

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-100, SUB 177

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
Rulemaking Proceeding to)	SUPPLEMENTAL
Implement Securitization of Early)	REPLY COMMENTS OF
Retirement of Subcritical Coal-)	CIGFUR II & III
Fired Generating Facilities)	

NOW COME the Carolina Industrial Group for Fair Utility Rates II (CIGFUR II) and the Carolina Industrial Group for Fair Utility Rates III (CIGFUR III) (collectively, CIGFUR), pursuant to the Commission's January 4, 2022 Order Granting, In Part, Motion for Leave, and respectfully submit the following supplemental reply comments in the above-captioned docket. At the outset, CIGFUR hereby reiterates and incorporates by reference herein the initial comments it filed in this docket on November 22, 2021, and the reply comments it filed in this docket on December 20, 2021.

Next, CIGFUR respectfully provides the following supplemental reply comments:

- Consistent with its Initial and Reply Comments, CIGFUR notes that every other party to this rulemaking proceeding¹—save for Duke—shares CIGFUR's serious concerns that the language contained in S.L 2021-165 (House Bill 951) may be legally insufficient to effectuate the statutory directive to securitize 50% of the net book value of coal retirement costs

¹ See, e.g., Reply Comments of CIGFUR II & III at 1-2; Reply Comments of the Public Staff at 2; Reply Comments of the Sierra Club and NRDC at 3; Reply Comments of NCSEA at 3; Reply Comments of CUCA at 3; Reply Comments of NCRMA at 1-2; Reply Comments of Tech Customers at 2-4.

and, as a result, agrees with CIGFUR's recommendation that the Commission should seek (or direct Duke to seek) qualified, independent bond counsel to opine on this issue. Based on North Carolina case law, CIGFUR believes there is a chance that if the Commission attempted to promulgate the requisite non-impairment language as an agency rule, a colorable challenge to the rule may exist on the grounds that the rule exceeds the Commission's statutory authority, effectively changes North Carolina substantive law, and amounts to an unconstitutional delegation of legislative powers.²

- Juxtaposed against the serious concerns universally echoed by every other party to this proceeding, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (together, Duke) nonchalantly state in their Reply Comments as follows:

At this time, **the Companies have not fully evaluated the arguments of intervenors as enumerated above nor reached a position on the points raised as to the legal sufficiency of HB 951 to accomplish its goals.** Instead, the Companies have focused on developing and proposing a Coal Retirement Securitization Rule in accordance with HB 951 and in response to the Commission's *Order Requesting Comments and Proposed Rule*, under the assumptions that the Commission possesses the requisite authority to issue the Coal Retirement Securitization Rule and that HB 951 is sufficient as written. However, should it be determined at a future date that additional statutory modifications are required to achieve a successful securitization, **the Companies are committed to dialoguing with interested parties to explore such changes.**³

² See, e.g., *Adams v. North Carolina Dept. of Natural and Economic Resources*, 295 N.C. 683, 698 (1978); *Bring v. North Carolina State Bar*, 348 N.C. 655, 501 S.E.2d 907, *reh'g denied*, 348 N.C. 655, 514 S.E.2d 271 (1998); *In re Declaratory Ruling by NC Comm'r of Insurance Regarding 11 N.C.A.C. 12.0319*, 134 N.C. App. 22, 26 (1999).

³ Duke's Reply Comments at 5-6 (emphasis added).

- The legislative directive that Duke shall securitize 50% of its coal retirement costs was an integral component of the months-long stakeholder negotiations that culminated in the enactment of House Bill 951.⁴ That ratepayers should receive the maximum amount of cost savings flowing from such securitization was both what the Legislature intended and a bargained-for compromise without which Duke would have been unable to garner the necessary votes from lawmakers to pass House Bill 951. For these reasons, Duke’s nonchalant, avoidant reaction should only highlight the importance and urgency of needing to address as soon as practicable the valid concerns universally espoused by nearly every other party to this docket. Moreover, that Duke is “committed to dialoguing with interested parties”⁵ in the future should the concerns articulated by nearly all other parties to this docket come to fruition is woefully inadequate. As stated in CIGFUR’s initial comments, CIGFUR maintains “that it is necessary for the protection of ratepayers to resolve this uncertainty now, on the front end, when a solution – to the extent one may be needed – can more readily be obtained either through regulatory or legislative means, or both[.]”⁶
- CIGFUR generally supports the Public Staff’s proposed rule as set forth in Exhibit A to its Reply Comments and believes that the Public Staff’s

⁴ See, e.g., John Downey, “NCMA wants utility regulation issues addressed before it endorses Duke Energy-backed reform bill,” Charlotte Business Journal (June 21, 2021), available at <https://www.bizjournals.com/charlotte/news/2021/06/21/ncma-manufacturing-duke-energy-nc-utility-reform.html> (last accessed Jan. 9, 2022).

⁵ Duke’s Reply Comments at 6.

⁶ CIGFUR’s Initial Comments at 3.

proposed rule serves the public interest and effectuates legislative intent more so than does Duke's proposed rule. More specifically, CIGFUR strongly supports the Public Staff's contention, as echoed by CIGFUR, the Tech Customers, and the Sierra Club and NRDC in reply comments,⁷ that all unanswered questions—for example, whether 50% of coal-retirement costs means the net book value of each retired subcritical coal-fired plant individually, or of all such plants in the aggregate—should be resolved in whichever way maximizes benefits and savings for ratepayers.

- Because they serve to further ensure savings for ratepayers are maximized consistent with the overarching legislative intent to utilize securitization of coal-retirement costs as a means of offsetting House Bill 951 compliance costs to be borne by ratepayers, CIGFUR strongly supports the Public Staff's revised provisions related to the “bond advisory team” and “issuance advice letter” processes as set forth in the Public Staff's Reply Comments and Exhibit A attached thereto, as well as the additional “best practices” recommended by the Public Staff.⁸
- CIGFUR agrees with the Public Staff that securitization of coal retirement costs is inextricably intertwined with many of the decisions that will be ripe for Commission consideration in development of the Carbon Plan. More specifically, CIGFUR agrees with the Public Staff that “the Carbon Plan and interrelated timing and sequencing of retirements of subcritical coal-

⁷ See, e.g., Tech Customer's Reply Comments at 5; CIGFUR's Reply Comments at 3; Reply Comments of the Sierra Club and NRDC at 2.

⁸ See Public Staff's Reply Comments at 3, 6, 10-14.

fired generating facilities will substantially impact the securitization of coal plan retirement costs.”⁹ CIGFUR further agrees with the Public Staff that “[s]ecuritization is a key consideration for optimal resource analyses in general, and the Carbon Plan in particular.”¹⁰

- CIGFUR agrees with the Tech Customers that Subsection (g)(4) of Duke’s proposed rule, if adopted by the Commission, would allow the utility to retain “unfettered discretion” over “whether and when to transfer coal retirement property or cause bonds to be issued” after a financing order is issued by the Commission. Such a process could ostensibly contravene the statutory directive that 50% of coal-retirement costs shall be securitized for the benefit of ratepayers, if the utility in its sole discretion decides to “indefinitely table [a bond] issuance without any recourse by the Commission or stakeholders.” For this reason, CIGFUR encourages the Commission to reject this provision of Duke’s proposed rule.
- For the reasons set forth in CUCA’s supplemental reply comments, CIGFUR agrees that should the Commission decide to adopt a technical definition for the term “subcritical coal-fired plant,” it should use the Public Staff’s proffered definition as modified in CUCA’s supplemental reply comments. In addition, for the reasons set forth in CIGFUR’s reply comments which CIGFUR will not repeat here,¹¹ CIGFUR reiterates the importance of identifying as soon as possible the specific plants and units

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ *See* CIGFUR’s Reply Comments at 7-8.

within Duke's coal fleet that meet the Commission-determined criteria for qualifying as "subcritical."

- CIGFUR agrees with NCRMA that Duke's proposed rule appears to allow "a return that is higher than the return at the time an individual recovery bond is priced,"¹² and that this approach should be rejected as inconsistent with the directives set forth in N.C. Gen. Stat. § 62-172(b)(3)b.3, with which future coal retirement bonds are to comply pursuant to House Bill 951.

CIGFUR appreciates the opportunity to file these supplemental reply comments regarding the adoption of rules to implement the pertinent provisions of S.L. 2021-165.

WHEREFORE, CIGFUR respectfully requests that the Commission consider these supplemental reply comments.

Respectfully submitted this 12th day of January, 2022.

BAILEY & DIXON, LLP

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¹² NCRMA's Reply Comments at 2.

CERTIFICATE OF SERVICE

The undersigned attorney for CIGFUR certifies that she served by electronic mail the foregoing Supplemental Reply Comments of CIGFUR II & III upon the parties of record in this proceeding, as set forth in the service list for this docket maintained by the Chief Clerk of the North Carolina Utilities Commission.

This the 12th day of January, 2022.

By: /s/ Christina D. Cress
Christina D. Cress