

**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION**

**DOCKET NO. E-2, SUB 1095**

**DOCKET NO. E-7, SUB 1100**

**DOCKET NO. G-9, SUB 682**

In the Matter of:	)	
	)	
Application of Duke Energy Corporation	)	<b>DUKE ENERGY CORPORATION AND</b>
and Piedmont Natural Gas Company,	)	<b>PIEDMONT NATURAL GAS COMPANY, INC.'S</b>
Inc. to Engage in a Business	)	<b>MOTION FOR LEAVE TO FILE RESPONSE AND</b>
Combination Transaction and Address	)	<b>RESPONSE TO NC WARN MOTION FOR</b>
Regulatory Conditions and Code of	)	<b>RECONSIDERATION</b>
Conduct	)	

Pursuant to North Carolina Utilities Commission ("Commission") Rules R1-5, R1-7 and R1-9(c), Duke Energy Corporation ("Duke Energy") and Piedmont Natural Gas Company, Inc. ("Piedmont") (collectively "the Applicants"), respectfully submit the following Motion for Leave to File Response and Response to the Motion for Reconsideration ("Reconsideration Motion") filed by the North Carolina Waste Awareness and Reduction Network, the Climate Times and the NC Housing Coalition (collectively "NC WARN") as part of their post-hearing brief in this proceeding. As set forth below, the NC WARN's motion simply raises the same arguments that have already been considered and rejected by the Commission, and the motion should be denied.

In support of this motion and response, Applicants show unto the Commission as follows:

**BACKGROUND**

1. On January 15, 2016, the Applicants filed an application seeking to engage in a business combination transaction ("Merger").

2. On June 10, 2016, NC WARN filed the testimony of J. David Hughes and Touché Howard. The testimony submitted by these two witnesses addressed broad policy issues related to production methods for natural gas, related environmental concerns and their general opposition to the production, transportation and use of natural gas to generate electricity.

3. On June 16, 2016, the Applicants filed a Motion to Strike and Motion in Limine, requesting that the Commission strike substantially all of the testimony filed by NC WARN witnesses Hughes and Howard on the basis that the testimony was irrelevant to the matters before the Commission for consideration and beyond the scope of this proceeding.

4. On June 22, 2016, NC WARN filed a response to the Applicants' Motion to Strike and Motion in Limine. In the response, NC WARN asserted that its testimony was relevant to the issue of whether the proposed merger will serve the public convenience and necessity.

5. On June 28, 2016, the Commission issued its Order Granting Motion to Strike and Reserving Decision on Motion in Limine ("June 28 Order"). In the June 28 Order, the Chairman concluded 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" and therefore, struck the majority of witnesses Howard's and Hughes' testimony. June 28 Order at p. 4.

6. On August 25, 2016, as part of its post-hearing brief, NC WARN filed its Reconsideration Motion (presumably pursuant to G.S. § 62-80<sup>1</sup>) requesting that the Commission reconsider the June 28 Order. In support of its Reconsideration Motion, NC WARN reasserts that the prefiled testimony of witnesses Hughes and Howard is relevant to this proceeding because the testimony addresses potential future risks associated with the expansion of Duke Energy's natural gas platform. Specifically, the Reconsideration Motion states that "Mr. Hughes would testify the supply of natural gas is at risk because the current fracking plays will not be

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<sup>1</sup> Although no reference, much less discussion, is made to the statutory or legal basis upon which the Reconsideration Motion is based, Applicants presume it is based on G.S. § 62-80, which provides that:

The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.

able to maintain their present level of production [and] Mr. Howard would testify the high methane emissions from venting and leakage in natural gas production and distribution will require controls because of the significant impact of methane on the climate crisis.” Reconsideration Motion at p. 26.

7. The Reconsideration Motion does not present any new evidence of a change in circumstances or any additional basis for altering or rescinding the June 28 Order than was presented in NC WARN's original response to Applicants' Motion to Strike.

#### **Motion for Leave to File Response**

The Applicants respectfully request that they be granted leave to file the following response to NC WARN's Reconsideration Motion. Applicants submit that no prejudice will arise to any party from the grant of such leave and that the matters raised in the following response are meritorious and necessary to a complete understanding of the matter in dispute. Applicants also respectfully note that G.S. § 62-80 provides that in ruling on motions for reconsideration the Commission should allow an “opportunity to be heard” and this filing is consistent with that statutory requirement.

#### **Applicants' Response to Reconsideration Motion**

By order issued April 4, 2012 in Docket No. G-5, Sub 524, the Commission articulated the showing that must be made to support a motion for reconsideration of a Commission order.

The Commission stated:

A decision to rescind, alter or amend any order is within the Commission's discretion. *State ex rel. Utilities Comm'n v. MCI Telecommunications Corp.*, 132 N.C. App. 625, 630, 514 S.E.2d 276, 280 (1999). However, the Commission cannot arbitrarily or capriciously rescind, alter or amend a final order. Rather, there must be some change in circumstances or a misapprehension or disregard of a fact that provides a basis for the amendment, modification or rescission. *State ex rel. Utilities Comm'n v. North Carolina Gas Service*, 128 N.C. App. 288, 293-294, 494 S.E.2d 621, 626, *rev. denied*, 348 N.C. 78, 505 S.E.2d 886 (1998).

Contrary to statutory requirements and Commission precedent, NC WARN's basis for reconsideration consists of a recitation of its generic concerns over methane emissions, the

potential inadequacy of natural gas supplies and the possibility that higher natural gas prices will be passed on to customers. As specified by the Reconsideration Motion: “Mr. Hughes would testify the supply of natural gas is at risk because the current fracking plays will not be able to maintain their present level of production[] [and] Mr. Howard would testify the high methane emissions from venting and leakage in natural gas production and distribution will require controls because of the significant impact of methane on the climate crisis.” Reconsideration Motion at p. 26. These are all concerns which NC WARN asserted in its response to Applicants’ original Motion to Strike, and which were properly addressed in the June 28 Order.

The June 28 Order correctly concluded that the majority of witnesses Hughes’ and Howard’s testimony is not evidence of any fact of consequence to the Commission’s decision to approve or deny the Merger. As explained in the June 28 Order, pursuant to G.S. § 62-65(a), the Commission applies the rules of evidence that are applicable to civil actions in the superior court, insofar as practicable. Pursuant to Rule 402 of the North Carolina Rules of Evidence, only relevant evidence is admissible and 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.

In determining whether a proposed merger complies with 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. As the June 28 Order correctly notes, the Commission applies a three-prong test when determining whether approval of a merger would serve the public convenience and necessity. June 28 Order at p. 3. The factors examined by the Commission are: (1) whether the merger would have an adverse impact on rates and; (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). Moreover, “[i]n applying the public convenience and necessity test, the Commission must compare the extent to which the public interest will be affected by the proposed combination. In other words, *contested factors urged for the Commission to consider should bear some nexus to the changes anticipated to occur from the combination or merger at issue. A G.S. 62-111 proceeding should not become one in which every perceived ill associated with the utility's operations may be litigated.*” *Order Denying NC WARN's Motions for Reconsideration and to Compel Discovery*, Docket Nos. E-2, Sub 998 and E-7, Sub 986, 2012 N.C. PUC LEXIS 2212, \*9-10 (2012) (emphasis added). Therefore, in order to successfully have the June 28 Order reconsidered, NC WARN must present grounds that bear an appropriate nexus to a change in circumstances, new evidence or the Commission's misapprehension of facts related to the factors considered by the Commission pursuant to G.S. § 62-111. NC WARN has made no such showing.

NC WARN provides no new evidence to support its Reconsideration Motion and fails to identify any change in circumstances or misapprehension by the Commission in the June 28 Order. Instead, it simply argues that the Commission reached the wrong conclusion in that order and should now reverse itself. As a consequence, NC WARN's Reconsideration Motion is insufficient, as a matter of law, to support the relief it requests. The testimony at issue discusses speculative future risks associated with the projected expansion of Duke Energy's natural gas platform, a plan that will not be impacted in any way by the proposed Merger. The Reconsideration Motion, therefore, is also substantively unjustified. The June 28 Order correctly concluded that NC WARN's prefiled testimony does not have any tendency to make the existence of a fact that is of consequence to a Commission determination under 62-111(a) more or less probable and is, therefore, irrelevant to the issues under consideration in this proceeding and NC WARN has provided no basis upon which the Commission could reasonably reach a different conclusion.

Applicants respectfully submit that NC WARN's Reconsideration Motion should be denied because it fails to meet the statutory requirements for reconsideration of a Commission decision under G.S. 62-80 and because it is otherwise substantively unjustified.

WHEREFORE, based on the foregoing, Applicants respectfully request that the Commission (i) grant Applicants Motion for Leave to File Response, and (ii) deny NC WARN's Reconsideration Motion.

Respectfully submitted, this the 1st day of September, 2016.

**Duke Energy Corporation**

/s/ Kodwo Ghartey-Tagoe  
Kodwo Ghartey-Tagoe  
Senior Vice President – State  
and Federal Regulatory Legal Support  
Duke Energy Corporation  
DEC 45A  
P.O. Box 1006  
Charlotte, North Carolina 28201-1006  
(T) 704-382-4295  
(email) kghartey-tagoe@duke-energy.com

/s/ Lawrence B. Somers  
Lawrence B. Somers  
Deputy General Counsel  
Duke Energy Corporation  
Post Office Box 1551/NCRH 20  
Raleigh, North Carolina 27602  
(T) 919-546-6722  
(email) bo.somers@duke-energy.com

**Piedmont Natural Gas Company, Inc.**

/s/ James H. Jeffries IV

James H. Jeffries IV  
Moore & Van Allen PLLC  
100 North Tryon Street, Suite 4700  
Charlotte, NC 28202-4003  
(T) 704-331-1079  
(email) jimjeffries@mvalaw.com

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the attached is being served this date upon all of the parties to this docket electronically or by depositing a copy of the same in the United States Mail, First Class Postage Prepaid, at the addresses contained in the official service list in this proceeding.

This the 1st day of September, 2016.

/s/ Richard K. Goley  
Richard K. Goley