

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. M-100, SUB 145

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)
Rulemaking to Establish Procedure for) PETITION FOR
Settlements and Stipulated Agreements) RULEMAKING
BY NC WARN

NOW COMES the NC Waste Awareness and Reduction Network, Inc. (“NC WARN”), by and through the undersigned attorney, with a petition for rulemaking to establish a fair and transparent procedure for settlements and stipulated agreements in matters before the Commission. This petition demonstrates the need for the rule and proposes draft language for the rule.

In support of the petition is the following:

1. NC WARN is a not-for-profit corporation under North Carolina law, with more than one thousand individual members and families across North Carolina. Its primary purpose is to work for climate protection through the advocacy of clean, efficient, and affordable energy. Its members receive services from several regulated electric and natural gas utilities, and are impacted by decisions made by the Commission. Its address is Post Office Box 61051, Durham, North Carolina 27715-1051.

2. The attorney for the Intervenor to whom all correspondence and filings should be addressed is John Runkle, Attorney at Law, 2121 Damascus Church Road, Chapel Hill, North Carolina 27516. Rule 1-39 service by email is acceptable and may be sent to jrunkle@pricecreek.com.

3. In NC WARN's recent experience in significant and controversial matters before the Commission, one of the practices that is most unfair and nontransparent is the method by which matters are settled. Often settlements, commonly referred to as stipulated agreements, are reached between the Public Staff and the utility or between the utility and another party. Other parties do not have the opportunity to enter into the negotiations, and at times the settlement is reached before the deadline for other parties to file testimony or complete the discovery process on the initial application, and before an evidentiary hearing or public hearing has taken place. This rush by parties to reach a settlement results in agreements that are not based on complete knowledge of how the agreement impacts customers.

4. Often the agreement addresses only the concerns of certain parties while others are excluded. After the settlements are presented, other parties are given only days to respond to the settlement, not leaving adequate time for expert review and preparation of testimony.

5. In support of the petition, NC WARN is attaching a summary of four of the major matters in which it intervened and at the same time, was unfairly impeded from participating fully. EXHIBIT A. Other parties, and especially intervenors, also have faced the same barriers to full participation.

6. Too often settlements are presented to the Commission as a *fait accompli*. The settlement usually has a clause such as this one in the ongoing merger between Duke Energy and Piedmont Natural Gas in Dockets Nos E-2 Sub 1095, E-7 Sub 1100, and G-9 Sub 682:

Paragraph 16. Acceptance of Agreement in Its Entirety. This 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.

An agreement between only two of the parties, without further support, may be useful to the Commission as a starting point, but it is only those parties' view of what is in the public interest. The clause presents the settlement to the Commission in a manner that attempts to minimize the Commission's authority and duty to select the outcome in the best interest of customers.

7. The lack of transparency of the settlements is also troublesome, especially when side agreements, i.e. between the utility and another party, are not filed with the Commission, or filed under a shield of confidentiality. The case in point was the merger between Duke Energy and Progress Energy in Dockets E 7, Sub 986 and E-2, Sub 998, when numerous "secret agreements" were made so that major parties would pledge their support for the merger. A number of those agreements may give benefits to certain customers or customer classes at the expense of other customers. All settlements should be filed openly with all transparency.

8. In developing its proposed rules on settlements before regulatory bodies, like this Commission, NC WARN was unable to find model rules for settlements or even rules by other Commissions incorporating settlements into their hearing procedures. Judicial bodies in many jurisdictions across the country have requirements that parties to litigation enter into mediated settlements, but even these do not incorporate time limits or take into account multiple parties entering into a docket under differing requirements.

9. NC WARN has attached Scott Hempling's essay on regulatory settlements as EXHIBIT B. As noted in the summary of his qualifications at the end of his essay, Mr. Hempling has a broad background in utility mergers and acquisitions, corporate restructuring, ratemaking, utility investments in nonutility businesses, and state–federal jurisdictional issues. Mr. Hempling's conclusions regarding regulatory settlements are summarized in two principles:

1. A settlement proposal must be backed by principles and evidence aligned with commission priorities.
2. The resources, expertise, and alternatives available to each party must be roughly equivalent. Under these conditions, no one party's view of "the public interest" prevails for reasons other than merit.

In light of those principles, NC WARN is attaching a proposed rule as a starting point for the development of a rule to establish a settlement process that is fair and transparent. EXHIBIT C. All parties should have the opportunity to fully participate and advocate for their view of the public interest in a roughly equivalent manner.

10. NC WARN would be glad to work with other parties and interest groups to develop this rule and to provide additional comments in support of the proposed rule.

THEREFORE, NC WARN prays the Commission open a rulemaking docket to develop rules for settlement.

Respectfully submitted, this the 14th day of June 2016.

/s/ John D. Runkle

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CERTIFICATE OF SERVICE

As this is a new docket and does not have a service list, complimentary copies of this petition are being sent initially to the parties in the Duke Energy / Piedmont Natural Gas merger dockets, Nos E-2 Sub 1095, E-7 Sub 1100, and G-9 Sub 682, by email transmission.

This is the 14th day of June 2016.

/s/ John D. Runkle

EXHIBIT A

Merger of Duke Energy Corporation and Piedmont Natural Gas Docket No. E-2 Sub 1095, E-7 Sub 1100, G-9 Sub 682

Application filed – 1/15/16

Order establishing procedural deadlines - 3/2/16

Deadline for petition to intervene – 5/27/16

Deadline for intervenor testimony – 6/10/16

Settlement filing date – 6/10/16

Opportunity for testimony responding to settlement by 6/27/16

Public hearing – 7/18/16

Evidentiary hearing – 7/18/16

Duke Energy Carolinas Application for Rate Increase (2013)

Docket No. E-7 Sub 1026

Application filed – 2/4/13

Order establishing procedural deadlines – 3/4/13

Public hearings – 5/21/13, 5/22/13, 6/19/13, 6/26/13, 7/2/13, 7/8/13

Deadline for petition to intervene – 6/10/13

Notice of settlement filing date – 6/12/13

Deadline for intervenor testimony – 6/17/13 (extended from 6/10/13, 6/12/13)

Opportunity for testimony responding to settlement by 6/21/13

Evidentiary hearing – 7/8/13

Deadline for proposed orders – 8/20/13 (extended from 8/19/13)

NCUC order issued – 9/24/13

Progress Energy Application for Rate Increase (2012)

Docket No. E-2 Sub 1023

Application filed – 10/12/12

Order establishing procedural deadlines – 11/5/12

Public hearing – 2/19/13, 2/20/13, 2/26/13, 3/5/13, 3/13/13, 3/18/13

Deadline for petition to intervene – 2/11/13

Notice of settlement filing date – 2/25/13

Deadline for intervenor testimony – 2/28/13 (extended from 2/18/13, 2/25/13)

Opportunity for testimony responding to settlement by 3/6/13

Evidentiary hearing – 3/18/13

Deadline for proposed orders – 4/29/13 (extended from 4/24/13)

NCUC order issued – 5/30/13

Merger of Duke Energy Corporation and Progress Energy, Inc.
Docket No. E-7 Sub 986, E-2 Sub 998

Application filed – 4/4/11

Order establishing procedural deadlines – 4/27/11

Deadline for petition to intervene – 8/12/11

Settlement filing date – 9/2/11

Deadline for intervenor testimony – 9/8/11 (extended from 8/26/11, 9/7/11)

Opportunity for testimony responding to settlement by 9/8/11

Public hearing – 9/20/11

Evidentiary hearing – 9/20/11

Deadline for proposed orders – 11/23/11 (extended from 11/14/11)

Supplemental settlement filing date – 5/8/12

Order establishing procedural deadlines – 5/15/12

Evidentiary hearing – 6/25/12

NCUC order issued – 6/29/12

Regulatory Settlements: When Do Private Agreements Serve the Public Interest?

Scott Hempling

<http://www.scotthemplinglaw.com/essays/regulatory-settlements>

July 2008

It is the policy of this commission to encourage settlements.
— Multiple sources

Settlements seem somehow to reach the lowest common denominator in many instances, and often end up defying the public interest. They are often used to tie commissioners' hands, not to help them resolve vexing problems.
— Former state commission chair

* * *

State commissions are seeing more filings: rate cases, requests for pre approvals, corporate restructurings. Commissions also are instigating proceedings themselves: carbon reduction options, transmission construction, and renewable energy. Staff sizes are dropping due to retirements and hiring freezes.

The resulting workload-resource squeeze makes settlements attractive as work reducers. But settlements are double edged swords: They have positive value if they solve public-interest challenges, negative value if they edge the commission out of its statutory role. This distinction is not always easy to discern.

Is "settlement" a misnomer? First, a clarification of terms. A regulated utility may conduct no commerce—provide no service, charge no rates—absent commission approval based on filed documents. This "filed rate doctrine" distinguishes utility regulation from ordinary commerce. In regulation, a settlement settles nothing substantive; it is only the parties' proposal.

Benefits of Settlements

Informality: Settlement processes involve informal exchange. Informal exchange enhances understanding of each entity's technical problems and private goals. Both effects spiral upwards. As technical fluency grows, commissions defer to the parties' solutions, encouraging more informal exchange, more technical understanding, and more commission deference. Mutual exposure to parties' private goals spurs settlement

solutions that align private interest with public interest—if the commission has established public-interest parameters first.

Expedition: Settlements can save decisionmakers time. Two caveats: First, the parties' time matters too. When unguided settlement processes combine with resource differentials, large parties can grind down the small, making "settlement" a euphemism for "take it or leave it." Litigation, when disciplined and efficient, can make resource differences less relevant. Second, saving decisionmakers' time is not an end in itself; success is measured in high-quality decisions, not per year dispositions.

Risks of Regulation-by-Settlement

A settlement culture can induce regulatory passivity: The less they get into the parties' business, the less they (a) engage mentally, (b) learn about the regulated businesses, (c) gain confidence, and (d) lead objectively. A stance of "Let's see what the parties say" leads to "Let's see what the parties want" and, ultimately, "Who are we to stand in the way of their deal?" There is risk of atrophy: Muscles unused become muscles less able. This spiral points downward: As the commission becomes less engaged and less alert, it becomes less respected and less relied upon, leading to more settlements and more atrophy.

Favoring Settlement in the Abstract Confuses Commissions with Courts

A court's jurisdiction is limited to a case or controversy initiated by a plaintiff. A settlement eliminates the controversy. *Plaintiff vs. Defendant becomes plaintiff and defendant*, the parties agreeing that they no longer need the judge. The court has no general "public interest" power independent of the dispute as defined by the parties. (Caution: In disputes with a large public-interest component, a court could reject a plaintiff defendant motion to withdraw, especially if interveners remain dissatisfied. The court's powers still are bounded, however, by the original complaint.

But a commission is not a court. (See "[Commissions Are Not Courts; Regulators Are Not Judges](#)"). A commission's powers are defined not by the case as filed, but by substantive enabling law. The commission's baseload duty—to ensure reliable service at reasonable prices—does not vary with parties' private decisions to initiate or "settle" disputes. The regulatory purpose is not inter-party peace but public-interest advancement.

So When Are Settlements Appropriate?

Settlements are appropriate when they help a commission carry out its public-interest obligations. Favorable conditions include: (1) The settlement subject demands technical proficiency, (2) the parties' proficiency exceeds the commission's, and (3) the parties' private interests are aligned with the long term public interest.

But beware of gaps—in the settlement process and the outcome. If the settlement process is missing segments of the public-interest spectrum, such as future generations,

workforce quality, environmental responsibility, management efficiency, and technological innovation, the settlement's claim on the public interest is incomplete. And the mere presence of these segments does not necessarily mean effective presence. The mantra that "settlements are more efficient than litigation" has holes when there are resource differentials. Undisciplined settlement processes favor large parties: They can attend more meetings, produce more studies, bring more staff, pay more lawyers to talk longer and louder. In contrast, strong judges using efficient litigation procedures can make resource differentials diminish. Abstract preferences for settlement ignore these points.

What Evidentiary Support?

A commission order makes policy. A settlement approving order is no different. Credible policies require credible evidence. A settlement therefore needs testimony supporting the signatories' public-interest assertions—testimony having the same rigor and comprehensiveness as litigation testimony. "We negotiated hard and this is our agreement" is not public-interest evidence.

The record should not only contain evidence that supports the settlement; it should retain the evidence that preceded the settlement. Settlements often require each signatory to withdraw its initial testimony, mainly because that testimony contradicts the settlement outcome. A party now asserting that "the settlement ROE of 12.5% is sufficient" prefers no reminder of his witness's prior statement that "anything below 14% will cripple the company." No party wishes to be heard saying, "As my chances of victory vary, so does my view of the truth." Testimony is a statement under oath; it is not mere choreography, to revise as the music changes. Credibility is the coin of the regulatory realm. Respect for the realm diminishes if the commission abets testimonial hide and seek. Leaning in the other direction—recording all filed testimony, pre and post settlement—disciplines parties to take public-interest positions to begin with. It also ensures transparency, a factor essential to earning the public's trust.

Recommendations for Regulators

Regulatory settlements are joint proposals for commission action. They advance the public interest when the "jointness" arises not from short term baby splitting, not from one party dominance masked as compromise, but from expert idea sharing. (Settlements also work for compromises of private commercial matters that do not affect non parties, present or future.) The likelihood of public-interest results rises, therefore, if the commission focuses not on an abstract preference for harmony, but on two criteria:

- 1. A settlement proposal must be backed by principles and evidence aligned with commission priorities.*
- 2. The resources, expertise, and alternatives available to each party must be roughly equivalent. Under these conditions, no one party's view of "the public interest" prevails for reasons other than merit.*

Scott Hempling

Scott Hempling is an attorney, expert witness and teacher. As an attorney, he has assisted clients from all industry sectors—regulators, utilities, consumer organizations, independent competitors and environmental organizations. As an expert witness, he has testified numerous times before state commissions and before committees of the United States Congress and the legislatures of Arkansas, California, Maryland, Minnesota, Nevada, North Carolina, South Carolina, Vermont, and Virginia. As a teacher and seminar presenter, he has taught public utility law and policy to a generation of regulators and practitioners, appearing throughout the United States and in Australia, Canada, Central America, Germany, India, Italy, Jamaica, Mexico, New Zealand, Nigeria, Peru and Vanuatu.

The first volume of his legal treatise, [*Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction*](#), was published by the American Bar Association in 2013. It has been described as a "comprehensive regulatory treatise [that] warrants comparison with Kahn and Phillips." The second volume will address the law of corporate structure, mergers and acquisitions. His book of essays, [*Preside or Lead? The Attributes and Actions of Effective Regulators*](#), has been described as "matchless" and "timeless"; a Spanish translation will be widely circulated throughout Latin America, through the auspices of the Asociación Iberoamericana de Entidades Reguladoras de la Energía and REGULATEL (an association of telecommunications regulators from Europe and Latin America). The essays continue monthly and are available on [the Monthly Essays tab](#).

His articles have appeared in the *Energy Bar Journal*, the *Electricity Journal*, *Energy Regulation Quarterly*, *Public Utilities Fortnightly*, *ElectricityPolicy.com*, publications of the American Bar Association, and other professional publications. These articles cover such topics as mergers and acquisitions, the introduction of competition into formerly monopolistic markets, corporate restructuring, ratemaking, utility investments in nonutility businesses, transmission planning, renewable energy and state–federal jurisdictional issues. From 2006 to 2011, he was the Executive Director of the National Regulatory Research Institute.

Hempling is an adjunct professor at the Georgetown University Law Center, where he teaches courses on public utility law and regulatory litigation. He received a B.A. *cum laude* in (1) Economics and Political Science and (2) Music from Yale University, where he was awarded a Continental Grain Fellowship and a Patterson research grant. He received a J.D. *magna cum laude* from Georgetown University Law Center, where he was the recipient of an *American Jurisprudence* award for Constitutional Law. Hempling is a member of the U.S. Department of Energy's Future Electric Utility Regulation Advisory Group.

NCUC Docket M-100, Sub 145

PROPOSED COMMISSION RULE

Rule 1-[]. PROCEDURES FOR SETTLEMENTS AND STIPULATED AGREEMENTS.

(a) The Commission encourages the parties, as defined in Rule R1-3, to settle matters between and among themselves in order to focus on the issues required to be heard by the Commission. However, settlements and stipulated agreements filed with the Commission shall be supported by credible evidence, expert testimony, and exhibits.

(b) In order to have a fair and transparent procedure for incorporating settlement, also referred to as a stipulated agreement, into the Commission's current practices, are the following:

(1) The Commission will not accept a settlement or stipulated agreement between or among parties until 10 days after the deadline for intervention or the filing of expert testimony established by the Commission, whichever comes later.

(2) The Commission will not accept a settlement or stipulated agreement until 10 days after the last public hearing, excluding the opportunity for public testimony at the beginning of an evidentiary hearing, if public hearings are scheduled as part of the proceeding,

(3) A statement shall accompany the settlement or stipulated agreement stating that all of the parties had the opportunity to participate in settlement negotiations, and that all parties had the opportunity to review and comment on the settlement or stipulated agreement at least 10 days before it was filed with the Commission.

(4) Parties, including those not entering into the settlement or stipulated agreement, are encouraged to file statements within 10 days from the date as to which provisions of the settlement or stipulated agreement they support, oppose, or have no position on.

(5) The parties entering into the settlement or stipulated agreement shall file expert testimony and exhibits providing support for the filing.

(6) The Commission will not accept settlements or stipulated agreements which require the settlement or stipulated agreement to be approved in its entirety or not at all.

(c) Parties are encouraged to submit data requests or pursue other discovery as soon as possible so the information to all parties is roughly equivalent prior to the review of the settlement or stipulated agreement. Late-filed discovery requests will not provide grounds to extend the settlement review period.

(d) All parties should carefully examine all filings in order to minimize, if not eliminate, filings under the seal of confidentiality or trade secret.