

No. P16-483

N.C. UTILITIES COMMISSION

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA EX	)	
REL. UTILITIES COMMISSION;	)	
PUBLIC STAFF - NORTH	)	
CAROLINA UTILITIES	)	
COMMISSION; and DUKE ENERGY	)	<u>From the North Carolina</u>
CORPORATION, PIEDMONT	)	<u>Utilities Commission</u>
NATURAL GAS COMPANY, INC.,	)	
	)	Docket No. E-2, Sub 1095
Respondent,	)	Docket No. E-7, Sub 1100
	)	Docket No. G-9, Sub 682
v.	)	
	)	
RICHARD FIREMAN,	)	
	)	
Petitioner.	)	
	)	

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RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS  
OF RESPONDENT PUBLIC STAFF -  
NORTH CAROLINA UTILITIES COMMISSION

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OFFICIAL COPY

Jul 12 2016

INDEX

TABLE OF CASES AND AUTHORITIES.....	ii
RESTATEMENT OF THE FACTS.....	1
REASONS WHY WRIT SHOULD NOT ISSUE.....	8
ATTACHMENT.....	12
CONCLUSION.....	12
CERTIFICATE OF SERVICE.....	14

TABLE OF CASES AND AUTHORITIES

Cases:

<i>Ponder v. Joslin</i> , 262 N.C. 496, 138 S.E.2d 143 (1964) .....	8
<i>St. George v. Hanson</i> , 239 N.C. 259, 78 S.E.2d 885 (1954) .....	8

Statutes:

N.C. Gen. Stat. § 62-13(c) (2015) .....	9
N.C. Gen. Stat. § 62-15(d) (2015) .....	11
N.C. Gen. Stat. § 62-30 (2015) .....	8
N.C. Gen. Stat. § 62-31 (2015) .....	8
N.C. Gen. Stat. § 62-72 (2015) .....	8
N.C. Gen. Stat. § 62-111(a) (2015) .....	2, 7, 10

Rules:

N.C. R. App. P. 22(b) .....	2
N.C. R. App. P. 22(c) .....	1
Commission Rule R1-5 .....	3
Commission Rule R1-19 .....	3, 12
Commission Rule R1-19(a) (3) .....	9
Commission Rule R1-19(a) (4) .....	9
Commission Rule R1-19(d) .....	9
Commission Rule R1-19(e) .....	6

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RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS  
OF RESPONDENT PUBLIC STAFF -  
NORTH CAROLINA UTILITIES COMMISSION

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TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

NOW COMES the Public Staff - North Carolina Utilities Commission ("Public Staff"), and pursuant to Rule 22(c) of the North Carolina Rules of Appellate Procedure, respectfully files this Response in Opposition to the Petition for Writ of Mandamus ("Petition") filed by Richard Fireman ("Petitioner").

RESTATEMENT OF THE FACTS

On about 24 October 2015, Duke Energy Corporation ("Duke Energy") and Piedmont Natural Gas Company, Inc. ("Piedmont") entered into an Agreement and Plan of Merger (the "Agreement")



setting forth the terms of a business combination transaction (the "Merger") whereby Piedmont would become a direct, wholly-owned subsidiary of Duke Energy while continuing to exist as a separate entity.

Duke Energy's subsidiaries Duke Energy Carolinas, LLC ("DEC"), and Duke Energy Progress, LLC ("DEP"), are electric utilities with service territories in North Carolina and South Carolina. Piedmont is a natural gas utility with service territories in North Carolina, South Carolina, and Tennessee. The North Carolina operations of all three utilities are subject to the regulatory jurisdiction of the North Carolina Utilities Commission ("Commission").

On 15 January 2016, Duke Energy and Piedmont (collectively, the "Applicants") filed an application with the Commission ("Commission") pursuant to N.C. Gen. Stat. § 62-111(a) for approval of the Merger. (Pet. Exhibit A).<sup>1</sup> The following exhibits were attached to the application: the Agreement; a cost-benefit analysis and a market power analysis related to the Merger, as required by the Commission; Regulatory Conditions and Code of Conduct currently in effect for Duke Energy, DEC, and DEP, revised

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<sup>1</sup> The Petition served on the Public Staff by the Petitioner did not contain copies of the various documents referenced in the Petition; however, the Public Staff assumes that certified copies of such documents were filed with the Court as required by N.C. R. App. P. 22(b) and makes reference to such documents in this response.

to reflect the Merger; and the testimony and exhibits of five witnesses.

On 2 March 2016, the Commission issued an order scheduling the application for hearing. (Pet. Exhibit B). The order included a finding that the application satisfies the Commission's filing requirements. (Pet. Exhibit B, p 2). The order and the notice of hearing required that petitions to intervene pursuant to Rules R1-5 and R1-19 of the Rules and Regulations of the North Carolina Utilities Commission ("Commission Rules") be filed not later than 27 May 2016, and that intervenor testimony be filed not later than 10 June 2016. (Pet. Exhibit B, p 4 and Appendix A, p 2).

Petitions or motions to intervene were timely filed by the following: the Public Works Commission of the City of Fayetteville ("PWC"); Carolina Utility Customers Association, Inc. ("CUCA"); Environmental Defense Fund ("EDF"); North Carolina Waste Awareness Network ("NC WARN"), The Climate Times ("TCT"), and the North Carolina Housing Coalition ("NCHC"), filing jointly; Columbia Energy, LLC ("Columbia"); and the Petitioner, Richard Fireman. (Pet. Exhibit C).

PWC provides electric service to customers in the City of Fayetteville and surrounding areas. PWC owns natural gas-fired generation and purchases natural gas service from Piedmont. PWC's request to intervene was granted by order of the Chairman.

CUCA is an organization of industrial utility customers, including users of electricity and natural gas in the service territories of DEC, DEP, and Piedmont. CUCA's request to intervene was granted by order of the Chairman.

EDF is an organization with 8,544 members in North Carolina. EDF works with stakeholders to evaluate, improve, and advance electric and gas system investment plans with the aim of ensuring that utility investments in clean energy and grid modernization provide tangible benefits that outweigh the costs. EDF's request to intervene was granted by order of the Chairman.

NC WARN is an organization with more than 1,000 individual members and families across North Carolina. Its primary purpose is to work for climate protection through advocacy of clean, efficient, and affordable energy. TCT is an organization located in Boone, North Carolina, that is dedicated to the use of science and policy to minimize the impact of climate change. The NCHC is made up of more than 300 organizations and individuals around North Carolina working for decent and affordable housing for low- and moderate-income North Carolinians. Most of the members of NC WARN and the NCHC are customers of Duke Energy and many are customers of Piedmont. NC WARN/TCT/NCHC stated that, if allowed to intervene, they would advocate that the Commission fully investigate the costs and impacts of the Merger on ratepayers. After initially being granted on a provisional basis,



NC WARN/TCT/NCHC's request to intervene was granted by order of the Chairman.

Columbia is the owner of a natural gas-fired combined cycle facility located in Gaston, South Carolina. Columbia receives its gas service from South Carolina Electric & Gas Company. Columbia averred that the Merger may impact the rates, terms, and conditions applicable to gas distribution by Piedmont and will likely impact its ability to competitively source natural gas supply and to access natural gas on competitively neutral terms from existing and future pipelines. Columbia's request to intervene was denied by order of the Chairman, stating that Columbia is not a customer of DEC, DEP, or Piedmont and that Columbia's concerns regarding the impact of the Merger on pipeline capacity and competitive commodity pricing are matter within the jurisdiction of the Federal Energy Regulatory Commission.

The Petitioner is a retired medical doctor and resident of Mars Hill, North Carolina, who has been active in community affairs related to energy, energy efficiency, and renewable energy policy. He has a solar photovoltaic facility installed on his home and is connected to the electric grid though French Broad Electric Membership Corporation. He has also two grandchildren who live in North Carolina and are served by Duke Energy. (Pet. Exhibits C and E). The Petitioner averred that his interest in the proceeding is real and direct in that it is (1) true, (2) deeply believed,



(3) genuine, and (4) as palpable, tangible, and immense as his love for his wife, family, and life in general. (Pet. Exhibit E, p 1). The Petitioner's request to intervene was denied by order of the Chairman, stating that the Petitioner's activities and concerns do not, in and of themselves, establish the requisite interest in the Merger but noting that the Petitioner would have the opportunity to testify at the hearing as a public witness. (Pet. Exhibit F). The Petitioner's request that the full Commission review the Chairman's order denying his petition to intervene (Pet. Exhibit H) was dismissed by Commission order. (Pet. Exhibit I).

EDF filed the testimony of Diane Munns but subsequently withdrew its testimony upon entering into a Settlement Agreement with the Applicants. CUCA also entered into a Settlement Agreement with the Applicants but did not file testimony. Both of these Settlement Agreements were filed with the Commission.

Pursuant to Commission Rule R1-19(e), the intervention of the Public Staff is deemed recognized without the issuance of an order. Accordingly, the Public Staff's appearance on behalf of the using and consuming public will be made and noted at the hearing. The Public Staff filed the testimony of James G. Hoard along with an Agreement and Stipulation of Settlement ("Stipulation") between the Public Staff and the Applicants.

NC WARN/TCT/NCHC filed the testimony and exhibits of Touché Howard and J. David Hughes. Large portions of this testimony addressed broad concerns over methane emissions from various sources and their impact on the public health on global climate change, and the potential inadequacy of natural gas supplies and resulting increase and volatility in natural gas prices. The Applicants' motion to strike this testimony from the record was granted by order of the Chairman, stating that it was not relevant to the issues under consideration pursuant to N.C. Gen. Stat. § 62-111(a). (See Order Granting Motion to Strike and Reserving Decision on Motion in Limine attached hereto as Resp. Exhibit A).

As allowed by order of the Chairman, NC WARN/TCT/NCHC filed the testimony of Samuel Gunter, addressing the Stipulation between the Applicants and the Public Staff. Finally, the Applicants filed the rebuttal testimony of Bruce P. Barkley, addressing the Stipulation and the additional Settlement Agreements and responding to the testimony of witness Gunter.

On 1 July 2016, the Petitioner filed his Petition for Writ of Mandamus and Motion for Temporary Stay seeking an order from this Court compelling the Commission to grant him the right to intervene in the proceeding and temporarily staying the Commission's order denying him that right. By order entered on 5 July 2016, the Court dismissed the Motion for Temporary Stay.

REASONS WHY THE WRIT SHOULD NOT ISSUE

The appellate courts of this State have consistently held that an action for a writ of mandamus lies only where a petitioner shows a clear legal right to the action demanded, and the party to be coerced must be under a positive legal obligation to perform the act sought to be required. *St. George v. Hanson*, 239 N.C. 259, 263, 78 S.E.2d 885, 888 (1954).

It is well settled law that *mandamus* cannot be invoked to control the exercise of discretion of a board, officer, or court when the act complained of is judicial or *quasi-judicial*, unless it clearly appears that there has been an abuse of discretion. The function of the writ is to compel the performance of a ministerial duty -- not to establish a legal right, but to enforce one which has been established.

*Ponder v. Joslin*, 262 N.C. 496, 504, 138 S.E.2d 143, 149-50 (1964) (citations omitted). The Petitioner has failed to show that he has a legal right to intervene in the Merger proceeding or that the Commission has abused its discretion in denying his request to become a party.

The General Assembly has given the Commission broad power and authority to carry out the laws providing for the regulation of public utilities in North Carolina. N.C. Gen. Stat. §§ 62-30 and 62-31 (2015). "Except as otherwise provided in this Chapter, the Commission is authorized to make and promulgate rules of practice and procedure for the Commission hearings." N.C. Gen. Stat. § 62-72 (2015). This authority is essential to the Commission's



ability to perform its statutory functions in an orderly and efficient manner, and it includes the authority to determine the scope of Commission proceedings and who may intervene those proceedings.

The procedure for becoming a party to a proceeding before the Commission is set forth in Article 1 of the Commission's Rules and Regulations. Commission Rule R1-19(a)(3) and (4), respectively, require that a request to intervene in a proceeding include both a "clear, concise statement of the nature of the petitioner's interest in the subject matter of the proceeding, and the way and manner in which such interest is affected by the issues involved" and a "statement of the exact relief desired." Commission Rule R1-19(a)(3) and (4). Further, Commission Rule R1-19(d) provides, in part, as follows: "(d) Leave.— Leave to intervene filed within the time herein provided, in compliance with this rule *and showing a real interest in the subject matter of the proceeding*, will be granted as a matter of course . . . ." Commission Rule R1-19(d) (emphasis added).

Pursuant N.C. Gen. Stat. § 62-13(c), the Chairman as presiding commissioner is required to "hear and determine procedural motions or petitions not determinative of the merits of the proceedings and made prior to hearing . . . ." N.C. Gen. Stat. § 62-13(c) (2015). A request to intervene is such a petition. Here, the Chairman has determined that the Petitioner has not shown a "real



interest in the subject matter of the proceeding." This ruling is not a ministerial act but an exercise of the Chairman's discretion that is not subject to mandamus absent a showing of abuse, a showing which the Petitioner has failed to make.

The subject matter of this proceeding is the application for approval of a proposed Merger of Duke Energy and Piedmont pursuant to N.C. Gen. Stat. § 62-111(a). As stated in the Chairman's order granting the Applicants' motion to strike the testimony of witnesses Howard and Hughes, the Commission's emphasis in such a proceeding is on "the rates, services and protection of North Carolina's ratepayers." (Resp. Exhibit A, p 3). As such, the Commission applies a three-prong test in determining whether a proposed merger is justified by the public convenience and necessity: (1) whether the merger would have an adverse impact on the rates and services provided by the merging entities; (2) whether retail ratepayers would be protected as much as possible from potential cost and risks associated with the merger; and (3) whether the merger would result in sufficient benefits to offset such potential costs and risks. (Resp. Exhibit A, p 3).

Both the Petitioner's request for leave to intervene and his Petition show that Petitioner's real interest is elsewhere and that the subject matter the Petitioner seeks to address is not relevant to the Commission's determination of whether to approve or deny the Merger application. Indeed, the types of issues the

Petitioner has identified have been struck from the testimony of witnesses Howard and Hughes for this very reason. (Resp. Exhibit A).

The Public Staff, which is a party to the proceeding pursuant to N.C. Gen. Stat. § 62-15(d), has conducted an extensive investigation into the proposed Merger based on the test for approval articulated by the Commission in prior proceedings. The Public Staff's findings, conclusions, and recommendations are set forth in the Stipulation and in the testimony of witness Hoard, who will be subject to cross-examination by the parties and questioning by the Commission. But the Petitioner has no right to become a party, to present evidence, and to cross-examine the Public Staff on issues that are not relevant to the Commission's decision regarding Merger approval. Under well-established law, the Petitioner cannot invoke the writ of mandamus to establish a right to present evidence on adverse risks and impacts that already exist or might occur regardless of whether the Merger is approved, even if those risks and impacts involve his deeply held beliefs about the public health and welfare. The Petitioner's attempt to invoke the "public trust doctrine" is equally unavailing. A procedural ruling by a federal magistrate in Oregon (Pet. Exhibit J) has no bearing on whether the Commission and the Public Staff have fulfilled their statutory duties and responsibilities in this proceeding.

As indicated by the diverse parties that have been granted leave to intervene, the Commission is somewhat generous in its application of its Rule R1-19. This generosity, however, is not unbounded. In order to maintain judicial economy and carry out its responsibilities effectively, the Commission must be able to deny leave to intervene to persons who have no substantial interest in the subject matter of a proceeding, no matter how heartfelt their concerns might otherwise be. Chairman, in the proper use of his discretion, has endeavored to focus this proceeding on issues related to adverse impacts and risks that are or might be created by the proposed Merger. Likewise, the Public Staff has properly addressed those issues in the Stipulation and in its testimony. The Petitioner has no right to demand more.

ATTACHMENT

Attached to this response for consideration by the Court is a certified copy of the following order from the North Carolina Utilities Commission:

Exhibit A.        Certified copy of the Order Granting Motion to Strike and Reserving Decision on Motion in Limine issued June 28, 2016

CONCLUSION

Wherefore, the Public Staff respectfully requests that the Petitioner's request that this Court issue a Writ of Mandamus to



the Commission requiring it to allow the Petitioner to intervene in this proceeding be denied.

Respectfully submitted this the 11<sup>th</sup> day of July, 2016.

PUBLIC STAFF - NORTH CAROLINA  
UTILITIES COMMISSION

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N.C. R. App. P. 33(b) Certification:  
I certify that all of the attorneys  
listed below have authorized me to  
list their names on this document as  
if they had personally signed it.

Electronically submitted  
s/ Elizabeth D. Culpepper  
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*Attorneys for Respondent*



CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Response in Opposition to Petition for Writ of Mandamus by depositing a copy into an official depository of the United States Postal Service, in a first-class postage paid envelope, properly addressed as follows:

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This the 11<sup>th</sup> day of July, 2016.

Electronically submitted  
s/ Antoinette R. Wike

# *State of North Carolina Utilities Commission*

## *Certification*

*I hereby certify the attached (5 sheets) to be a true  
copy from the official records of this office viz;*

*Duke Energy Progress, LLC ---- Docket E-2, Sub 1095  
Duke Energy Carolinas, LLC----Docket E-7 Sub 1100  
Piedmont Natural Gas Company, Inc.---Docket G-9 Sub 682*

*Order Granting Motion to Strike and Reserving Decision on  
Motion in Limine  
Issued on June 28, 2016*

*In Witness Whereof, I have hereunto set my hand  
and affixed the official seal of the Commission.*

*This, the 7<sup>th</sup> day of July, 2016.*

  
  
\_\_\_\_\_  
*Gail L. Mount, Chief Clerk*



**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. E-2, SUB 1095  
DOCKET NO. E-7, SUB 1100  
DOCKET NO. G-9, SUB 682

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Duke Energy Corporation	)	
and Piedmont Natural Gas, Inc., to Engage	)	ORDER GRANTING MOTION
in a Business Combination Transaction	)	TO STRIKE AND RESERVING
and Address Regulatory Conditions and	)	DECISION ON MOTION IN LIMINE
Code of Conduct	)	

BY THE CHAIRMAN: On January 15, 2016, Duke Energy Corporation (Duke) and Piedmont Natural Gas Company, Inc. (Piedmont) (collectively, Applicants) filed an application in the above-captioned dockets for authorization to engage in a business combination transaction (proposed merger), and to revise and apply Duke Energy Carolinas, LLC's (DEC's) and Duke Energy Progress, LLC's (DEP's) Regulatory Conditions and Code of Conduct to Piedmont.

On June 10, 2016, the North Carolina Waste Awareness and Reduction Network (NC WARN), The Climate Times (TCT), and the North Carolina Housing Coalition (NCHC) (collectively, NC WARN), filed testimony of Touché Howard and J. David Hughes.

On June 16, 2016, the Applicants filed a Motion to Strike and Motion in Limine. The Motion to Strike requests that the Commission strike all of the substantive testimony of NC WARN's witnesses. In summary, Applicants state two grounds for striking NC WARN's testimony. First, Applicants contend that the testimony is irrelevant to the subject matter of this docket. Applicants cite G.S. 62-111(a) and several precedents under that statute, and submit that the main issue before the Commission is whether the proposed merger serves the public convenience and necessity. Applicants maintain that NC WARN's testimony has no relevance to that issue, but, rather, addresses broad public policy questions about regulating methane emissions and climate change, and speculates on the future adequacy of natural gas supplies. Applicants maintain that the Commission's approval of the proposed merger will have no effect on either of these matters. Second, Applicants contend that NC WARN's testimony is beyond the scope of this docket because regulating methane emissions and addressing future shortages of natural gas supplies are not matters within the jurisdiction of the Commission.

The Applicants' Motion in Limine requests that the Commission prevent NC WARN from cross-examining witnesses on irrelevant subject matters. In summary, Applicants state that NC WARN should be precluded from cross-examining the witnesses in this proceeding about the subject matters addressed in NC WARN's



testimony because those subject matters are irrelevant and beyond the scope of this docket.

Finally, the Applicants request expedited treatment of their Motion to Strike due to the July 1, 2016, deadline for Applicants to file rebuttal testimony.

On June 22, 2016, NC WARN filed a response to the Applicants' Motion to Strike and Motion in Limine. NC WARN asserts that its testimony is directly relevant to the issue of whether the proposed merger will serve the public convenience and necessity. NC WARN cites G.S. 62-111 and case law interpreting the statute. NC WARN acknowledges that it is not requesting that the Commission resolve the broad policy concerns addressed in its testimony, but, instead, is requesting that the Commission "consider the risky implications of these public policy issues on the proposed merger." Response to Motion to Strike and Motion in Limine, at p. 2. Moreover, NC WARN states that the utilities routinely use policy arguments in their filings with the Commission, including Integrated Resource Plans (IRPs), rate cases and merger cases. In addition, NC WARN notes that DEC's and DEP's most recent IRPs, in Docket No. E-100, Sub 141, state that they plan to build up to 15 natural gas-fired generating plants in the next 15 years, the costs of which will be passed on to Duke's ratepayers. According to NC WARN, its testimony "provides the background to the Commission on the fundamental issues of cost increases likely from this merger." *Id.*, at p. 3. Therefore, NC WARN submits that the Commission should deny the Applicants' Motion to Strike and Motion in Limine.

### **NC WARN's Testimony**

#### Testimony of Touché Howard

In summary, witness Howard testifies that methane emissions from the production of natural gas are far worse than the United States Environmental Protection Agency (EPA) or the oil and gas industry acknowledge. He discusses in detail the various sources of methane emissions during the production and delivery of natural gas, the methods for measuring the emissions, and his conclusion that current emission rate estimates are far too low. In addition, he asserts that the likelihood of new regulations to reduce methane emissions means that the cost of natural gas could increase. He further states that methane emissions are harmful to the public health and have a major impact on global climate change. Witness Howard concludes that "The combined companies' increased use and investment in natural gas transmission and distribution pipelines, compressor stations, and other equipment and facilities for natural gas may also increase the economic, environmental, health and safety risks for Duke Energy ratepayers." Testimony of Touché Howard, p. 2, lines 14-17.

#### Testimony of J. David Hughes

In summary, witness Hughes testifies that there is a risk of inadequate natural gas supplies in the future because of the overly optimistic forecasts of the production of shale gas. He discusses several studies of oil and gas production in the United States and Canada that show over estimation of the production from existing and future shale gas plays. According to witness Hughes, production is being over estimated by at least 50%,



thus posing the risk of higher gas costs from supply restrictions, with the higher gas costs being passed on to ratepayers. Therefore, he concludes that "The high decline rates for shale gas wells and overestimated supplies make the combination of Duke Energy and PNG, two companies that are heavily reliant on the shale gas industry, vulnerable to supply shortfalls and price spikes." Testimony of J. David Hughes, pp. 13-14, lines 15-16 and line 1. In addition, witness Hughes testifies that full cycle greenhouse gas emissions from shale gas are higher than coal emissions over a 20-year timeframe, but lower than coal over a 100-year timeframe. He opines that this factor has significant policy implications with regard to using gas-fired generation to replace coal plants. He concludes that reliance on natural gas is likely to result in higher and more volatile costs and more carbon emissions than could be attained by using other resources, such as demand-side management and carbon-free energy sources.

### Discussion and Conclusion

The Commission's orders must be based on competent, material and substantial evidence. Where practicable, the Commission applies the same rules of evidence used in the superior courts in civil matters. See G.S. 62-65(a).

Pursuant to Rule 402 of the North Carolina Rules of Evidence, only relevant evidence is admissible. Under Rule 401, "relevant evidence" is defined as

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

G.S. 8C-1, Rule 401.

With regard to the admissibility of NC WARN's testimony, the main question is whether the testimony has a bearing on "any fact that is of consequence to the determination of the action."

In the Commission's most recent merger dockets, the Commission has applied a three-prong test for determining whether approval of the merger would serve the public convenience and necessity. For example, in the Duke Energy Corporation and Progress Energy, Inc. merger docket in 2012, the Commission examined: (1) whether the merger would have an adverse impact on the rates and services provided by Duke Energy Carolinas, LLC, and Progress Energy Carolinas, Inc.; (2) whether retail ratepayers would be protected as much as possible from potential costs and risks; and (3) whether the merger would result in sufficient benefits to offset potential costs and risks. See Order Approving Merger Subject To Regulatory Conditions and Code of Conduct, Docket Nos. E-2, Sub 998 and E-7, Sub 986 (Duke/Progress Merger Order), aff'd, In re Duke Energy Corporation, 232 N.C. App. 573, 755 S.E.2d 382 (2014).

Pursuant to G.S. 62-111(a), the Commission must examine all relevant facets of the proposed merger having a bearing on the public convenience and necessity. However, as indicated by the three criteria stated above, the Commission's emphasis is on the rates, services and protection of North Carolina's ratepayers. Further, in assessing



adverse impacts and potential risks of the merger, the Commission necessarily focuses on adverse impacts and potential risks that might be created by the combination of the two companies, not adverse impacts and risks that already exist and may continue to exist irrespective of whether the merger is approved by the Commission.

Based on the foregoing and the record, 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 will be passed on to the Applicants' ratepayers. These are concerns of NC WARN that exist today with Duke and Piedmont operating as separate companies. Indeed, witness Hughes states that Duke and Piedmont are "two companies that are heavily reliant on the shale gas industry." Accepting, for the purpose of discussion, witness Hughes' opinion that Duke and Piedmont are "heavily reliant" on shale gas, his testimony and that of witness Howard is based on the premise that the merger of Duke and Piedmont will result in an increased use of natural gas by Duke and Piedmont. However, there is no evidence in the record that the merger of Duke and Piedmont will cause an increase in their use of natural gas. With regard to Duke, the transaction that most likely would cause an increase in its use of natural gas is DEC or DEP building a new gas-fired electric generating plant. As NC WARN notes, DEC's and DEP's IRPs, filed several months prior to the merger application, forecast an increased reliance on natural gas-fired generation. However, in order to build such a plant DEC or DEP would have to acquire a certificate of public convenience and necessity (CPCN) from the Commission. There is no application for a CPCN to build gas-fired electric generation in this docket. Likewise, there is no application to pass along increased rates in this docket. In addition, if DEC or DEP files an application for a CPCN to build a new natural gas-fired plant, that will be the docket in which relevant testimony regarding an increased use of natural gas by DEC or DEP will be appropriate.

With respect to Piedmont, a primary reason that it would increase its use of natural gas is to expand its services to new customers. Economic expansion of natural gas service to unserved areas is a public policy of the State of North Carolina. See G.S. 62-2(a)(9). However, there is no evidence in the record that the merger, in itself, will increase Piedmont's expansion of natural gas services. Further, there is no request in this docket to approve such an expansion of Piedmont's services, or to pass along increased rates. While Piedmont might also increase its use of natural gas to deliver it to electric generating plants, such delivery is as likely to occur without the proposed merger as with it.

Consequently NC WARN's testimony is not relevant to the issues under consideration pursuant to G.S. 62-111(a). As a result, the Chairman concludes that there is good cause to strike the bulk of NC WARN's testimony from the record.

With regard to the Applicants' Motion in Limine, it presents the issue of whether cross-examination on the subjects addressed in NC WARN's testimony would produce evidence of any fact of consequence to the Commission's decision to approve or deny the merger of Duke and Piedmont. The Chairman finds good cause to reserve a decision on the Motion in Limine until the expert witness hearing in this docket.

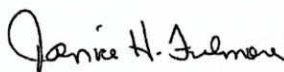
IT IS, THEREFORE, ORDERED as follows:

1. That the testimony of Touché Howard on page 2, line 8 through page 10, line 20 shall be, and is hereby, stricken from the record.
2. That the testimony of J. David Hughes on page 2, line 13, beginning with "These risks are both economic" through page 3, line 6, and page 3, line 12 through page 21, line 2 shall be, and is hereby, stricken from the record.
3. That a decision on the Applicants' Motion in Limine shall be, and is hereby, reserved until the expert witness hearing in this docket.

ISSUED BY ORDER OF THE COMMISSION.

This the 28<sup>th</sup> day of June, 2016.

NORTH CAROLINA UTILITIES COMMISSION



Janice H. Fulmore, Deputy Clerk