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 Company Inc., to Engage in Business Combination Transaction and Address Regulatory Conditions and Codes of Conduct	))))))	PUBLIC INTEREST GROUPS' BRIEF AND MOTION FOR RECONSIDERATION

NOW COME NC WARN, The Climate Times, and the North Carolina Housing Coalition (together the "Public Interest Groups"), by and through the undersigned attorney, with a brief and motion for reconsideration of the Commission's Order Granting Motion to Strike and Reserving Decision on Motion in Limine, filed June 28, 2016.

The Public Interest Groups maintain the merger application fails as there is no basis in the record for determining the merger is in the public interest. Duke Energy, in its purchase of Piedmont Natural Gas ("Piedmont NG"), is investing heavily in a natural gas infrastructure, and as a result, is relying more and more on natural gas for generation. The risks to ratepayers of this natural gas future with the increasing bills it will bring are substantial. The stipulation agreement between the utilities and the Public Staff does little to provide protection for the ratepayers, and cannot be seen as providing a rationale for the merger. The

merger simply does not meet the test of being in the public convenience and necessity.

BACKGROUND

Duke Energy Corporation, whose subsidiaries, Duke Energy Carolinas and Duke Energy Progress, are regulated utilities under North Carolina law, providing electricity to a wide range of customers connected to a grid. Piedmont NG is another regulated utility under North Carolina, delivering natural gas through a distribution system of pipelines. Both Duke Energy and Piedmont NG have a utility franchise, and are provided exclusive service areas, with rates approved by the Commission.

On January 15, 2016, the utilities filed an application to engage in business combination transaction, i.e., the cash purchase of Piedmont NG by Duke Energy. Duke Energy's acquisition of Piedmont NG will add one million customers to Duke Energy's existing customer base. Piedmont NG owns 22,490 miles of distribution pipelines, and 2,920 miles of transmission pipelines. The majority of Piedmont NG's utility plant assets are located in North Carolina, with some in Tennessee and South Carolina. Both utilities have equity positions in the Atlantic Coast Pipeline; Duke Energy is committed to 40% of the pipeline, while Piedmont NG has 10%. Duke Energy is part of the joint venture for the Sabal Trail pipeline in Florida, Georgia, and Alabama, while Piedmont has a stake in the Constitution pipeline. Tr. V.1, pp 105-106; NC WARN Good/Skains Cross-Exhibit 1, pp. 4, 38.

The purchase price of Piedmont NG is $4.9 billion in equity and the assumption of debt for $1.8 billion for a total of $6.7 billion. Tr. V.1, pp. 102-104. The book value of Piedmont NG is $1.4 so the purchase premium is $3.5 billion. Duke Energy witness, Mr. Young, described the purchase premium as "goodwill." Tr. V.2, p. 33.

An Agreement and Stipulation of Settlement between the Applicants and the Public Staff ("stipulation agreement"), containing regulatory conditions and code of conduct, was filed on June 20, 2016. More narrow stipulation agreements were reached with other parties.[1]

SCOPE OF REVIEW

The Commission cannot approve a merger affecting a public utility unless the merger is "justified by the public convenience and necessity." G.S. 62-111(a). The Commission "must inquire into all aspects of anticipated service and rates occasioned and engendered" by the merger in an effort to determine whether the merger is justified by the public convenience and necessity. *State ex rel. Utilities Comm'n v. Pinehurst*, 99 N.C. App. 224, 229, 393 S.E.2d 111, 115 (1992). As a "threshold question," the merger must not have adverse effects on ratepayers. *Id*. at 229, 393 S.E.2d at 115.

As noted by the Court in its decision on the Duke Energy Carolinas 2013 rate case, the Commission is required in rate cases to determine the effect on rate payers. *State ex rel. Utils. Comm'n v. Cooper* ("Cooper I"), 366 N.C. 484,

[1] The stipulation agreements were incorporated into the record without objection.

493, 739 S.E.2d 541, 547 (2013).[2] Although this decision was centered on the Commission's determination on the return on equity in a rate case, the Court stated "Chapter 62 as a whole, required the Commission to treat consumer interests fairly—not indirectly or as 'mere afterthoughts.'" 366 N.C. at 495, 739 S.E.2d at 548. The relevant discussion centered on whether a stipulation agreement standing alone provided adequate evidence in the record to support a Commission decision. The Court ruled the Commission had to fully formulate its own findings, rather than just rely on the "findings" in the agreement.

The Public Interest Groups maintain this mandate of requiring analysis of ratepayer impacts is appropriate for merger cases. The Commission is required to address risks to ratepayers associated with Duke Energy's multi-year commitment to increasing its natural gas platform as well as other issues related to the merger.

ARGUMENT

The legal position of the intervenors, the Public Interest Groups, was stated succinctly by Chairman Finley at the evidentiary hearing:

> We know that your client doesn't like the fact that Duke intends to burn natural gas in its generating facilities because you think that the methane emissions at the wellhead, and the transportation and distribution system are harmful to the environment, and you think that the prices of natural gas is going to go up because it's your contention that the estimates of the amount of reserve for natural gas in the Marcellus and the other non-conventional plays are not what people think it is.

[2] After the remand the Commission issued a second order which was upheld by the Court in *State ex rel. Utils. Comm'n v. Cooper* ("Cooper II"), 367 N.C. 444, 450, 761 S.E.2d 640, 644 (2014).

Tr. V.1, p. 132. The Public Interest Groups would add that increased costs to ratepayers resulting from the many risks from Duke Energy's natural gas future are the essential part of this position. This position is relevant to the merger deliberations; the questions the Commission needs to resolve are: what will be the viability of the two utilities after the merger? And what will be the impacts on the North Carolina ratepayers?

As the Public Interest Groups argue throughout this brief, the increase of Duke Energy's commitment and use of natural gas is a matter of crucial importance to the acceptability of the merger. The present case should not be immune from policy considerations, as well as economic considerations, and it is essential for the Commission to address all risks in making its determination on whether the merger is in the public convenience and necessity or whether the detriments to the ratepayers outweigh any benefits. In following specific arguments, the Public Interest Groups are requesting the Commission consider the risky implications of these public policy issues on the proposed merger.

However, the position by the Public Interest Groups in opposing the merger on one set of grounds does not restrict them from addressing relevant legal issues on all aspects of the merger, including risks to ratepayers outside of those caused by Duke Energy's natural gas platform, and the deficiencies in the stipulation agreement between Duke Energy, Piedmont NG and the Public Staff. As intervenors, the Public Interest Groups are permitted to participate on all issues in the proceeding, as persons who may be affected by any final order in the proceeding. NCUC Rule 1-19.

As demonstrated below, the merger between the two monopoly utilities, one electric and one natural gas, is not in the public convenience and necessity. In addition to the risks associated with the future of natural gas, a major issue to be investigated by the Commission is the potential for self-dealing and other anticompetitive practices. As demonstrated in Duke Energy's experiences with NC Natural Gas and the Westcoast NG, it is risky to tie an electric utility to a natural gas utility. Lastly, the stipulation agreement is in large part vague and unenforceable, and does not provide the Commission with adequate basis for determining whether the merger benefits ratepayers.

I. The proposed merger will increase Duke Energy's reliance on natural gas and will result in considerable risk to ratepayers.

The merger will support Duke Energy's planned reliance on natural gas as its fuel of choice for the next decade, and into the future. In her prefiled testimony, Duke Energy CEO, Ms. Good, stated "[t]his transaction establishes a valuable natural gas infrastructure platform which will provide strong growth opportunities for years to come." Tr. V.1, p.77. Ms. Good also listed the natural gas infrastructure owned by Piedmont NG as reasons for the purchase. Tr. V.1, pp. 105. Her conclusion was "the direct use of natural gas will become an even more important energy source." Tr. V.1, p. 157.

Both Ms. Good and the Piedmont NG CEO, Mr. Skains, explained Duke Energy's commitment to more natural gas. Ms. Good, in response to the Chairman's question, explained what she meant as "natural gas platform":

> Mr. Chairman, we have expanded into natural gas infrastructure with the Atlantic Coast Pipeline and with the Sabal Trail investment because the increasing dependence of electric generation on natural gas gives us an interest in ensuring that we have infrastructure to support that. Sabal Trail serves our plants in Florida. Atlantic Coast Pipeline will be important here in the Carolinas. And so, as looked at that change in our business and we had an opportunity to merge with Piedmont that is lead experts in natural gas procurement, and construction, and transportation and have been in the market for many years, we saw the benefit of bringing together all of those interests under one leadership.

Tr. V. 1, p. 148. Mr. Skains testified:

> The strategic nature of the Duke Energy acquisition of Piedmont is consistent with the idea that Duke Energy intends to use Piedmont as a platform for growth in the natural gas business, which will require continued management and operating personnel with significant gas industry experience.

Tr. V. 1 p. 96. In her testimony on cross-examination, Ms. Good also referred to the opportunity of liquefied natural gas (”LNG”) terminal at the Virginia ports and additional storage. Tr. V.1, pp.108-109.

Duke Energy has already significantly increased its reliance on natural gas for generation. In the past decade (2004 – 2014), it increased its electricity generated from natural gas from 4% to 30% and has continued to increase its dependence on natural gas. Tr. V.1, p. 128.

Further evidence of Duke Energy’s expected increase of natural gas usage is in the integrated resource plans (“IRPs”) filed by Duke Energy Carolinas (“DEC”) and Duke Energy Progress (“DEP”) in Docket E-100 Sub 141. Even with the understanding the IRPs are planning documents and subject to change, Duke Energy lays out a significant increase in the natural gas plants it is planning to serve its North and South Carolina jurisdictions. ATTACHMENT 1 herein. DEP’s base case plan is to construct 84 MW of combustion turbines (“CT”) at

Sutton, 560 MW of combined cycle (”CC”) plants at Asheville, plus undesignated 1790 MW of CCs and 2551 MW of CTs for a total of 4985 MW of natural gas-fired generation units by 2030. During the same time period, DEC plans to construct 670 MW of CC at Lee, plus undesignated 2685 MW of CC for a total of 3355 MW.[3] For both utilities, the total is 9010 MW, which is more than fifteen large natural gas plants over the next fourteen years. The “no carbon sensitivity” scenario in the IRPs replaces new nuclear with natural gas for a total of 10,690 MW of new natural gas generation.

Even if the totals for new natural gas generation in the IRPs appear overly ambitious and subject to change in the future, the fact remains Duke Energy is planning major natural gas additions to its system for the near future. As a result, Duke Energy is becoming almost totally reliant on natural gas for peaking and increasingly for baseload. In addition to the rate-based costs of new plants, the availability of future supplies, the production and distribution costs, and regulatory costs are relevant because those costs will be passed on to the ratepayers. The specter of stranded natural gas plants, with the costs pushed on ratepayers, cannot be ignored. The more Duke Energy is tied to natural gas, whether from construction of new generating plants or ownership of a natural gas company, the greater the potential risk to Duke Energy and therefore the greater the risk for much higher rates.

In response to a cross-examination question regarding a hypothetical cost increase, Piedmont NG witness, Mr. Skains, replied:

[3] It should be noted the base case in the Duke Energy IRPs includes 2234 MW of new nuclear, but given the overwhelming costs of new nuclear, it is likely future IRPs will not include it.

> Q. And would you pass that percent increase on to your customers?
>
> A. We would file with this Commission to track our actual cost of gas as we always have. We don't profit off of the natural gas price. Those costs flow through to our customers as they increase and as they decline over time, subject to this Commission's review and approval.

Tr. V.1, p. 123. The utilities' position is customers will pay whatever the fuel costs end up being so there is no need to analyze what the risks and the causes of the price increase will be as a part of evaluation of the merger. This argument fails if the merger encourages Duke Energy to construct new natural gas plants because of expected access to new markets of fracking gas through Piedmont NG and the proposed Atlantic Coast Pipeline. Fuel cost variability and availability might lead to overcapacity of natural gas generation, and the resulting stranded costs to be pushed on ratepayers.

The utilities' argument is the future increased costs and risky supply of natural gas, and the resulting increased costs to consumers, is outside the Commission's consideration. The Public Interest Groups disagree; determining the risk to ratepayers for increased cost is the central responsibility of the Commission in merger proceedings.

II. The future of natural gas is risky for both of the utilities, and therefore for ratepayers in all classes.

The risks to Piedmont NG will become Duke Energy's risks if the merger is approved, and those risks will be passed on to ratepayers. Piedmont NG's 2015 Form 10-K filing to the Security Exchange Commission ("SEC") gives a

comprehensive summary of the company's financial performance, including risks to natural gas pricing and availability. Good/Skains Cross-Exhibit 1. In cross examination, Piedmont NG witness, Mr. Skains, responded to those risks and testified "[t]oday, in the current market environment, these are risks that Piedmont Natural Gas faces and these same risks would transfer unless conditions change, which they always do, to Piedmont Natural Gas as a subsidiary of Duke Energy." Tr. V. 1, p. 141.

The Piedmont NG Form 10-K recognizes the potential for natural gas prices to increase:

> A supply and demand imbalance in natural gas markets could cause an increase in the price of natural gas. Recently, the increased production of U.S. shale natural gas has put downward pressure on the wholesale cost of natural gas; accordingly, restrictions or regulations on shale gas production could cause natural gas prices to increase.

NC WARN Good/Skains Cross-Exhibit 1, p. 9. Making major investments in natural gas transmission pipelines, such as the Atlantic Coast Pipeline, may exacerbate the problems with price increases and availability. "The financial condition of the natural gas marketers and pipelines that supply and deliver natural gas to our distribution system can increase our exposure to supply and price fluctuations." NC WARN Good/Skains Cross-Exhibit 1, p. 37.

The Piedmont NG 10-K also recognizes rules and regulations in the natural gas business are shifting quickly, and states "[w]e are subject to new and existing laws and regulations that may require significant expenditures, significantly increase operating costs, or significant fines or penalties for

noncompliance." NC WARN Good/Skains Cross-Exhibit 1, p. 19; Tr. V.1, pp118-121.

Piedmont NG's 10-K also acknowledges new federal regulations could expand to include emissions of methane, and other regulations could cover natural gas distribution and transmission, as well as pipeline design, construction, operation, maintenance, integrity, safety and security. Clearly, Piedmont NG understands significant change is coming:

> We are subject to DOT and state regulation of our pipeline and related facilities and have ongoing transmission and distribution pipeline integrity programs to inspect our system for anomalies, corrosion and leaks as well as monitoring key metrics of our system for its safe operation. We anticipate federal legislative and regulatory enactments will increase in scope and add further requirements and costs to our pipeline safety and integrity programs and our capital and O&M expenditure programs."

NC WARN Good/Skains Cross-Exhibit 1, p. 3. The Piedmont NG 10-K emphasizes the risk from future regulatory actions:

> We are also subject to various federal regulations that affect our utility and non-utility operations. These federal regulations include regulations that are particular to the natural gas industry, such as regulations of the Federal Energy Regulatory Commission (FERC) that affect the certification and siting of new interstate natural gas pipeline projects, the purchase and sale of, the prices paid for, and the terms and conditions of service for the interstate transportation and storage of natural gas, regulations of the U.S. Department of Transportation (DOT) that affect the design, construction, operation, maintenance, integrity, safety and security of natural gas distribution and transmission systems, and regulations of the Environmental Protection Agency (EPA) relating to the environment, including proposed air emissions regulations that would expand to include emissions of methane.

NC WARN Good/Skains Cross-Exhibit 1, p. 2. The admissions of future regulatory costs go far beyond simply being risks outlined for investors, they will in all likelihood raise costs for North Carolina ratepayers.

Overreliance on fracking gas from the Marcellus Shale Region also is recognized as a significant risk in the Form 10-K. Rather than address the potential decline of the fracking play, Piedmont stated "[w]e continue to diversify our supply portfolio by contracting to bring abundant and low cost natural gas supplies from the Marcellus supply basin to our natural gas markets in the Carolinas." NC WARN Good/Skains Cross Exhibit 1, p. 8.

However, the Marcellus region may be "over piped" in the words of natural gas expert, Mr. Braziel, and the need for more takeaway capacity out of the Marcellus and Utica shale gas plays is headed for a pipeline overbuild. NC WARN Yoho Cross Exhibit 1. As demonstrated in his article, Mr. Braziel said an evaluation of price and production scenarios through 2021 suggests the industry is planning too many pipelines in an effort to relieve the region's current capacity constraints. He drew parallels between the current state of shale hydrocarbon commodities markets and the housing market crash during the Great Recession. "What we're really seeing is the tail end of a bubble, and what's actually happened is that bubble attracted billions of dollars' worth of infrastructure investment that now has to be worked off." *Ibid*, p. 2. Mr. Braziel's conclusion is the availability of natural gas will be limited as early as next year.

The Piedmont 10-K summarizes other potential risks to Piedmont NG:

- Economic conditions in our markets
- Wholesale price of natural gas

- Availability of adequate interstate pipeline transportation capacity and natural gas supply
- Regulatory actions at the state level that impact our ability to earn a reasonable rate of return and fully recover our operating costs on a timely basis
- Competition from other companies that supply energy
- Changes in the regional economies, politics, regulations and weather patterns of the three states in which our operations are concentrated
- Costs of complying or effect of noncompliance with state and federal laws and regulations that are applicable to us
- Effect of climate change, carbon neutral or energy efficiency legislation or regulations on costs and market opportunities
- Inability to complete necessary or desirable pipeline expansion or infrastructure development projects.

NC WARN Good/Skains Cross Exhibit 1, pp. 21-22.

It is important to note each of these risks, acknowledged by Piedmont NG in its SEC Form 10-K, may have a significant impact on the viability of Piedmont NG. Based on Mr. Skains' testimony, in the event of a merger these risks would be adopted by Duke Energy and therefore may have a significant impact on the viability of Duke Energy as a whole if the companies are allowed to combine. None of these risks were analyzed in any detail as part of the application, nor by any Duke Energy / Piedmont NG witnesses. Public Staff witness, Mr. Hoard, stated the Public Staff did not analyze various natural gas company risk factors or even conduct a cost-benefit study. Tr. V. 2, p. 98.

The Public Interest Groups, on the other hand, did attempt to provide expert analysis of some of the risks outlined in the Piedmont NG 10-K. The pre-filed testimony of Dr. Hughes sought to explain certain risks to natural gas supply and pricing while the pre-filed testimony of Mr. Howard sought to outline the

potential for new regulations of methane emissions in the natural gas industry and their likely impact on natural gas prices.

III. The merger may not benefit Piedmont NG, a regulated utility, nor the North Carolina ratepayers who paid for its infrastructure.

A. Purchase then sell assets. At some level, the two utilities – gas and electric -- compete for customers for heating, cooling, and other utility services. As stated in Piedmont NG's 2015 Form 10-K:

> The natural gas business is competitive, and we face competition from other companies that supply energy, including electric companies, oil and propane dealers, renewable energy providers and coal companies in relation to sources of energy for electric power plants, as well as nuclear energy. A significant competitive factor is price."

NC WARN Good/Skains Cross Exhibit 1, p. 10. The merger will potentially eliminate the competition between electricity and natural gas in the present Piedmont NG service area overlapping the Duke Energy service area in North Carolina.

Duke Energy has attempted and failed to incorporate natural gas companies into its corporate structure in the past. Whether these failures were attempts to incorporate a reliable natural gas supply or just to limit competition is a matter of speculation. What is certain is the natural gas utilities were fundamentally changed after just a few years of Duke Energy control.

In 1999, Duke Energy (operating as Carolina Power & Light at the time) purchased North Carolina Natural Gas ("NCNG") as a wholly owned subsidiary.[4] In 2002, Duke Energy (operating as Progress Energy at the time) sold NCNG to Piedmont Natural Gas. Duke Energy's press release at the time of the purchase is resonant with the same rhetoric used in the merger *sub judice*;

> Carolina Power & Light's acquisition of North Carolina Natural gas – which was approved July 13 [1999] by N.C. and S.C. regulators and will close today – marks a significant milestone in CP&L's strategy to become a total energy provider in the region.

NC WARN Barkley Cross Exhibit 1, p. 1. The press release at the time of sale announces "Progress Energy plans to use the net proceeds from the sale to pay down debt." *Ibid*, p. 4.

Again in 2002, Duke Energy acquired Westcoast Energy, a Canadian corporation, owner of Union Gas. Tr. Vol. 1, page 148. Duke Energy's press release at the time of purchase states "[t]he acquisition is an excellent strategic fit for Duke Energy and provides a platform for significant growth and asset optimization."[5] In January 2007, Duke Energy had completed the spin-off of its Westcoast Energy and Union Gas, to form Spectra Energy.

Ring fencing provisions in the settlement agreement are inadequate to protect Piedmont NG customers in the long run, if Duke Energy once again buys heavily into natural gas infrastructure then sheds the assets a few years later. Regulatory Condition 8.8 states:

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[4] The purchase of NCNG was in combined Commission Dockets G-9, Sub 466; G-21 Sub 377; and E-2 Sub 740A. The resulting sale of NCNG to Piedmont Natural Gas was in combined Commission Dockets G-9, Sub 470; G-21, Sub 439; and E-2, Sub 825.

[5] Available at www.duke-energy.com/news/releases/2002/Mar/2002031401.html

> The operation of DEC, DEP, and Piedmont under a holding company structure shall continue to be subject to Commission review. To the extent the Commission has authority under North Carolina law, it may order modifications to the structure or operations of Duke Energy, DEBS, another Affiliate, or a Nonpublic Utility Operation, and may take whatever action it deems necessary in the interest of Retail Native Load Customers and Piedmont's Customers to protect the economic viability of DEC, DEP, and Piedmont, including the protection of DEC's, DEP's, and Piedmont's public utility assets from liabilities of Affiliates.

The best way to protect the ratepayers and the economic viability of the utilities is to deny the merger, rather than take unprecedented action at some point in the future.

The Public Interest Groups are concerned about the impacts on the ratepayers of both utilities of this pattern of the electric utility purchasing a gas utility and then selling it off. The end results do not appear to have benefited the ratepayers in any manner. In both of the above-referenced instances, the creation of a natural gas platform failed and Duke Energy spun off its natural gas holdings. The initial purchase was touted as a superlative strategic advantage to Duke Energy and its shareholders, but in the course of a few years, Duke Energy had divested itself of the natural gas utility to pay down debt. The benefits of the mergers were not realized, even between the utilities.

B. Purchase premium. As noted above, the purchase premium is approximately $3.5 billion, more than the entire book value of Piedmont NG and its debt Duke Energy would assume if the deal is completed. Duke Energy witness, Mr. Young, described the purchase premium as "goodwill," including recognition of services provided, and Piedmont NG's status as a regulated utility

with an exclusive service area. Tr. V.2, p. 33. The Public Interest Groups would suggest that the premium also places a value on the captive customers in that service area who can only receive natural gas from Piedmont NG. Altogether, the value of Piedmont NG's franchise is due to its stable source of revenue, and that revenue source given to it through the government decision to grant the utility an exclusive franchise.

Passing on the entire purchase premium to the Piedmont NG shareholders unduly overcompensates them, and at the same time, denies customers benefits proportionate to their past burdens. Almost a century ago, the United State Supreme Court recognized the legally protected interest of a utility investment, the "capital embarked in the enterprise," i.e., the money in the rate base invested in assets that serve the public. *Missouri ex re. Southwestern Bell Telephone Co. v. Public Service Comm'n*, 262 U.S. 276, 290, 307-308 (1923) (Brandeis, J, concurring). At the same time, the Court determined the entire sale value of the utility may not be a legally protected interest. In the merger *sub judice*, the capital that has gone into the Piedmont NG's rate base has come from its ratepayers to create the infrastructure that provided the service, and generated the goodwill.

The question the Commission should ask Piedmont NG is whether its shareholders should receive the entire premium, i.e., the amount above the book value, or whether it rightfully belongs to the ratepayers. There is no rationale why the Piedmont NG shareholders should receive the purchase premium as opposed to the ratepayers who put up the capital in the first place. The premium

should be seen as extra compensation from its ratepayers and accrued by Piedmont NG over the years. There simply is no evidence the value of the premium was created by shareholder risk-taking or the Piedmont NG executives' managerial merit. The utility franchise requires the Commission to set rates and provide a reasonable opportunity for Piedmont NG to earn a fair return. At least some portion of the premium is deserved by the ratepayers, whose captive role and loyal monthly payments produced the stream of earnings that have created the value represented by the control premium.

In the present proceeding, Duke Energy desires to take control of the entire Piedmont NG franchise, including the goodwill built by Piedmont NG with the ratepayers' money. Passing the total premium to shareholders distorts the market of the utility acquisition. The Public Interest Groups maintain the franchise is not Piedmont NG's to sell; it is a government-granted right, the right to be the sole provider in a government-defined service area. It belongs to the ratepayers and not to Piedmont NG's shareholders.

IV. The settlement agreement does not support the necessary findings for public convenience and necessity.

The stipulated agreement entered into by Duke Energy, Piedmont NG, and the Public Staff, contains a number of provisions that are vague or unreasonable, and lacking enforcement mechanisms. The following are in addition to the abject failure by the three parties to analyze any of the risks associated with the merger utilities and their potential impacts on ratepayers as described above.

A. Savings Guarantee. In the stipulated agreement, Duke Energy promises to guarantee North Carolina retail customers will receive their allocable shares of $650 million in total projected fuel and fuel-related cost savings, as well as a small amount of non-fuel operations and maintenance cost savings, to be achieved over the first five years following the close of the Merger. Stipulated Agreement, Paragraph 2. There is no mechanism for automatic pass through of these cost savings nor is there a timeframe when these projected savings will be received by the ratepayers.

Regulatory Condition 5.18 allows other parties to seek to include these savings:

> Inclusion of Cost Savings in Future Rate Proceedings. Neither DEC, PEC, Duke Energy Corporation, any other Affiliate, nor a Nonpublic Utility Operation shall assert that any interested party is prohibited from seeking the inclusion in future rate proceedings of cost savings that may be realized as a result of any business combination transaction impacting DEC and PEC.

The only way the projected savings can be recovered by ratepayers is at a rate proceeding, and then only if requested. The amounts of the savings are not openly tracked nor filed with the Commission.

These vague provisions in the present stipulated settlement should be contrasted to those in the Joint Final Consolidated Stipulation, Conditions, and Code of Conduct Rate treatment of savings in the Duke Energy and Progress Energy merger in 2012.[6] In paragraph A.2., the saving guarantees of "$650

[6] NCUC Dockets E-2, Sub 998, and E-7, Sub 986.
http://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=56e59c27-bb62-44a4-ab3c-6c0363a9891f

million in total projected fuel and fuel-related savings, as well as a small amount of non-fuel operations savings, to be achieved by them over the first five years following the close of the Merger" and automatically flow to "North Carolina retail customers in varying amounts in each year of the five-year period." Paragraph A.2.(a). Each of the savings are specifically described in the Joint Final Consolidated Stipulation. The fuel savings are required to be filed monthly so the Commission, the Public Staff, and interested persons have the ability to track the savings and more important, the ratepayers benefit from the savings.

B. Self-dealing. G.S. 62-153 requires all contracts for payments of any kind between affiliated or subsidiary companies to be filed with Commission for a review at a hearing. If the contract "is found to be unjust or unreasonable, and made for the purpose or with the effect of concealing, transferring or dissipating the earnings of the public utility," the Commission may disapprove the contract. The provisions in the stipulated agreement to protect the ratepayers against self-dealing are vague and without enforcing mechanisms. As such they are unjust and unreasonable, and would enable Duke Energy to unduly hide its earnings or the efficiencies gained by the merger.

The requirement that sales of natural gas by Piedmont NG to Duke Energy cannot be for less than fair market value begs the question, how will fair market value be evaluated? Regulatory Condition 3.4 states:

> Purchases and Sales of Electricity and Natural Gas between DEC, DEP, Piedmont, and Duke Energy, Other Affiliates, or Nonpublic Utility Operations. Subject to additional restrictions set forth in the Code of Conduct, neither DEC, DEP, nor Piedmont shall purchase

> electricity (or related ancillary services) or natural gas from Duke Energy, another Affiliate, or a Nonpublic Utility Operation under circumstances where the total all-in costs, including generation, transmission, ancillary costs, distribution, taxes and fees, and delivery point costs, incurred (whether directly or through allocation), based on information known, anticipated, or reasonably available at the time of purchase, exceed fair Market Value for comparable service, nor shall DEC, DEP, or Piedmont sell electricity (or related ancillary services) or natural gas to Duke Energy, another Affiliate, or a Nonpublic Utility Operation for less than fair Market Value; provided, however, that such restrictions shall not apply to emergency transactions. This condition shall not apply to transactions between DEC and DEP that are governed by the JDA.

The fair market value of sales by a natural gas provider to an electric utility relying on natural gas generation is at best not a straightforward matter. Fair market value can be shown by comparable purchase contracts, i.e., the going rate, but Duke Energy will purchase its natural gas only from Piedmont NG and one other gas utility in North Carolina. Because the options are so limited there can be only limited analysis of market competitiveness. Comparison to other contracts can only be made to similar contracts in other jurisdictions; the North Carolina market, given Duke Energy's overwhelming control, is extremely limited.

On cross-examination, Duke Energy witness, Mr. Barkley, discussed the fair market value determination between the utilities.

> Q. So who is going to make the determination of what fair market value is?
>
> A. Fair market value will be determined in this context. It will be determined by the Companies, and it would certainly be subject to review by other parties.

Tr. V. 2, p. 175. Market competitiveness becomes whatever Duke Energy and Piedmont NG decide it is.

The Public Interest Groups further find it troublesome the present contracts between Duke Energy and Piedmont NG may be unfair and unreasonable on their face. Piedmont NG witness, Skains, stated:

> My recollection is that the throughput that we deliver through our natural gas systems, about half of that goes to power generation, most of which is to serve Duke Energy's power plants. In terms of contribution to our margin revenues, I think Duke is about 10 percent of the revenue margins that we collect on an annual basis.

Tr. Vo. 1, p. 108. Duke Energy witness, Ms. Good, confirmed Duke Energy received approximately 50% of the natural gas throughput, and only contributed 10% of Piedmont NG's revenue. Market competitiveness is a vague notion when there is only an extremely limited market in play.

C. Contributions. Paragraphs 3 and 4 of the settlement in the stipulation agreement purport to compensate families who might be harmed by the proposed merger. Compared to the $3.5 billion purchase premium, the amount set aside in the stipulation agreement to assist low-income families is negligible.

The foundation gifts for community support in paragraph 3 are not new money, just a commitment by the utility-funded charities to continue at the same annual funding levels. It is likely the two charities would contribute the amounts regardless of the settlement agreement so this provision does little to compensate for higher utility costs. Duke Energy witness, Mr. Barkley, states "[i]t represents a going level that has been provided over the recent few years, so it's a guarantee that that which has been done will continue to be done." Tr. V. 2, p. 167.

The other contributions in Paragraph 4 for workforce development and low income energy assistance are only $7.5 million, woefully inadequate to meet the needs of low income ratepayers. As emphasized in Mr. Gunter's testimony, the NC Housing Coalition and the other Public Interest Groups are concerned about rising utility costs, which disproportionately affect low-income families. As of 2014, more than 1.2 million families in North Carolina are housing cost-burdened and more than 500,000 families are severely housing cost-burdened. Gunter Testimony, pp. 2-3. A family is cost-burdened when they spend more than 30% of their income on housing and utilities, while a family is *severely* cost-burdened when they spend more than 50% of their income on housing and utilities. Rising utility costs – from either electricity or natural gas -- can be catastrophic for a family whose budget already has no margin for error.

The $7.5 million for both workplace development and low-income energy assistance in paragraph 4 of the stipulated agreement is inadequate, especially given the substantial risks and potential for increasing bills that the merger represents. Gunter Testimony, pp. 3-4. Rather than just providing a limited amount of assistance, a fully funded energy efficiency and weatherization program would extend much further toward lowering energy bills for consumers. A successful program to compensate low-income households for potentially increased bills would improve housing and at the same time, increase economic, health, and comfort benefits.

The utilities and the Public Staff have not provided any basis for the establishment of the giving amounts in the stipulation agreement, nor have they

stated any goals for what the contributions are expected to accomplish. The Public Interest Groups recommend an increased financial commitment to families that would be most vulnerable to cost increases, at a considerably higher level than is in the stipulation agreement.

D. Stipulation of "no harm." Paragraph 12 of the stipulated agreement baldly concludes

> Approval of Merger. The terms of this Stipulation, including the Regulatory Conditions and Code of Conduct, will ensure that the proposed Merger will have no adverse impact on the rates charged and the service provided by DEC, DEP, and Piedmont to North Carolina jurisdictional ratepayers; that DEC's, DEP's, and Piedmont's North Carolina jurisdictional ratepayers are protected and insulated to the maximum extent possible from all known and potential costs and risks associated with the Merger; and that the benefits of the Merger to DEC's, DEP's, and Piedmont's North Carolina jurisdictional ratepayers are sufficient to offset those potential costs and risks. Therefore, the proposed Merger is justified by the public convenience and necessity and meets the standard for approval by the Commission under G.S. 62-111(a).

The stipulated agreement between Duke Energy, Piedmont NG, and the Public Staff by itself does not provide any basis in the record for the Commission to make its necessary findings and conclusions about whether the merger is in the public interest. The testimony presented by the utilities and the Public Staff at the evidentiary hearing did little to add to this unsubstantiated supposition. There is no quantitative analysis of the risks and benefits to the ratepayers, only a vague promise ratepayers will somehow be protected.

As outlined above, the stipulated agreement's terms, which are vague and lack necessary enforcement mechanisms, make clear that there are a vast

number of ways the merger is likely to harm ratepayers. On top of these potential harms, there are numerous risks the Public Staff acknowledged were not analyzed at all. Therefore, there is no justification for the conclusion that the costs and risks of the merger would be somehow balanced or outweighed by the nominal benefits specified in the agreement.

E. Take it or leave it. As a matter of policy, the Commission should not endorse the provision in the stipulated agreement requiring the Commission to approve the agreement in its entirety or it will not be binding on the parties. Paragraph 16 of the stipulated agreement states "[t]his Stipulation is the product of give-and-take negotiations, and no portion of this Stipulation will be binding on the Stipulating Parties unless the entire Stipulation is accepted by the Commission."

As demonstrated above, the stipulation agreement is seriously flawed and does not provide the Commission with any meaningful rationale for agreeing to the merger. The "take it or leave it" clause simply cannot be used as a rationale to accept the entire stipulation agreement.

MOTION FOR RECONSIDERATION

The Commission in its Order Granting Motion to Strike and Reserving Decision on Motion in Limine agreed with Duke Energy and Piedmont NG that testimony on the future risks to ratepayers because of the expansion of Duke Energy's natural gas platform are "not relevant to the issues under consideration pursuant

to G.S. 62-111(a).” Order, p. 4. As described above and fully supported by testimony and evidence in the hearing record, Duke Energy’s expanded natural gas platform, including the purchase of Piedmont NG, will lead to a direct increase of natural gas generated electricity. At the same time, the risks from future natural gas price increases and problems with availability will lead to significant risks to ratepayers. As a result, the Public Interest Groups move for a reconsideration of the order striking the testimony of Mr. Hughes and Mr. Howard, and deny the motion *in limine* renewed by Duke Energy at the hearing.

The issues presented in the testimony of Mr. Hughes and Mr. Howard are directly addressed in the cross-examination of witnesses regarding Piedmont NG’s Form 10-K and the cross examination exhibits. Echoing the same concerns raised in the Form 10-K, 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. Mr. Howard would testify the high methane emissions from venting and leakage in natural gas production and distribution will require regulatory controls because of the significant impact of methane on the climate crisis.

The costs from increased regulation, on top of the cost increases from the lack of availability, will have serious rate impacts as fuel costs are passed through to customers. As such, the present low costs of natural gas will increase in the near future, and in North Carolina. The more Duke Energy is tied to natural gas, whether from construction of new generating plants or ownership of a

natural gas company, the greater the potential risk to Duke Energy and therefore the greater the risk for much higher rates for Duke Energy customers.

THEREFORE, the Public Interest Groups urge the Commission to deny the application for the merger, and in light of the testimony and exhibits, reconsider its order striking testimony and further to deny the motion *in limine*.

Respectfully submitted, this the 25th day of August 2016.

/s/ John D. Runkle

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CERTIFICATE OF SERVICE

I hereby certify I have this day served a copy of the foregoing PUBLIC INTEREST GROUPS' BRIEF AND MOTION FOR RECONSIDERATION upon each of the parties of record in this proceeding or their attorneys of record by deposit in the U.S. Mail, postage prepaid, or by email transmission.

This is the 25th day of August 2016.

/s/ John D. Runkle

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ATTACHMENT 1 -- 2015 DUKE ENERGY IRPs

Table 6-C DEP Base Case Resources– Summer (with CO_2)

Duke Energy Progress Resource Plan [1] Base Case - Summer		
Year	**Resource**	**MW**
2016	-	-
2017	Sutton Blackstart CTs; Nuclear Uprates	84; 14
2018	Nuclear Uprates	15
2019	CC Uprates; CHP	135; 20
2020	Asheville CC	663
2021	New CC; New CT; CHP	895; 828; 20
2022	New CC	895
2023	-	-
2024	-	-
2025	-	-
2026	-	-
2027	New CT	828
2028	-	-
2029	-	-
2030	New CC	895

Notes: (1) Table includes both designated and undesignated capacity additions

Table 6-D DEP Base Case Resources (with CO_2) Cumulative Summer Totals

DEP Base Case Resources
Cumulative Summer Totals - 2016 - 2030

Nuclear	29
CC	3483
CT	1740
CHP	40
Total	5292

Table 6-E No Carbon Sensitivity – Summer

Duke Energy Progress Resource Plan [1] No Carbon Sensitivity - Summer		
Year	**Resource**	**MW**
2016	-	-
2017	Sutton Blackstart CTs, Nuclear Uprates	84, 14
2018	Nuclear Uprates	15
2019	CC Uprates, CHP	135, 20
2020	Asheville CC	663
2021	New CT, New CC, CHP	828, 895, 20
2022	New CT	414
2023	-	-
2024	New CT	414
2025	-	-
2026	-	-
2027	New CT	414
2028	New CT	414
2029	-	-
2030	New CT	1242

Notes: (1) Table includes both designated and undesignated capacity additions

Table 6-F No Carbon Sensitivity Cumulative Summer Totals

DEP No Carbon Sensitivity Resources
Cumulative Summer Totals - 2016 - 2030

Nuclear	29
CC	1693
CT	3810
CHP	40
Total	5572

Table 6-C DEC Base Case Resources – Summer (with CO_2)

Duke Energy Carolinas Resource Plan [1] Base Case - Summer				
Year	Resource		MW	
2016	Nuclear Uprates	Hydro Units Return to Service [2]	20	1
2017	Nuclear Uprates		45	
2018	Lee CC [3]	CHP	670	20
2019	Hydro Units Return to Service [4]		10	
2020	Hydro Units Return to Service [4]	CHP	6	20
2021	-		-	
2022	New CC		895	
2023	-		-	
2024	New Nuclear		1117	
2025	-		-	
2026	New Nuclear		1117	
2027	-		-	
2028	New CC		895	
2029	-		-	
2030	New CC		895	

Notes: (1) Table includes both designated and undesignated capacity additions
(2) Bryson City and Mission hydro units return to service
(3) Lee CC capacity is net of NCEMC ownership of 100 MW
(4) Rocky Creek Units currently offline for refurbishment; these are expected return to service dates

Table 6-D DEC Base Case Resources (with CO_2) Cumulative Summer Totals

DEC Base Case Resources Cumulative Summer Totals - 2016 - 2030	
Nuclear	2299
CC	3355
CT	0
Hydro	17
CHP	40
Total	5711

The following charts illustrate both the current and forecasted capacity by fuel type for the DEC system, as projected in the Base Case. As demonstrated in Chart 6-A, the capacity mix for the DEC system changes with the passage of time. In 2030, the Base Case projects that DEC will have a smaller reliance on coal and a higher reliance on gas-fired resources, nuclear, renewable resources and EE as compared to the current state.

Table 6-E No Carbon Sensitivity - Summer

Duke Energy Carolinas Resource Plan [1] No Carbon Sensitivity - Summer				
Year	**Resource**		**MW**	
2016	Nuclear Uprates	Hydro Units Return to Service [2]	20	1
2017	Nuclear Uprates		45	
2018	Lee CC [3]	CHP	670	20
2019	Hydro Units Return to Service [4]		10	
2020	Hydro Units Return to Service [4]	CHP	6	20
2021	-		-	
2022	New CC		895	
2023	-		-	
2024	-		-	
2025	New CC		895	
2026	-		-	
2027	New CT		414	
2028	New CT		1242	
2029	New CT		414	
2030	New CC		895	

Notes: (1) Table includes both designated and undesignated capacity additions
(2) Bryson City and Mission hydro units return to service
(3) Lee CC capacity is net of NCEMC ownership of 100 MW
(4) Rocky Creek Units currently offline for refurbishment; these are expected return to service dates

Table 6-F No Carbon Sensitivity Cumulative Summer Totals

DEC No Carbon Sensitivity Resources
Cumulative Summer Totals - 2016 - 2030

Nuclear	65
CC	3355
CT	2070
Hydro	17
CHP	40
Total	5547