-74, 435 S.E.2d 553, 557 (1993) (finding the specific and general standards in Chapter 62, when read together,

[4] *See, e.g., id*., at 10 ("Moreover, for investors to accept these bonds with virtually no excess debt service coverage or overcollateralization, the rating agencies and investors need to be persuaded that over the life of the transactions, there is little risk of political and regulatory interference from the legislature and/or a subsequent Commission that may delay payments on the bonds.").

sufficient to permit the Commission to adopt standards for review of certificates of public convenience and necessity).

As noted above, S.L. 2021-165 requires the Commission to enact securitization rules "substantially identical" to the provisions authorizing securitization of storm costs in N.C. Gen. Stat. § 62-172. However, Section 62-172 includes a number of enactments that fall outside the Commission's usual administrative authority. Specifically, the Commission would be required to:

(1) Issue financing orders to approve and regulate the issuance of bonds;

(2) Provide for creation of a property interest in the Retirement Costs of utilities ("energy transition property");

(3) Establish that: (a) a financing order and related energy transition property remains in effect until bonds have been paid in full or defeased, and all financing costs have been recovered in full; and (b) the financing order remains in effect regardless of the utility's reorganization, bankruptcy or other insolvency, merger, sale, or default;

(4) Impose obligations on any successor public utility to "perform and satisfy all obligations of . . . a financing order (including created energy transfer property);

(5) Creation of a security instrument that is governed by the Commission's regulations, and not by the Uniform Commercial Code;

(6) Provide that energy transition bonds are not public debt, and the State is not liable on any such bonds;

(7) Require that the State and its agencies will not take action to impair the bonds.

See id. Of these requirements, only numbers one and four—approving and regulating the grant and transferability of bonds among public utilities—appear to fall within the Commission's commonly-exerted authority. *See* N.C. Gen. Stat. §§ 62-2(b), 62-30. Each of the other items reach beyond the regulation of utilities specifically, and may require the

Commission to exert authority over other regulatory agencies and the General Assembly itself. It is not clear whether the General Assembly may properly delegate its authority in this regard, or whether the standards set forth in Chapter 62 provide the legislative standards or guidance required by *Adams*.

Three items are of particularly notable concern.

First, the Commission is required under S.L. 2021-165 to *create* a property interest in the form of energy transition property. This interest forms the basis of bonds created to securitize retirement costs. However, the Commission has not been directly granted the authority to create property interests. While Article 8 of Chapter 62 prohibits a utility from pledging "its faith, credit, moneys or property for the benefit of any holder of its preferred or common stocks or bonds, nor for any other business interest with which it may be affiliated" without the approval of the Commission, that authority does not contemplate creation of any underlying interests in the first place. *See* N.C. Gen. Stat. § 62-160. Relatedly, under the present circumstances, the assertion of such authority in the absence of express statutory authorization and clear "guiding standards" would raise significant concerns of an improper delegation of legislative authority. *See Adams*, 295 N.C. at 696-97, 249 S.E.2d at 410.

Second, the Commission must establish rules for security interests that supersede those in the state's Uniform Commercial Code. In North Carolina, the Uniform Commercial Code governs the legality and creation of security interests. *See* N.C. Gen. Stat. § 25-9-109. Section 62-172, however, explicitly stated that the statutory process for the securitization of storm costs superseded the Uniform Commercial Code, N.C. Gen. Stat. § (e)(2)(a)—thus displacing North Carolina's law governing security interests. The

legislature has the power to write, re-write, or displace statutory law, as it did with Section 62-172. *See Kornegay v. City of Goldsboro*, 180 N.C. 441, 105 S.E. 187, 192 (1920). State agencies, such as the Commission, do not have such power. *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.").

Third, the Commission must provide that the State and its agencies will take no later action that would impair any bonds created, but such a rule would require the Commission to exert authority over other North Carolina agencies and the General Assembly. Given that the Commission is a creature of the General Assembly, there are serious constitutional questions about the Commission having the ability to bind the very hands that created and empowered the Commission—which leaves doubt as to the Commission's power to create a property interest that could not be impaired by another governmental body.

Thus, the General Assembly has not directly granted the Commission authority anywhere in Chapter 62 to create energy transfer property, or security instruments based thereupon. The General Assembly did not (and cannot) empower the Commission to rewrite statutory law. The Commission also, it seems, cannot exert control over other agencies and the General Assembly in order to regulate such instruments.

Yet, in the face of these serious concerns, the policies set forth in Section 62-2 might provide some standards for regulation of retirement cost bonds. *E.g.* N.C. Gen. Stat. § 62-2(4) ("provide just and reasonable rates and charges for public utility services . . ."); *id.* § 62-2(4a) ("assure that facilities necessary to meet future growth can be financed by

the utilities operating in this State on terms which are reasonable and fair to both the customers and existing investors of such utilities"); *id.* § 62-2(10)(c) ("promote the development of renewable energy and energy efficiency through the implementation of a Renewable Energy Efficiency Portfolio Standard (REPS) that will . . . [e]ncourage private investment in renewable energy and energy efficiency"). Alternatively, the rulemaking directive of S.L. 2021-165 to enact rules "substantially identical" to N.C. Gen. Stat. § 62-172 may provide a sufficient standard to meet the constitutional requirements of *Adams*.

In sum, serious questions surround the Commission's ability to create the necessary security instruments. Because of these significant questions, and to provide certainty as it moves forward with this rulemaking, the Commission should obtain the opinion of competent bond counsel that it has authority to enforce any rules enacted in accordance the requirements of S.L. 2021-165.

Should the Commission move forward on the basis of the existing legislation, Duke Energy, as the chief proponent of HB 951 and the party most responsible for its passage, should be required to indemnify and hold harmless ratepayers from any costs and expenses[5] that are incurred with any unsuccessful securitization efforts.

(3) <u>Proposed Rules and Requests for Information</u>

To the extent that other stakeholders propose specific rules to implement securitization, CUCA will review and offer comments, as may be appropriate. However,

[5] These costs and expenses are not insubstantial. Estimated up-front financial costs associated with storm cost recovery securitization bonds are $4.4 million (DEC) and $7.1 million (DEC). *See* DEC Issuance Advice Letter, Docket No. E-7, Sub 1243 (Nov. 18, 2021), at Attachment 2; DEP Issuance Advice Letter, Docket No. E-2, Sub 1262 (Nov. 18, 2021), at Attachment 2.

should the Commission conclude that it possesses the requisite authority to implement securitization under HB 951, CUCA notes that the following matters should be addressed.

- Immediate information on coal plants. Prior to the submission of Reply Comments, Duke Energy should be required to disclose the current and projected net book value of the subcritical coal facilities, which would allow the intervenors to understand the associated costs and incorporate that information into their Reply Comments.
- Definition of "subcritical coal-fired electric generating facilities." The critical 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 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, sufficiently in advance of the reply comments so that stakeholders may offer meaningful comment.
- Model rules. To the extent possible, any proposed rules should be modeled on the draft statutory provisions set forth in Edition 2 of HB 951 (which provided extensive detail on the securitization requirements and process) and S.L. 2019-244 (the legislation for storm securitization costs).

CONCLUSION

CUCA respectfully requests that the Commission consider the foregoing Initial Comments, including its request that Duke Energy be required to submit certain

information prior to, and sufficiently in advance of, the Reply Comments deadline so that intervenors may consider such information in connection with their Reply Comments.

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

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Certificate of Service

I hereby certify that a copy of the foregoing *Initial Comments of CUCA* 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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