STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. M-100, SUB 145

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Rulemaking Proceeding to Consider Proposed Rule Establishing Procedures for Settlements and Stipulated Agreements	))))	ORDER DECLINING TO ADOPT PROPOSED SETTLEMENT RULES

BY THE COMMISSION: On July 14, 2016, North Carolina Waste Awareness and Reduction Network, Inc. (NC WARN) filed a Petition for Rulemaking in the above-captioned docket. In summary, NC WARN alleged that in recent significant Commission dockets it experienced unfair impediments to participating fully in negotiated settlements by the Public Staff and other parties. In support of its allegations, NC WARN attached a summary of pertinent proceedings in four Commission dockets. NC WARN asserted that settlements are often reached between the Public Staff and the utility or between the utility and another party without other parties having the opportunity to enter into the negotiations. Further, NC WARN stated that settlements are sometimes reached before the deadline for other parties to intervene, file testimony, or conduct discovery, and at other times the settlements are presented just days prior to the expert witness hearing, without adequate time for expert review.

In addition, NC WARN contended that settlements often are presented to the Commission as a fait accompli, in that the settlement includes a non-severability clause providing that no portion of the settlement will be binding on the settling parties unless the settlement is approved by the Commission in its entirety.

Moreover, NC WARN stated that all settlements should be filed openly with full transparency. NC WARN asserted that there is a lack of transparency of the terms of settlements, especially when side agreements, such as between the utility and another party, are not filed with the Commission, or are filed under seal as confidential trade secrets. NC WARN stated that a case in point was the merger between Duke Energy Corporation and Progress Energy, Inc., in Docket Nos. E 7, Sub 986 and E-2, Sub 998. According to NC WARN, numerous “secret agreements” were made so that major parties would agree to the merger.

NC WARN stated that it was unable to find model rules for settlements or rules by other Commissions incorporating settlement procedures into their hearing procedures. It further noted that many judicial bodies across the country have requirements that parties to litigation enter into mediated settlement discussions, but that these guidelines do not include time limits or address the question of multiple parties entering into a settlement under specific requirements.

In addition, NC WARN attached an essay authored by Scott Hempling entitled "Regulatory Settlements: When Do Private Agreements Serve the Public Interest?" (Hempling article). NC WARN stated that Hempling's conclusions are summarized in two principles:

(1) A settlement proposal must be backed by principles and evidence aligned with commission priorities.

(2) The resources, expertise, and alternatives available to each party must be roughly equivalent. Under these conditions, no one party's view of "the public interest" prevails for reasons other than merit.

Finally, NC WARN attached a proposed rule that it suggested as a starting point for the Commission and parties to use in developing a rule to establish a settlement process that NC WARN would view as fair and transparent. NC WARN stated that it would be glad to work with other parties and interest groups to develop this rule and to provide additional comments in support of the proposed rule. The primary components of the rule proposed by NC WARN are: (1) the Commission should encourage the parties to settle matters between and among themselves in order to reduce the issues to be heard by the Commission; (2) settlements filed with the Commission shall be supported by credible evidence, expert testimony, and exhibits; (3) the Commission will not accept a settlement until 10 days after the deadline for intervention or the filing of expert testimony established by the Commission; (4) the settlement shall be accompanied by a statement that all of the parties had the opportunity to participate in the settlement negotiations, and to review and comment on the settlement at least 10 days before it was filed with the Commission; (5) all parties should be encouraged to file statements as to which provisions of the settlement they support, oppose, or have no position on; (6) the parties entering into the settlement shall file expert testimony and exhibits providing support for the settlement; (7) the Commission will not accept settlements that require acceptance of the settlement in its entirety or not at all; (8) parties should be encouraged to submit data requests or pursue other discovery as soon as possible so that the information available to all parties is roughly equivalent prior to the review of the settlement. Late-filed discovery requests will not provide grounds to extend the settlement review period; and (9) all parties should carefully examine all filings in order to minimize, if not eliminate, filings under seal as confidential.

On August 1, 2016, the Commission issued an Order Requesting Comments on Proposed Rule. The Order requested that the Public Staff and other interested parties file comments and reply comments on the rule proposed by NC WARN. In addition, the Order included the investor-owned electric and natural gas public utilities as parties to this docket without the need for those entities to file petitions to intervene.

Petitions to intervene were filed by Carolina Utility Customers Association, Inc. (CUCA) and the North Carolina Sustainable Energy Association (NCSEA). The Commission issued Orders allowing the intervention of NCSEA and CUCA on August 1, 2016 and August 25, 2016, respectively.

On September 16, 2016, initial comments were filed by the Public Staff; jointly by Duke Energy Carolinas, LLC (DEC), Duke Energy Progress, LLC (DEP), Virginia Electric and Power Company d/b/a Dominion North Carolina Power (DNCP), Piedmont Natural Gas Company, Inc. (Piedmont), Public Service Company of North Carolina, Inc. (PSNC), and Frontier Natural Gas Company, LLC (Frontier) (collectively, utilities); NCSEA and NC WARN.

On October 14, 2016, reply comments were filed by the Public Staff, CUCA and NC WARN.

Summary of Comments

Public Staff

The Public Staff opposes the rule proposed by NC WARN. The Public Staff states that the rule is unnecessary and would hinder good faith negotiations between parties in Commission proceedings, citing the history of parties working together to resolve issues through settlement, and G.S. 62-69(a) requiring the Commission to encourage the parties to settle dockets through stipulations, settlement agreements and consent orders. In addition, the Public Staff cites State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 466, 500 S.E.2d 693, 703 (1998), and Knight Publ'g Co. v. Chase Manhattan Bank, 131 N.C. App. 257, 262, 506 S.E.2d 728, 731 (1998) as examples of court decisions touting the benefits of settlements in utilities regulation and business litigation, respectively.

Further, the Public Staff submits that settlements promote the informal exchange of ideas and information among the parties, the elimination of insignificant or noncontroversial issues ahead of an evidentiary hearing, informed decision-making and the efficient administration of justice, especially in the complex matters that are typically before the Commission. Moreover, settlements result in savings to consumers by reducing litigation expenses that would otherwise be recoverable by utilities as a component of the cost of providing utility service.

The Public Staff discusses the Hempling article and states that the apparent thrust of the essay is a concern that settlements can "edge the commission out of its statutory role" and "induce regulatory passivity." Further, Hempling expresses concern about "resource differentials" between parties representing private interests and those representing the public interest. The Public Staff opines that such concerns about resource differentials between utilities and consumers in Commission proceedings were addressed by the General Assembly many years ago with the enactment of G.S. 62-15 and the designation of about 87 former Commission staff positions as the Public Staff. In addition, the Public Staff notes that it is entirely independent of the Commission in the performance of its duties, being under the sole supervision, direction, and control of an Executive Director appointed by the Governor, and is prohibited by G.S. 62-70 from engaging in ex parte communications with the Commission, as are all parties to a pending docket.

Citing State ex rel. Utilities Commission v. Carolina Utility Customers Association, Inc., 348 N.C. 452, 500 S.E.2d 693 (1998) (CUCA I), and State ex rel. Utilities Commission v. Carolina Utility Customers Association, Inc., 351 N.C. 223, 524 S.E.2d 10 (2000) (CUCA II), the Public Staff addresses NC WARN's contention that recent settlements contested by NC WARN were a *fait accompli* and were simply rubber stamped by the Commission. The Public Staff states that in compliance with the above Supreme Court cases, the Commission cannot simply accept a nonunanimous settlement, but instead must weigh all of the evidence and render an independent decision supported by the evidence.

With regard to NC WARN's objection to non-severability clauses in settlements, the Public Staff states that a settlement is a package that represents the give-and-take negotiations of the parties. In the negotiating process a settling party makes trade-offs to obtain the relief that it wants, agreeing in return to the relief that the other party wants. The non-severability clause protects a party from the possibility that the Commission might reject the settlement relief that it bargained to receive and accept the relief that it bargained to give. If that occurs, then the non-severability clause gives the party the right to withdraw from the settlement agreement.

The Public Staff discusses other flaws in the proposed rule, including:

- The proposed rule omits any parameters for maintaining confidentiality in settlement discussions involving proprietary and trade secret information that is filed with the Commission under seal. It is impractical to allow a party to participate in settlement discussions without having signed a confidentiality agreement, as that party lacks the full information necessary to meaningfully participate. Additionally, the parties should be required to affirm compliance with North Carolina Rule of Evidence 408, which prohibits the admission of evidence related to settlement discussions.

- The prohibition on filing settlements before intervention/testimony deadlines would nullify the goal of promoting judicial economy, and appears to be an attempt to require the stipulating parties to provide other parties with a basis for opposing a settlement without conducting discovery.

- The timelines in the proposed rule are unrealistic. Constructive settlement discussions are a complex process. They become possible as the parties develop their respective cases through discovery and analysis and determine that a good faith opportunity exists to explore resolving some or all of the issues. For example, it is difficult to negotiate rate design in a general rate case if a revenue requirement has not yet been established. Thus, the timeline required for determining whether or not settlement discussions are warranted varies from case to case, and once begun, actual negotiations can range from days to months.

- The proposed rule does not adequately define “opportunity to participate” in settlement negotiations. As noted above, settlement discussions are typically very fluid and involve the exchange of ideas and information between groups

and individuals through various means, sometimes simultaneously. Including every party on every communication is simply not possible. In addition, some parties come into settlement negotiations unprepared to participate, having conducted little or no discovery. Any rule governing the settlement process should contain a provision requiring good faith participation in the process and include a mechanism for excluding parties seeking to delay or obstruct negotiations.

- The proposed rule threatens the constitutional rights of parties to form contracts without government restrictions, citing Muncie v. Ins. Co., 253 N.C. 74, 79, 116 S.E.2d 474, 478 (1960), and Alford v. Textile Ins. Co., 248 N.C. 224, 227, 103 S.E.2d 8, 10-11(1958). Contrary to the principle of freedom of contract, the proposed rule would force parties to engage in settlement discussions with any party, including parties who are abusive, advocate irrelevant issues, negotiate in bad faith, or maintain irrational expectations. The public interest argument of NC WARN does not change the freedom of contract principle, as the Commission remains responsible for making decisions that ensure that the public interest is served by a settlement agreement that the Commission decides to approve. Experience shows that comprehensive settlements between utilities and the Public Staff have produced positive results for consumers, as amply demonstrated by the cases cited by NC WARN in Exhibit A of its Petition. These settlements achieved benefits for consumers that the Commission could not have ordered on its own, such as monetary concessions and regulatory conditions. Additionally, other parties had the opportunity to participate fully in the settlement negotiations by entering into confidentiality agreements to gain access to confidential information provided to the Public Staff, and by taking other steps that would have placed the party in a position to effectively participate in the settlement negotiations. This is the process that has been followed for years, and there is nothing opaque or secretive about it. Any perceived barriers to a party's participation in the process would have been largely of the party's own making.

Utilities

The utilities state that the proposed rule is not reasonable, not necessary to the Commission's implementation of the Public Utilities Act (Act), contrary to the Commission's statutory mandate to encourage settlement, and would effectively erode parties' well established practice of utilizing stipulations to resolve legal and factual issues in contested Commission proceedings. They cite several sections of the Act that establish the Commission's regulatory and rulemaking authority, as well as CUCA I. In addition, the utilities submit that several provisions of the proposed rule contradict the mandate of G.S. 62-69(a) that the Commission encourage settlements, including (1) proposed subsections (b)(1) and (b)(2) prohibiting the Commission from accepting a settlement until 10 days after the later of intervention or the filing of expert testimony would unreasonably constrain the timing and process for parties to file a settlement, and (2) proposed subsection (b)(6) prohibiting non-severability clauses fails to recognize that the

Commission must independently find that the provisions of the settlement are in the public interest, citing CUCA I.

In addition, the utilities note that the Act establishes procedural rights to ensure that all interested parties can fully participate and advocate their interests in Commission proceedings, including G.S. 62-73, 101(c) and 94. In addition, under G.S. 62-79(a), CUCA I, and CUCA II the rights of non-settling parties are protected by requiring that the Commission demonstrate to the appellate courts that it considered all the evidence and used its independent judgment before approving a nonunanimous settlement. The utilities opine that the elaborate procedural, hearing, and appeals process mandated by the Act is working today as designed.

Further, the utilities maintain that the proposed rule is unreasonable because it is based on a fundamental mischaracterization of the existing practice and procedure of resolving contested Commission proceedings. They cite as examples NC WARN's allegations in its Petition and public statements that the settlement process is "unfair and nontransparent," that NC WARN has been "unfairly impeded from participating fully" in proceedings in which it has intervened, that settlements are presented to the Commission as a "fait accompli," and that "secret agreements" result in a lack of transparency. The utilities counter that the settlement of proceedings is a well-established and valuable practice, citing Estate of Barber v. Guilford County Sheriff's Dep't, 161 N.C. App. 658, 661, 589 S.E.2d 433, 435 (2003). Moreover, the utilities submit that compromise by settlement allows the utility, the Public Staff, and other parties to avoid protracted and contentious litigation, to narrow the disputed issues before the Commission, and, in certain cases, to resolve or eliminate conflicting testimony on a given issue. The utilities contend that this is a valuable process for large and small utilities alike. Further, settlements are not a "fait accompli," as the Commission is free to require evidence in support of them, and to accept or reject them as it deems appropriate based on the public interest.

The utilities also contend that the substantive provisions of the proposed rule are either not workable or are unnecessary under the Commission's practices and procedures. They state as an example that proposed subsections (b)(1) and (b)(2) would be unworkable in cases where separate public hearings are not scheduled other than at the opening of the expert witness hearing, or where the Commission determines there is no need for a public witness or expert witness hearing due to lack of protest, or if there is not 10 days between the last public witness hearing and the expert witness hearing. In addition, the utilities state that proposed subsection (b)(3), requiring that all parties be given "the opportunity to participate" in settlement negotiations, would present an impracticable obstacle to the resolution of contested matters before the Commission, without offering any discernable additional benefit. They state that their doors are always open for engaging in good faith and constructive settlement discussions with any and all parties. However, the utilities state that they have determined in certain circumstances that a party's interests and advocacy are completely irreconcilable to the utilities' fundamental position, making it unlikely that settlement discussions would be productive. Based on this experience, the utilities contend that there is neither authority nor benefit in attempting to force parties whose goals and interests are completely contrary to engage in settlement discussions with each other.

With respect to proposed subsection (b)(4), the utilities state that this provision also is unnecessary. They contend that the Act provides parties significant procedural and due process rights to contest stipulations either in testimony, at a hearing or in proposed orders or briefs. Similarly, the utilities submit that proposed subsection (b)(5) is unnecessary because Commission Rule R1-24(c) provides that the Commission may require proof of the facts stipulated to by parties, notwithstanding the stipulation.

In addition, the utilities maintain that proposed subsection (b)(6) is unreasonable and unworkable. They state that non-severability clauses are essential to protect a party's right to revert to its original position if a settlement is not approved by the Commission. Moreover, subsection (c) of the proposed rule, which would encourage timely discovery in Commission proceedings, is also unnecessary. The Commission provides clear guidance in its procedural orders at the outset of a given case regarding the timing and scope of discovery.

Further, the utilities contend that proposed subsection (d) is unreasonable and potentially unworkable to the extent that it is inconsistent with parties' rights under North Carolina law to protect trade secret and other confidential information from public disclosure. They also note that the Commission or any party can challenge a designation of confidentiality.

In conclusion, the utilities request that the Commission dismiss NC WARN's petition.

NCSEA

NCSEA states that settlements should be encouraged, and that transparency promotes public discourse about energy issues, and public confidence, both of which advance the public interest. NCSEA recommends that the Commission consider using prehearing conferences more frequently, or perhaps requiring them in complex proceedings, such as rate cases and mergers. Further, if the Commission is inclined to modify its rules, NCSEA recommends modernizing Commission Rule R1-20 as shown in Exhibits A and B attached to its comments, which are redlined and clean versions of Commission Rule R1-20 that incorporates NCSEA's proposed changes as well as comments to provide context for the proposed changes. NCSEA states that its proposed language updates Commission Rule R1-20 to include language from several sources, including the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions, the General Rules of Practice for the Superior and District Courts, the South Carolina statutes governing that state's Office of Regulatory Staff, and the now-repealed Rules of the North Carolina Supreme Court Implementing the Electric Supplier Territorial Dispute Mediation Program.

NC WARN

NC WARN filed letters from Citizens Action Coalition, Indianapolis, Indiana, Alliance for Energy Democracy, Weaverville, North Carolina, and Institute for Local Self-Reliance, Minneapolis, Minnesota, in support of its proposed rules. In summary, these organizations state their support for the inclusion of all parties in settlement negotiations and greater transparency in settlement agreements. In addition, NC WARN states that further research indicates that no other commission has adopted rules regulating settlements, and that a rule adopted by the Commission could serve as a model for other jurisdictions.

Summary of Reply Comments

CUCA

CUCA states that it has been an active participant in the existing rate case settlement process and believes that, in most circumstances, the process has worked well. It cites as examples settlements in the last DEC and DEP rate cases in Docket Nos. E-7, Sub 1026 and E-2, Sub 1023, respectively, and PSNC's rate case in Docket No. G-5, Sub 565. CUCA further notes that it participated in lengthy settlement discussions with DNCP in its recent rate case, Docket No. E-22, Sub 532, but that despite good faith bargaining a settlement that included all the parties was not reached.

CUCA states that confidentiality of the settlement negotiations is essential to the goal of full and frank discussions. Further, requiring parties to participate in a more formalized structure would be contrary to the confidential and voluntary nature of settlement talks. CUCA states that a settlement is an "offer" to the Commission, supported by competent evidence, that the proposed settlement constitutes a fair and reasonable balancing of the interests of both the utility and its consumers. Thus, the Commission retains plenary power to accept or reject the proposed settlement. CUCA believes that the current, more informal and confidentiality-protected process of settlement is the better way to proceed, and that the sound exercise of the Commission's discretion, rather than a hard and fast rule, is the better way to handle settlements that occur near the start of scheduled hearings.

CUCA states that a significant barrier to NC WARN's participation in the settlement process is NC WARN's staunch refusal to execute appropriate confidentiality agreements. CUCA further states that the utilities and CUCA would be unwilling to have another party participate in settlement negotiations if that party has not executed a confidentiality agreement.

In addition, CUCA states that it reviewed the initial comments filed by the utilities and the Public Staff and agrees with those comments, and it adopts the initial comments of those parties as the balance of its reply comments in this matter.

Public Staff

The Public Staff agrees with NCSEA that prehearing conferences could be used more frequently with positive results, but notes that there is no one-size-fits-all timeline or procedure for settlement discussions. In addition, the Public Staff states that NCSEA's proposed changes to Commission Rule R1-20 to require the Public Staff to act as a facilitator or mediator to resolve disputes and issues, and to advise all participants of circumstances bearing on possible bias, prejudice, or partiality of the Public Staff would be unworkable, as it would hinder the Public Staff's ability to perform its statutory responsibilities on behalf of the using and consuming public. The Public Staff states that it cannot serve as both a neutral facilitator and consumer advocate in the same docket, and that the current version of Rule R1-20 properly recognizes that convening and conducting prehearing conferences is solely a Commission function.

Further, the Public Staff states that the principles and policies underlying the existing settlement process are well established and are more than sufficient to protect the interests of parties who are prepared to participate in good faith. As a result, the Public Staff continues to maintain that the process should not be restricted by additional rules.

NC WARN

NC WARN states that in major electric cases, such as rate cases and mergers, it and similar public advocacy groups have been shut out of settlement discussions. Further, NC WARN reiterates its contention that too many of the settlements are presented to the Commission as a "fait accompli" with "all or nothing" provisions demanding the Commission accept the settlement in its entirety, and that the Commission should always make its own independent findings of fact and conclusions of law, rather than indiscriminately adopt a settlement agreement.

In addition, NC WARN asserts that the utilities believe Commission Rule R1-24(c) authorizes the utilities to settle with some but not all of the parties. In response, NC WARN cites the Court's statement in CUCA I that it "encourages all parties to seek such resolution through open, honest and equitable negotiation." (Emphasis added). Id., at 466, 500 S.E.2d at 717.

NC WARN states that neither the Public Staff nor the utilities offer substantive arguments concerning the time constraints in the proposed rule, only that they are contrary to current practice. It states that the goal of the proposed rule is to encourage open and transparent negotiations, and to insure that no parties are put in an unequitable position of having settlements and stipulated agreements filed before testimony is filed, or a day or two before an expert witness hearing, and that these goals reflect the Act and case law provisions that encourage settlement by all parties.

Discussion and Decision

The Commission agrees with the parties that settlements should be encouraged, and that the Commission should do all it lawfully and reasonably can to facilitate the parties' efforts to reach a full and fair settlement. On the other hand, the Commission as the decision maker cannot be involved in the settlement discussions, or make and enforce rules that have a substantive effect on the parties' settlement negotiations. These parameters are firmly established by the Act and other considerations. In addition, there is a long Commission history in which settlement negotiations have proceeded in a fair, cooperative and productive manner, resulting in hundreds of settlements that the Commission has independently reviewed and subsequently approved, in whole or in part, as serving the public interest. In light of the success of existing settlement practices, the Commission is hesitant to attempt a major "fix" of the process when it is not broken. In addition, the Commission must abide by the following legal requirements and principles.

Pursuant to G.S. 62-69(a), the Commission "shall encourage the parties and their counsel to make and enter stipulations of record." Further, "The Commission may make informal disposition of any contested proceeding by stipulation, agreed settlement, consent order or default." However, irrespective of whether the case is settled or fully litigated, the Commission's orders must be based on competent, material and substantial evidence. G.S. 62-65. In addition, the Commission's authority to accept or reject a nonunanimous settlement is governed by the standards set by the North Carolina Supreme Court in CUCA I and CUCA II. In CUCA I, the Supreme Court held that

> [A] stipulation entered into by less than all of the parties as to any facts or issues in a contested case proceeding under Chapter 62 should be accorded full consideration and weighed by the Commission with all other evidence presented by any of the parties in the proceeding. The Commission must consider the nonunanimous stipulation along with all the evidence presented and any other facts the Commission finds relevant to the fair and just determination of the proceeding.
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> The Commission may even adopt the recommendations or provisions of the nonunanimous stipulation as long as the Commission sets forth its reasoning and makes "its own independent conclusion" supported by substantial evidence on the record that the proposal is just and reasonable to all parties in light of all the evidence presented.

348 N.C. at 466, 500 S.E.2d at 703.

However, as the Court made clear in CUCA II, the fact that fewer than all of the parties have adopted a settlement does not permit the Court to subject the Commission's Order adopting the provisions of a nonunanimous stipulation to a "heightened standard" of review. 351 N.C. at 231, 524 S.E.2d at 16. Rather, the Court said that Commission approval of the provisions of a nonunanimous stipulation "requires only that the Commission ma[k]e an independent determination supported by substantial evidence on the record [and] ... satisf[y] the requirements of chapter 62 by independently considering

and analyzing all the evidence and any other facts relevant to a determination that the proposal is just and reasonable to all parties." Id., at 231-32, 524 S.E.2d at 16.

Where practicable, the Commission applies the rules of evidence used in the superior courts in civil matters. See G.S. 62-65(a). Pursuant to Rule 408 of the North Carolina Rules of Evidence, in pertinent part, "Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible." G.S. 8C-1, Rule 408. There are two main reasons for prohibiting settlement discussions to be used as evidence: (1) to encourage open and frank settlement discussions by the parties regarding the evidence supporting their positions, the strengths and weaknesses of their positions and their parameters for accepting a settlement; and (2) to prevent the court, jury or Commission from knowing the lowest amount or least relief that any party might be willing to accept in resolution of the case.

Thus, in establishing and enforcing any settlement guidelines, the Commission must walk the fine line between encouraging all parties to resolve their differences prior to trial, while avoiding the exercise of any control over the structure or content of the settlement discussions. The Commission's analysis of the best means for striking the proper balance between these principles leads the Commission to the following conclusions regarding the particular rule provisions proposed by NC WARN.

Subsection (a)

> The Commission encourages the parties, as defined in Rule R1-3, to settle matters between and among themselves in order to focus on the issues required to be heard by the Commission. However, settlements and stipulated agreements filed with the Commission shall be supported by credible evidence, expert testimony, and exhibits.

As previously discussed, G.S. 62-69(a) requires the Commission to encourage settlements. Therefore, the first sentence of subsection (a) of the proposed rule is unnecessary. The second sentence of subsection (a) is repeated as a part of proposed subsection (b)(5), and will be discussed subsequently.

Subsections (b)(1) and (b)(2)

> (1) The Commission will not accept a settlement or stipulated agreement between or among parties until 10 days after the deadline for intervention or the filing of expert testimony established by the Commission, whichever comes later.
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> (2) The Commission will not accept a settlement or stipulated agreement until 10 days after the last public hearing, excluding the opportunity for public testimony at the beginning of the evidentiary hearing, if public hearings are scheduled as part of the proceeding.

These rules would create an unworkably narrow window for settlements to be filed. Under the Commission's rules, direct testimony is generally due 10-15 days before the expert witness hearing. See Commission Rules R1-24(g)(2), R1-17(f) and R8-55(h)(i). The Commission's scheduling orders typically set the date for filing direct testimony as 15 days prior to the hearing. Thus, if testimony was due on April 1 and the expert witness hearing was set for April 16, the settling parties would have to file their testimony on April 1, but could not file their settlement before April 11. It appears that NC WARN would like to prevent the Public Staff and other parties from signing a settlement agreement prior to 10 days after filing their testimony. However, the proposed rule would not prohibit that, as the parties could sign a settlement agreement but hold the filing of the agreement until 10 days after filing their testimony. In addition, one likely consequence of the proposed rule would be to discourage the parties from continuing to negotiate towards a settlement of the case after they have filed their testimony. Once a party has filed its direct testimony stating its litigation position on the utility's application, that party has staked out a somewhat rigid position and may find it difficult to settle for any relief that is significantly less.

In addition, one of the chief benefits of a settlement is that it saves parties and ratepayers the expense of fully litigating a case. For example, one of the most labor intensive and, consequently, expensive aspects of litigation is the preparation of testimony. To require a party to file litigation testimony, as opposed to settlement testimony, perhaps as productive settlement discussions are continuing and a settlement is nigh, would be wasteful.

With regard to the proposed prohibition against filing a settlement before the last public witness hearing scheduled in the docket, this would create the same unworkably narrow window for settlement discussions as under proposed (b)(1). The dates set for public witness hearings in a particular docket and the date for the expert witness hearing have no particular timing or relationship. Rather, there are several factors that bear upon the dates set by the Commission for public witness hearings. These factors include the availability of hearing locations, a preference for grouping the hearings on consecutive dates if the locations of the hearings are in the same area of the state, and the Commissioners' schedules. Thus, there is no set time frame for public witness hearings. They could be several weeks prior to the expert witness hearing, or they could be during the same week as the expert witness hearing. For example, in the PSNC rate case, Docket No. G-5, Sub 565, the last public witness hearing was held on August 29, and the evidentiary hearing began on August 30. In the DEC rate case, E-7, Sub 1026, the last public witness hearing was held on July 2, and the expert witness hearing began on July 8.

In addition, there is no compelling reason to require parties to withhold the filing of their settlement agreement until after the date of the last public witness hearing. Similar to the prohibition in proposed subsection (b)(1), it appears that NC WARN would like to prevent parties from signing a settlement agreement prior to the last public witness hearing. However, the proposed rule would not do so, as the parties could sign a settlement agreement but hold the filing of the agreement until after the final public witness hearing. In addition, the Commission encourages parties to begin settlement discussions as soon as they are sufficiently knowledgeable about the facts and issues, and to conclude them as quickly as reasonably possible. This helps provide the Commission and non-settling parties

with sufficient time to review and understand the terms of the settlement before the expert witness hearing. Requiring that a settlement not be reached prior to the last public witness hearing would be an arbitrary and counterproductive rule.

Perhaps NC WARN is concerned that a public witness hearing held after the parties have filed a settlement gives the impression that the hearing is just "going through the motions" to give the appearance of listening to ratepayers, even though the parties, or some of them, have reached a settlement. If that is NC WARN's concern, then NC WARN is ignoring the main purpose of the public witness hearing – to provide the opportunity for ratepayers to express their views and present evidence to the Commission, which has not approved the settlement, and continues to have a duty to consider all the evidence and exercise its independent judgment to decide the case in the public interest.

Subsection (b)(3)

> A statement shall accompany the settlement or stipulated agreement stating that all of the parties had the opportunity to participate in settlement negotiations, and that all of the parties had the opportunity to review and comment on the settlement or stipulated agreement at least 10 days before it was filed with the Commission.

With regard to the first portion of this proposed rule, the Commission agrees that it is preferable when manageable for all parties to have an opportunity to participate in the settlement negotiations. However, the Commission also agrees with the Public Staff that it is not manageable to have a party that has not signed a confidentiality agreement participate in settlement negotiations. Therefore, the Commission does not expect the Public Staff or utilities to include a party who has declined to sign a confidentiality agreement. Further, it sometimes becomes apparent during settlement discussions that a participating party perhaps is not truly interested in settling the case or has settlement interests that hamper the ability or likelihood of other participants to reach agreement on issues they could otherwise resolve. Thus, when it is no longer fruitful to continue to include a party in the settlement meetings, the other parties must have the freedom to exclude the party. On the other hand, settlement discussions are a two-way street. Any party can initiate settlement discussions with any other party, a few of the parties or with all of the parties.

The Commission acknowledges that the Public Staff is in somewhat of a different position than a private party litigant. The Public Staff represents ratepayers and must be guided by the public interest, whereas most private litigants represent only their particular interests. However, the Public Staff is a state agency completely independent of the Commission. The Commission does not and cannot control how the Public Staff investigates dockets, the decisions it makes about how best to represent ratepayers, or the decision it makes about who to include in settlement negotiations or what it believes to be the fairness of a particular settlement agreement. To do so would place the Commission in the unethical position of controlling the ratepayer advocate while also serving as the decision maker. Similarly, the Attorney General's Office (AGO) frequently intervenes to represent consumers in the public interest, under the authority granted in G.S. 62-20. Again, the AGO is a separate agency from the Commission, and the

Commission has no control over its investigations, decisions about how best to represent ratepayers, or decisions about who it chooses to negotiate with or its view as to the fairness of a particular settlement agreement.

With regard to the last portion of proposed subsection (b)(3), the requirement to provide non-settling parties with the settlement agreement at least 10 days before it is filed would create the same unacceptable narrow window for settlement negotiations as previously discussed with regard to subsections (b)(1) and (b)(2). The rule would effectively end settlement discussions if a settlement had not been reached at least 10 days prior to the expert witness hearing. As stated earlier, the Commission encourages parties to begin settlement discussions early and conclude them as quickly as reasonably possible, but requiring that they be concluded at least 10 days prior to the expert witness hearing would be counterproductive.

Subsection (b)(4)

> Parties, including those not entering into the settlement or stipulated agreement, are encouraged to file statements within 10 days of the date as to which provisions of the settlement or stipulated agreement they support, oppose, or have no position on.

The Commission agrees with the general proposition of this proposed subsection and welcomes statements, especially by the non-settling parties, regarding the parties' position on a proposed settlement agreement. However, the Commission concludes that it is unnecessary to adopt a Commission rule on this point.

Subsection (b)(5)

> The parties entering into the settlement or stipulated agreement shall file expert testimony and exhibits providing support for the filing.

As previously noted, G.S. 62-65 requires that the Commission's orders be based on competent, material and substantial evidence. In practice, the settling parties typically file testimony and exhibits in support of their settlement agreement. Therefore, the Commission concludes that it is unnecessary to adopt a Commission rule on this point.

Subsection (b)(6)

> The Commission will not accept settlements or stipulated agreements which require the settlement or stipulated agreement to be approved in its entirety or not at all.

Non-severability clauses are a standard provision in settlement agreements and other contracts. They are intended to protect the benefit of the bargain that each of the settling parties negotiated to receive. For example, the Public Staff may agree to allow the utility to defer certain costs in return for the utility giving up its claim to recover construction work in progress (CWIP). If the Commission "cherry picks" the settlement by

accepting the parties' agreement on cost deferral but rejecting their agreement on CWIP, then the balance of the bargain negotiated by the parties may be seriously impaired.

Of course, a non-severability clause does not prevent the Commission from approving the settlement provisions that it concludes are in the public interest, and rejecting those that are not. Rather, it protects the parties by allowing them to decide whether the Commission's partial approval of the settlement is acceptable to them. If not, then the parties can decide to withdraw from the settlement.

As noted above, CUCA I and CUCA II require the Commission to exercise its independent judgment to determine whether all of the provisions of a settlement agreement are in the public interest. As a result, the Commission does not view itself as being bound by the non-severability clauses included in settlement agreements. Indeed, the Commission has demonstrated its independence from such provisions in several major dockets by adding conditions of its own, or rejecting proposed settlement provisions. See Order Approving Merger Subject to Regulatory Conditions and Code of Conduct, Docket No. E-7, Sub 795 (2006); and Order Granting General Rate Increase, Docket No. E-7, Sub 989 (2012).

Finally, and perhaps most importantly, the Commission does not have the legal authority to prohibit parties from including a non-severability clause in their settlement agreements.

With regard to NC WARN's concern about “secret agreements,” the Commission cannot know about or attempt to regulate every tangential agreement or stipulation entered into by the parties. It is not infrequent that a party intervenes in a docket to obtain relief on a very narrow issue that affects only that party, and the utility resolves that issue with that party without filing a settlement agreement. Nonetheless, the Commission does not impliedly or otherwise condone any “secret agreement,” and especially if such an agreement might impact the position of other parties to the docket. In addition, NC WARN's assertions with regard to secret agreements are not supported by the example it gave, the Duke/Progress merger proceeding, Docket Nos. E-2, Sub 998 and E-7, Sub 986. In that docket, the Commission issued a Post-Hearing Order Requiring Verified Information on November 2, 2011. The Order, among other things, required the merger Applicants to file a copy of all settlements related to the proposed merger. The Applicants subsequently filed 17 settlement agreements under seal. In response to a request under the Public Records Act for public disclosure of the settlement agreements, the Applicants contended that public release of the settlement agreements would chill future settlement negotiations and impede the public policy in favor of settlements. The Commission rejected this argument and required disclosure of the settlement agreements, although the Applicants were allowed to redact provisions that the Commission determined were trade secrets exempted from public disclosure by G.S. 132-1.2. See Final Order on Public Records Act Request, Docket Nos. E-2, Sub 998 and E-7, Sub 986 (August 14, 2012).

Subsection (c)

> Parties are encouraged to submit data requests or pursue other discovery as soon as possible so the information to all parties is roughly equivalent prior to the review of the settlement or stipulated agreement. Late-filed discovery requests will not provide grounds to extend the settlement review period.

In its orders scheduling hearings the Commission sets out very specific time limitations and other guidelines for the parties to follow in conducting discovery. In addition, the scheduling orders include the following statement: "A party shall not be granted an extension of time to pursue discovery because of that party's late intervention or other delay in initiating discovery." Thus, the Commission concludes that it is unnecessary to adopt a Commission rule addressing these points.

Subsection (d)

> All parties should carefully examine all filings in order to minimize, if not eliminate, filings under the seal of confidentiality or trade secret.

Pursuant to the North Carolina Public Records Act, G.S. 132-1.2, a party has the right to file information under seal when the information constitutes a trade secret. The seminal case involving a Commission determination under the Act is State ex rel. Utilities Comm'n v. MCI Telecommunications Corp. (MCI), 132 N.C. App. 625, 514 S.E. 2d 276 (1999). The appeal in MCI arose from Docket Nos. P-100, Sub 133 and P-55, Sub 1022. MCI and other competing local providers (CLPs), objected to public disclosure of certain information that the Commission required the CLPs to provide in their monthly access line reports, which were entitled Questions for Competing Carriers (QCC). In particular, QCC Nos. 11, 12 and 13 required the CLPs to provide detailed plans of when they intended to enter the market for local telephone service and how they intended to provide business and residential customers with such service. In its initial order concerning the matter, on October 21, 1997, the Commission acknowledged that the answers to QCC Nos. 12 and 13 might involve trade secrets. The Commission stated:

> CLPs may, of course, assert their privilege to designate answers to any questions as confidential trade secrets, but they should be prepared at the time of filing to submit a detailed and cogent statement of the reasons therefore, in accordance with the provisions of G.S. 132-1.2(4). (Emphasis in original)

Order Concerning Confidentiality of Report Filings (MCI Order), at p. 2.

The Commission has similarly recognized that the disclosure of certain information could affect a public utility's ability to negotiate with providers of products and services, and the utility's negotiations in other contexts. As a result, the Commission has approved the maintenance of the proprietary nature of such trade secret information. On the other hand, the Commission has also recognized the value of making more information public so as to improve customer confidence in the expenditures made by public utilities and, in the present context, settlement agreements.

In addition, the Commission urges all parties to pay close attention to that portion of G.S. 132-6(c) that provides: “No request to inspect, examine or obtain copies of public records shall be denied on the grounds that confidential information is commingled with the requested non-confidential information.” This provision makes it incumbent on the party claiming confidentiality to redact from each page filed with the Commission only that information that is exempt from disclosure under the Public Records Act. When parties mark as confidential and file under seal the full text of each page of a document, even though much of the text is not trade secret information, that impedes the public's and the other parties’ right to have information that does not belong under seal. Thus, the Commission takes this opportunity to reaffirm the requirement of the MCI Order that parties submit a detailed and cogent statement of the reasons for filing information under seal, and the requirement of G.S. 132-6(c) that parties refrain from including non-confidential information in their claim for confidentiality of trade secrets.

Finally, the Commission appreciates NCSEA's comments regarding prehearing conferences. However, prehearing conferences have little to do with facilitating settlement agreements. Instead, a prehearing conference is a tool by which the Commission can discuss with the parties measures that might be taken to organize the presentation of witnesses and evidence in order to streamline the expert witness hearing. As the decision maker, the Commission has the authority to supervise the entire decision-making process. If necessary, this includes giving the parties direction regarding legal and ethical requirements pertinent to settlement negotiations. However, as previously discussed, the Commission generally refrains from exercising direct control over the settlement negotiation process, other than procedural matters, such as extensions of time, that might assist the parties in their effort to negotiate a settlement.

Conclusion

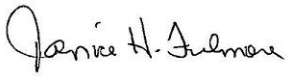
Based on the foregoing and the record, the Commission is not persuaded that there is good cause to adopt the settlement guidelines proposed by NC WARN. As a result, the Commission concludes that NC WARN's Petition for Rulemaking should be dismissed.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the __1st__ day of March, 2017.

NORTH CAROLINA UTILITIES COMMISSION



Janice H. Fulmore, Deputy Clerk