

October 26, 2016

Ms. Paige Morris  
Interim Chief Deputy Clerk  
North Carolina Utilities Commission  
430 N. Salisbury Street  
Raleigh, NC 27603

**RE: NTE Carolinas II, LLC**  
***Application for a Certificate of Public Convenience and Necessity to Construct***  
***a Natural Gas-Fired Electric Generating Facility in Rockingham County,***  
***North Carolina***  
***Docket No. EMP-92, Sub 0***

Dear Ms. Morris:

We are herewith electronically submitting the attached **Motion to Strike and Motion in Limine as to Portions of The Testimony of William E. Powers** in the above-referenced docket.

If you have any questions or comments regarding this filing, please do not hesitate to call me. Thank you in advance for your assistance.

Very truly yours,

/s/Karen M. Kemerait.

Cc: Chris Ayers, Esq.  
Dianna Downey, Esq.  
John Runkle, Esq.

STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH

DOCKET NO. EMP- 92, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of NTE  
Carolinas II, LLC, for Certificate of Public  
Convenience and Necessity to Construct a  
Natural Gas-Fired Electric Generating  
Facility in Rockingham County, North  
Carolina

MOTION TO STRIKE AND MOTION IN  
LIMINE AS TO PORTIONS OF THE  
TESTIMONY OF WILLIAM E. POWERS

NOW COMES NTE Carolinas II, LLC (“NTE” or “Applicant”), through counsel, pursuant to Rules R1-7 and R1-24 of the North Carolina Utilities Commission (the “Commission”) and Rules 402 and 702 of the North Carolina Rules of Evidence, and moves to strike specific portions of the testimony of William E. Powers filed on behalf of NC WARN and to limit testimony, arguments, and cross-examination to only those issues relevant to the issues in this docket. Specifically, NTE requests that the Commission strike

(1) the portion of Mr. Powers’ testimony concerning NC WARN’s general objection to the proposed facility based upon alleged environmental impacts of natural-gas fueled facilities (pg. 9, line 3 to pg. 11, line 10; and the sentence beginning on pg. 11, line 19 through pg. 12, line 4); and

(2) the portion of Mr. Powers’ testimony alleging that peak demand could or should be met with battery storage (pg. 10, line. 11 to pg. 11, line 9).

In short, NC WARN’s objection to natural gas and its environmental concerns are broad policy-based energy and environmental issues that are beyond the scope of the

statutory standards and criteria of N.C.G.S. 62-110.1 and Commission Rule R8-63, and, thus, irrelevant.

In addition to the Motion to Strike, NTE submits this Motion in Limine requesting the Commission to limit testimony, arguments, and cross-examination to issues that are relevant to the statutory standards and criteria of N.C.G.S. 62-110.1 and Commission Rule R8-63 applicable to the application filed in the docket, rather than those irrelevant issues discussed in Mr. Powers' testimony.

In support of these Motions, NTE shows the following:

### ARGUMENT

I. **Issues regarding alleged environmental effects and desired environmental policies may be addressed at legislative forums or other regulatory agencies but are unrelated to the CPCN standards applicable to the application in this docket.**

The purpose of this proceeding is not for NC WARN to challenge the country's and the state's environmental or energy policies. Instead, the purpose is for the Commission to determine whether to grant a CPCN to NTE for its proposed Reidsville facility under the public convenience and necessity ("CPCN") standard of N.C.G.S. § 62-110.1. As the Commission noted in its *Order Denying Objection to Intervention* issued in this docket on October 17, 2016, the Commission will consider additional factors, such as the proposed location for the plant, NTE's balance sheet and income statement, details of the nature of the proposed facility, including fuel and transmission resources, and service contracts or tariffs for interstate gas pipeline capacity. However, the Commission should not consider NC WARN's challenges to environmental policies raised in Mr.

Powers' testimony, as such concerns are left to other regulatory agencies. *See State ex rel. Utilities Commission v. High Rock Lake Ass'n*, 37 N.C. App. 138, 245 S.E.2d 787 (“[I]t is clear that the purpose of requiring a certificate of public convenience and necessity for before a generating facility can be built is to prevent costly overbuilding. Environmental concerns were generally left to other regulatory agencies, except as they affect the cost and efficiency of the proposed operating facility.”).

The first category of testimony that NTE moves to strike is about methane gas emissions and climate concerns that are wholly irrelevant to the Commission's jurisdiction in this matter -- determination of whether the public convenience and necessity are served by the construction and operation of the proposed facility. It is clear that a Commission order in this docket must be based upon competent, material and substantial evidence. *See Order Granting in Part and Denying in Part Motion to Strike*, Docket No. E-7, Sub 1026 (July 3, 2013). Where practicable, the Commission should apply the same rules of evidence used in the superior courts in civil matters. *See* N.C.G.S. § 62-56(a); *State ex rel. Utilities Commission v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966). Pursuant to Rule 402 of the North Carolina Rules of Evidence, only relevant evidence is admissible. Rule 401 of the North Carolina Rules of Evidence defines “relevant evidence” as:

[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable to the determination of the action than it would be without the evidence.

(emphasis added).

The referenced testimony of Mr. Powers clearly does not constitute relevant evidence as to whether a CPCN should be granted. Instead, it relates to NC WARN's

general objection to the use of natural gas in North Carolina and NC WARN's allegations as to the negative impacts of natural-gas fueled facilities. Such objection to natural gas raises broad policy-based issues that are beyond the scope of the issues to be determined in this proceeding and, thus, are irrelevant. The allegations as to negative environmental impacts are beyond the scope of this proceeding because regulating methane emissions is not a matter within the jurisdiction of the Commission. Therefore, the referenced testimony is not evidence of any fact of consequence to the Commission's decision on NTE's requested CPCN. Further, as mentioned above, NC WARN's concerns about the environmental effects of natural gas must be left to other regulatory agencies. *See State ex rel. Utilities Commission v. High Rock Lake Ass'n*, 37 N.C. App. 138, 245 S.E.2d 787 (agencies such as the North Carolina Department of Natural and Economic Resources, the Environmental Management Commission, and the Nuclear Regulatory Commission "are better equipped to deal with environmental protection" than the Commission).

If NC WARN seeks to prohibit the use of natural gas due to its environmental concerns or to change current laws and regulations, NC WARN should make its policy arguments to the United States Congress or the North Carolina legislature, rather than trying to change energy policy at the Commission in a CPCN proceeding. The Commission has previously allowed a motion to strike NC WARN's testimony when it addressed issues outside the scope of the proceeding. *See, e.g., Order Granting Motion to Strike and Reserving Decision on Motion in Limine*, Docket Nos. E-2, Sub 1095, E-7, Sub 1100, G-9, Sub 682 (June 28, 2016) (motion to strike allowed as to NC WARN's testimony that addresses generic concerns over methane emissions, among other concerns); *see also Order Allowing Motion to Strike*, Docket No. E-100, Sub 114 (June

18, 2008); *Order Granting in Part and Denying in Part Motion to Strike*, Docket No. E-7, Sub 1026 (July 3, 2013) (granting, in part, motion to strike testimony of Greenpeace witness arguing that company plants and improvements should be cancelled as irrelevant to the general rate case proceeding). In the Commission's *Order Granting Motion to Strike and Reserving Decision on Motion in Limine* in Docket Nos. E-2, Sub 1095, E-7, Sub 1100, G-9, Sub 682, the Commission stated:

The Chairman concludes that the bulk of NC WARN's testimony is not evidence of any fact of consequence to the Commission's decision to approve or deny the merger of Duke and Piedmont. Rather, the testimony addresses NC WARN's generic concerns over methane emissions, the potential inadequacy of future natural gas supplies, and the possibility that higher natural gas prices supplies, and the possibility of higher natural gas prices will be passed on to the Applicants' ratepayers.

As in Docket Nos. E-2, Sub 1095, E-7, Sub 1100, G-9, Sub 682, NC WARN's objectionable testimony in this docket is not evidence of any fact of consequence to the Commission's decision to approve or deny NTE's CPCN application.

In this context, it is also worth noting that – although the purpose of the CPCN requirement is to prevent overbuilding of unneeded power plants -- the policy reason and concern underlying this purpose are different for a merchant plant than for a utility-owned plant. The costs incurred by a utility to construct power plants become part of the utility's rate base on which the utility earns an allowed rate of return, paid by its customers. N.C.G.S. 62-110.1(f1) ("The public utility shall recover through rates in a general rate case . . . "). In contrast, a merchant plant is constructed with private investor capital, and the financial risks are borne by those investors, not by utility ratepayers. Because of this important difference and the Commission's interest in streamlining the

certification process for merchant plants, Rule R8-63 requires less information to be filed than is required for a public utility CPCN.

Therefore, for all of these reasons, Mr. Powers' pre-filed testimony at page. 9, line 3 to pg. 11, line 10; and the sentence beginning on pg. 11, line 19 through pg. 12, line 4 are irrelevant to any issue in this docket and should be stricken.

**II. The alleged capability of battery storage to meet peak demand is not a consideration in the statutory CPCN standards, is not based upon any modeling, and is not included in the utilities' IRPs; therefore, testimony, arguments, or examination on this topic is irrelevant in this docket.**

Similarly to the inappropriateness of objecting to the use of natural gas, NC WARN's support of the use of battery storage in place of combustion turbine capacity to meet peak demand need is not an appropriate issue in this CPCN proceeding. NC WARN should argue for a change in policy to the State's legislature, rather than at the Commission. Nowhere in N.C.G.S. 62-110.1 or Commission Rule R8-63 is there any mention of battery storage as a consideration for evaluating new generation, and certainly not in relation to a combined cycle plant as proposed in this docket.

Moreover, the Commission specifically considered and addressed this issue in its Order issued on June 2, 2015 in Docket E-100, Sub 141. In that docket, NCSEA advocated adding battery storage as an alternative supply-side energy resource to be considered in the integrated resource planning process. All parties to that recent docket acknowledged, however, that "models do not currently exist today to fully evaluate the costs and benefits of energy storage." Commission Order Approving Integrated

Resources Plans, issued June 2, 2015, in Docket E-100, Sub 141, at pg. 48. Therefore, the Commission concluded:

[T]hese technologies are not economical or viable at this time for mandatory inclusion in the utilities' IRPs. Further, as models do not currently exist for a proper evaluation of energy storage, the Commission does not see a benefit in simply asking the IOUs to take their best shot at a modeling approach at this time.

*Id.* If there are no models currently in existence for the evaluation of energy storage and energy storage is not of sufficient viability to be included in the utilities' IRPs, then energy storage cannot be relevant to a determination of the need for NTE's proposed facility. Therefore, Mr. Powers' testimony in this regard is irrelevant and should be stricken.

In summary, NTE submits that NC WARN is inappropriately utilizing its position as an intervenor to advocate for its political positions about national environmental and energy policies. Accordingly, the referenced testimony of NC WARN witness Powers should be stricken as requested herein.

#### **MOTION IN LIMINE**

NTE also requests that the Commission issue an Order limiting cross-examination of NTE's witnesses and the witnesses of other parties and limiting any attempts by NC WARN to introduce evidence in this proceeding relating to matters outside the proper scope of the docket and the Commission's jurisdiction. In particular, NC WARN should be precluded from cross-examining witnesses and presenting any evidence on the matters discussed above that are the subject NTE's Motion to Strike. Such matters are irrelevant to the Commission's standard for approval of the requested CPCN in this docket, and as such, should not be the subject matter of arguments or cross-examination of any witness at the evidentiary hearing.



WHEREFORE, NTE respectfully moves that the portion of Mr. Powers' testimony beginning on page 9, line 3, and through page 11, line 9, be stricken from the record. NTE further moves that the Commission limit arguments, testimony, and examination witnesses to matters relevant to this docket, and limit any attempts by NC WARN to introduce evidence or arguments in this proceeding that are not within the scope of the issues properly to be determined in this docket.

Respectfully submitted, this 26<sup>th</sup> day of October, 2016.

SMITH MOORE LEATHERWOOD, LLP

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**CERTIFICATE OF SERVICE**

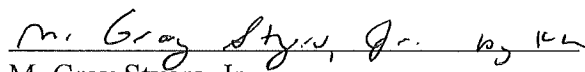
It is hereby certified that the foregoing MOTION TO STRIKE AND MOTION IN LIMINE AS TO PORTIONS OF THE TESTIMONY OF WILLIAM E. POWERS has been served this 26<sup>th</sup> day of October, 2016, by hand delivery, electronic mail or by depositing copies of same in a depository under the exclusive care and custody of the United States Postal Service in postage prepaid envelopes and properly addressed as follows:

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