

No. COA P16-483

N.C. UTILITIES COMMISSION

NORTH CAROLINA COURT OF APPEALS

IN THE MATTER OF:

APPLICATION OF DUKE ENERGY
CORPORATION AND PIEDMONT
NATURAL GAS, INC. TO ENGAGE
IN A BUSINESS COMBINATION
TRANSACTION AND ADDRESS
REGULATORY CONDITIONS AND
CODE OF CONDUCT

From NORTH CAROLINA
UTILITIES COMMISSION
DOCKET NO. E-2, SUB 1095
DOCKET NO. E-7, SUB 1100
DOCKET NO. G-9, SUB 682

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RESPONSE IN OPPOSITION TO
PETITION FOR WRIT OF MANDAMUS

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Mandamus (“Petition”) and, for the reasons set forth below, submit that such Petition should be denied.¹

PRELIMINARY STATEMENT

Petitioner seeks an order of this Court directing the North Carolina Utilities Commission (“Commission”) to grant his Petition to Intervene in a pending proceeding before the Commission. Petitioner’s mandamus request follows two denials of his petition to intervene by the Commission. Under the law of North Carolina, mandamus is not an available remedy to compel the Commission to reverse its prior decisions nor to grant Petitioner intervention in the proceedings below.

As is discussed below, a writ of mandamus is an extraordinary remedy used to command lower courts or commissions to perform statutorily imposed ministerial duties that do not involve the exercise of discretion.² The Commission’s denial of Fireman’s Petition to Intervene is not a statutorily imposed ministerial decision – i.e. Fireman has no statutory right to intervene in the proceedings below. Instead, and pursuant to Commission Rule R1-19, intervention is a matter within the

¹ Petitioner’s original filing included a Motion for Temporary Stay. Inasmuch as that motion has been denied by the Court, by order issued July 5, 2016, no response to that motion is provided herein.

² A court may properly utilize mandamus to compel a commission to make a discretionary decision if the commission otherwise refuses to act, but the court cannot require a particular result in such instance. *In re T.H.T.*, 362 N.C. 446, 453-54, 665 S.E.2d 54, 59 (2008). In this case, the Commission has made its discretionary decision to deny Fireman’s Petition to Intervene not once, but twice.

Commission's discretion premised upon a showing of a legally cognizable real interest in the subject proceedings. In this case, the Commission has twice exercised its discretion to deny Fireman's request to intervene. Those decisions may be appealable under the provisions of N.C. Gen. Stat. § 62-90 but they do not provide grounds upon which a writ of mandamus could properly be issued by this Court.

STATEMENT OF FACTS

1. Pursuant to N.C. Gen. Stat. § 62-111 and Commission Rule R1-5, on January 15, 2016, Duke Energy and Piedmont submitted an Application to Engage in a Business Combination Transaction and Address Regulatory Conditions and Code of Conduct to the Commission. (Fireman's Petition for Writ of Mandamus (hereinafter "Pet.") at Ex. A.)³ In their application, Respondents sought permission to enter into a transaction whereby Duke Energy and Piedmont would merge and Piedmont would become a subsidiary of Duke Energy (the "Merger"). (*See id.* ¶ 4.)

2. On March 2, 2016, the Commission issued an order scheduling hearing, establishing procedural deadlines, and requiring public notice. (Pet. at Ex. B.)

³ In his Petition, Fireman identifies Exhibits A-J and provides a document title for each exhibit. However, no exhibits were attached to the Petition Fireman served on Respondents. In this Opposition, Respondents cite to Fireman's exhibits based on the description he provided for each exhibit. As Respondents were not served with copies of such exhibits, Respondents are unable to confirm that the exhibits Fireman filed with the Court are complete and accurate and adhere to the descriptions put forth in his Petition.

3. On May 24, 2016, Fireman filed a Petition to Intervene with the North Carolina Utilities Commission. (Pet. at Ex. C.) In support of his petition Fireman offered only the following: i) he is a resident of North Carolina; ii) he is a member of certain committees and advisory councils; iii) he is connected to the electric grid through French Broad EMC, which has a contract through Duke Energy Progress (a subsidiary electric utility of Duke Energy); iv) he has two grandchildren who live in North Carolina and are served by Duke Energy; and v) he believes the Merger does not serve the public interest. (*Id.* ¶¶ 3, 4.)

4. On May 25, 2016, Duke Energy and Piedmont responded in opposition to Fireman's petition to intervene. (Pet. at Ex. D.) In their response, Duke Energy and Piedmont explained that Commission Rule R1-19 requires that a party seeking intervention demonstrate "a real interest in the subject matter of the proceedings" and that Fireman, who is not a customer of Duke or Piedmont, has no such interest. (*Id.* ¶¶ 1, 2.)

5. On May 31, 2016, Fireman filed a response in support of his Petition to Intervene. (Pet. at Ex. E.) Fireman claimed that his interest in the proceedings was "real" because it was: i) not false, but true; ii) not insincere, but deeply believed as true; iii) not pretense or hypocrisy, but genuine; iv) not insubstantial, but as palpable, tangible and immense as his love for his wife, family and life in general; and v) that

his grandchildren ages 7 and 11 are customers of Duke Energy through their parents. (*Id.*)

6. On June 9, 2016, the Chairman of the Commission issued an order denying Fireman's Petition to Intervene. (Pet. at Ex. F.) The Chairman determined that there was not good cause to grant Fireman's Petition to Intervene because Fireman is not a customer of Duke Energy Carolinas, LLC, Duke Energy Progress, LLC or Piedmont, and Fireman's activities and his concern that the Commission and Public Staff fulfill their obligations to serve the public interest do not, in and of themselves, establish the requisite legally cognizable real interest in the Merger. (*Id.*) In his June 9, 2016 Order, the Chairman explained that notwithstanding his order, Fireman would have the opportunity to testify as a public witness regarding his position at the July 18, 2016 hearing of this matter. (*Id.*)⁴

7. On June 18, 2016, Fireman requested full Commission review of the order denying his petition to intervene, effectively seeking the possible reversal of the Chairman's decision to deny him intervenor status. (Pet. at Ex. H.)

8. On June 23, 2016, the Commission denied Fireman's request for full Commission review. (Pet. at Ex. I). The Commission made clear that under the North Carolina Public Utilities Act, N.C. Gen. Stat. § 62-13(c), "petitions not

⁴ This fact is significant. Mr. Fireman will not be precluded from providing sworn testimony to the Commission as a public witness at the hearing of this matter and, therefore, his thoughts and opinions will be heard.

determinative of the merits of the proceedings and made prior to hearing” shall be determined by the presiding commissioner. (*Id.*)

9. On June 28, 2016, Fireman filed his Petition for Writ of Mandamus and Motion for Temporary Stay with this Court.

ARGUMENT

I. FIREMAN’S PETITION FOR WRIT OF MANDAMUS SHOULD BE DENIED AS NONE OF THE ELEMENTS NECESSARY FOR MANDAMUS ARE PRESENT IN THIS CASE.

A. A Writ of Mandamus is an Extraordinary Writ Granted Only Where Petitioner Has a Clear and Established Legal Right to the Act Requested and the Lower Court or Commission Has a Clear Legal Duty to Perform the Act Requested.

A writ of mandamus is a court order to a board, corporation, inferior court, officer or person commanding the performance of a “specified official duty imposed by law.” *See In re T.H.T.*, 362 N.C. 446, 453, 665 S.E.2d 54, 58 (2008) (citing *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971)). It is an extraordinary writ used only in limited instances. *See id.* In particular, mandamus can be maintained to enforce only “*clear legal rights or the performance of ministerial duties which are enjoined by law.*” *Moody v. Transylvania Cty.*, 271 N.C. 384, 390, 156 S.E.2d 716, 720-21 (1967) (citing *Thomas v. Bd. of Elections*, 256 N.C. 401, 124 S.E. 2d 164 (1962)) (emphasis added). “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 (1964) (citing cases).

The extraordinary relief of mandamus may be granted only when the following elements are satisfied: i) the party seeking relief demonstrates “a clear legal right to the act requested”; ii) the defendant has a clear legal duty to perform the act requested and such legal duty is not reasonably debatable; iii) performance of the duty-bound act must be ministerial in nature and not involve the exercise of discretion, however, a court may compel a public official to make a discretionary decision, as long as the court does not require a particular result; and iv) the defendant must have neglected or refused to perform the act requested and the time for performance of the act must have expired. *In re T.H.T.*, 362 N.C. at 453-54, 665 S.E.2d at 59 (citing cases). Finally, the court may only issue a writ of mandamus in the absence of an alternative, legally adequate remedy. *Id.* (citing *King v. Baldwin*, 276 N.C. 316, 321, 172 S.E.2d 12, 15 (1970); *Snow v. N.C. Bd. of Architecture*, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968)). When appeal is the

proper remedy, mandamus does not lie. *Id.* (citing *Snow*, 273 N.C. at 570, 160 S.E.2d at 727).⁵

B. None of the Elements Necessary for Mandamus are Present Here and Fireman's Petition Should Be Denied.

Fireman's petition for mandamus should be denied because none of the elements necessary for mandamus are present here.⁶ Under the law of North Carolina, the grant or denial of Fireman's Petition to Intervene is not a ministerial act and the Commission has no statutory duty to grant Fireman intervenor status where he has not demonstrated a real legally cognizable interest in the underlying proceeding. Similarly, Fireman does not have a clear legal right to intervene and the

⁵ Examples of circumstances where mandamus has been found to be proper include the following instances: a juvenile court failed to issue an opinion in the time frame specified by statute; a trial court failed to hold a hearing as required by statute; a trial court refused to hold voluntary admission hearings as required by statute; and a trial court failed to enter a written order. *See In re T.H.T.*, 362 N.C. at 454, 665 S.E.2d at 59-60 (citing *State v. Wilkinson*, 302 N.C. 393, 393-94, 275 S.E.2d 836, 837 (1981); *Stevens v. Guzman*, 140 N.C. App. 780, 783, 538 S.E.2d 590, 593 (2000)).

⁶ In addition to the grounds set forth above, Fireman's Petition should also be denied because he has failed to bring his Petition under the proper statutory authority and failed to follow the mandates of Rule 22 of the North Carolina Rules of Appellate Procedure. Fireman brings his Petition under N.C. Gen. Stat. § 62-90, 62-91, 62-92 and Rule R1-19. N.C. Gen. Stat. § 62-90 deals with the right to appeal a final order of the Commission. N.C. Gen. Stat. § 62-91 deals with docketing a title for a cause on appeal from the Utilities Commission and N.C. Gen. Stat. § 62-92 requires that in any appeal the complainant in the original complaint before the Commission shall be a party to the record and have a right to appear. Mandamus, on the other hand, is governed by Rule 22 of the North Carolina Rules of Appellate Procedure. Rule 22 requires, *inter alia*, that a petition for mandamus contain a statement of the facts, statement of the issues and certified copies of any order or opinion or parts of the record that may be essential to an understanding of the matters set forth in the petition. Fireman's brief does not contain a statement of issues and while it lists attachments A-J, the copies of Fireman's petition received by Duke Energy and Piedmont contain no attachments.

Commission has not failed to act upon his request (it has simply acted in a way contrary to his desired outcome). *See e.g., In re T.H.T.*, 362 N.C. at 453, 665 S.E.2d at 58.

North Carolina General Statute Section 62-72 provides that “[e]xcept as otherwise provided in this Chapter, the Commission is authorized to make and promulgate rules of practice and procedure for the Commission hearings.”⁷ Intervention in active proceedings before the Commission is governed by Commission Rule R1-19. Neither any statute nor Rule R1-19 provides Fireman with the unfettered right to intervene or require that the Commission allow his intervention in the proceedings before the Commission.⁸ Rather, R1-19 requires that Fireman demonstrate “a real interest in the subject matter of the proceedings,” upon which intervention may be granted. In this case, as determined by the Chairman in the proper exercise of his discretion, Fireman has failed to demonstrate a legally

⁷ In construing this grant of authority, the North Carolina Supreme Court has held that the “Commission, in absence of statutory inhibition, may regulate its own procedure within broad limits and may prescribe and adopt reasonable rules and regulations with respect thereto . . .” *State ex rel Utilities Comm’n v. Carolinas Comm. for Indus. Power Rates and Area Dev., Inc.*, 126 S.E. 2d 325, 257 N.C. 560 (1962).

⁸ This fact is central to the propriety of the Commission’s actions in this case and the lack of grounds for issuance of a writ of mandamus. In this regard, the Court should take note of the fact that under both the General Statutes and the Commission’s rules, certain parties do have a legal right to intervene in pending dockets before the Commission. For example, N.C. Gen. Stat. § 62-20 grants such a right to the Attorney General and Commission Rule R1-19(e) conveys a similar right to the Public Staff. The standard for intervention applicable to Fireman, however, is different and his intervention is a matter within the discretion of the Commission.

cognizable “real interest” in the proceedings below and, therefore, his intervention request was denied.⁹

Significantly, Fireman does not even argue that he has a legal right to intervene or that the Commission had a legal duty to allow such intervention. Instead, Fireman bases his request for mandamus on the following: i) he is a doctor; ii) he has grandchildren who live in North Carolina; iii) he understands the science of climate change; iv) he believes the Public Staff of the Commission must use all current science and econometric analysis of risk/cost/benefit analysis in its evaluation of the merger; v) he believes he can demonstrate that the Public Staff’s analysis of the merger is inadequate; vi) although he is not a direct customer of Duke Energy or Piedmont, he believes he has a substantial interest in the Merger;¹⁰ vii) there is no other intervener capable of representing his views; viii) he believes the Public Staff has abrogated its duty to protect the public interest by inadequate

⁹ It is significant that Fireman’s original pleading to the Commission was styled as a “Petition to Intervene” and requested that he be “allowed to intervene in this matter” – both of which explicitly recognize that intervention is not a right but a matter within the discretion of the Commission.

¹⁰ Fireman cites to *Juliana v. United States*, 2016 U.S. Dist. LEXIS 4719 (D. Or. Jan. 14, 2016), an Oregon case, to support his position that he has a substantial interest in the Merger. *Juliana* is factually and legally distinguishable and not binding on this court. Further, *Juliana* in no way addresses a writ of mandamus. In *Juliana*, a motion to intervene was determined under Federal Rule of Civil Procedure 42. Plaintiffs sought to phase out all fossil fuel, which the intervenors relied upon. *Id.* at *11. The court determined that the intervenors had a substantial interest in the case as required under Fed. R. Civ. P. 42 because if relief was granted to plaintiffs, it would “at a minimum, change the very nature of business engaged in by members of the proposed intervenors and substantially alter the various property and contractual rights, if not outright eliminate the businesses altogether.” *Id.* at *11.

analysis; and ix) he believes the Commission and Public Staff have failed to consider the Merger's impact on North Carolina's posterity. (Pet. at ¶ 1-12.) The foregoing may establish that Fireman has an opinion about the Public Staff's performance of their duties in this case and concerns about environmental matters which are unrelated to this docket but they do not establish that he has a right to intervene in the proceedings below and they wholly fail to establish any basis for the issuance of a writ of mandamus.

Also fatal to Fireman's request for mandamus, Fireman has an alternative legal remedy in this instance. *See In re T.H.T.*, 362 N.C. at 453-54, 665 S.E.2d at 59. Fireman is fully entitled to appeal the decision of the Commission denying him intervenor status. In fact, Fireman cites to the very statute, N.C. Gen. Stat. § 62-90, that gives him the right to appeal any final order or decisions of the Commission in his pleading. The fact that he has such right, precludes the issuance of a writ of mandamus by this Court. *Id.* (citing *King v. Baldwin*, 276 N.C. 316, 321, 172 S.E.2d 12, 15 (1970); *Snow v. N.C. Bd. of Architecture*, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968)).

Based on the foregoing, it is clear that Petitioner has failed to establish the elements necessary for the issuance of a writ of mandamus by the Court of Appeals effectively reversing the Commission's discretionary determination not to allow Mr.

Fireman to intervene in the proceedings below. Accordingly, Fireman's Petition for Writ of Mandamus should be denied.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that Fireman's Petition for Writ of Mandamus be denied.

Respectfully submitted this 11th day of July, 2016.

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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 enclosed in a first-class postage-paid wrapper into a depository under the exclusive care and custody of the United States Postal Service this 11th day of July, 2016, addressed as follows:

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