No. COA 13-566

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION; DUKE ENERGY CORPORATION; DUKE ENERGY CAROLINAS, LLC; and CAROLINA POWER & LIGHT COMPANY, d/b/a PROGRESS ENERGY CAROLINAS, INC.,	)	
Appellees,	)	FROM NC UTILITIES COMMISSION DOCKET NOS. E-2, SUB 998 AND E-7, SUB 986
v.	)	
CITY OF ORANGEBURG, SOUTH CAROLINA; and N.C. WASTE AWARENESS AND REDUCTION NETWORK,	)	
Appellants.	)	

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BRIEF OF APPELLANT NC WASTE AWARENESS AND REDUCTION NETWORK

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BRIEF OF APPELLANT NC WASTE AWARENESS AND REDUCTION NETWORK

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ISSUES PRESENTED

I. CAN THE COMMISSION APPROVE A MERGER WHEN THE APPLICANTS' REQUIRED COST-BENEFIT ANALYSIS FAILED TO CONSIDER THE COSTS OF THE MERGER?

II. CAN THE COMMISSION APPROVE A MERGER WHEN THE APPLICANTS SUBMITTED EVIDENCE THAT THE MERGER WILL BENEFIT ONLY THEMSELVES BUT NO EVIDENCE WAS SUBMITTED THAT THE MERGER WILL FURTHER THE PUBLIC CONVENIENCE AND NECESSITY?

III. CAN THE COMMISSION APPROVE A MERGER WHEN THE OVERWHELMING EVIDENCE SHOWS THAT THE MERGER IS NOT JUSTIFIED BY THE PUBLIC CONVENIENCE AND NECESSITY?

STATEMENT OF THE CASE

On 4 April 2011, Duke Energy Corporation ("Duke") and Progress Energy, Inc. ("Progress") (collectively referred to as "Applicants") jointly submitted an Application to Engage in a Business Combination Transaction and Address Regulatory Conditions and Codes of Conduct ("Application"), to the North Carolina Utilities Commission ("Commission"), in Docket No. E-2, Sub 998, and Docket No. E-7, Sub 986. (R p 4). The N.C. Waste Awareness and Reduction Network ("NC WARN") submitted a Motion to Intervene and Request for Public Hearings on 27 May 2011, which the Commission granted on 7 June 2011. (R pp 305, 310).

On 2 September 2011, Duke, Progress, and the Public Staff of the North Carolina Utilities Commission ("Public Staff") consummated an Agreement and Stipulation of Settlement ("Stipulation"). (R p 377). The Stipulation changed some components of the Applicants' Application but endorsed the merger. *Id.*

Shortly thereafter, evidentiary hearings were held on the Application and Stipulation, during which numerous parties presented testimony on 20 September 2011 through 22 September 2011, and on 25 June 2012. (R p 2122).

On 29 June 2012, the Commission approved the merger of Duke and Progress in an Order Approving Merger Subject to Regulatory Conditions and Code of Conduct ("Order"). (R p 1679). NC WARN filed a Motion for Reconsideration of Merger Order on 26 July 2012, which the Commission denied on 10 December 2012. (R pp 1865, 2055).

NC WARN filed a Notice of Appeal and Exceptions on 9 January 2013. (R p 2082).[1] The parties to this appeal stipulated that that document was timely filed. (R p 2126). The Notice of Appeal and Exceptions listed nine exceptions, seven of which challenged in whole or in part the Commission's Order approving the merger. (R pp 2084-88). Two of the exceptions within the Notice of Appeal and Exceptions—Exception No. 7 and Exception No. 8—went to the Commission's denial of NC WARN's Motion for Reconsideration, and the final exception—Exception No. 9—dealt only in part with the Motion for Reconsideration. (R pp 2087-88).

On 7 March 2013, Duke filed a Motion to Dismiss and Overrule Certain Exceptions of NC WARN. This Motion to Dismiss sought dismissal only of NC

[1] Appellant City of Orangeburg, South Carolina, also filed a Notice of Appeal from the Commission's Order. (R p 1997). Appellant Orangeburg's appeal deals with issues entirely separate from those of NC WARN's.

WARN's challenge to the Commission's denial of the Motion for Reconsideration. (R pp 2109, 2114). On 29 April 2013, the Commission dismissed Exception Nos. 7 through 9 to the extent those exceptions appealed the Commission's Order Denying NC WARN's Motion for Reconsideration. No other aspects of NC WARN's Notice of Appeal and Exceptions were disturbed by the dismissal.

GROUNDS FOR APPELLATE REVIEW

The Order approving the merger of 29 June 2012 constitutes a final order of the Commission, and as such NC WARN has the right to appeal the Order directly to the Court of Appeals pursuant to N.C. Gen. Stat. §§ 62-90, 7A-29(a), and Rule 18 of the North Carolina Rules of Appellate Procedure.

STATEMENT OF THE FACTS

This controversy began on 4 April 2011 when the Applicants filed their Application for a merger. (R p 4). The Application proposed that Duke acquire all of the issued and outstanding common stock of Progress. (R pp 9-10). While Progress would technically continue to exist, the emerging entity would be Duke, and Progress would be a wholly-owned subsidiary of Duke. (R pp 9-10, 33). Operations will be controlled by two operating companies, Duke Energy Carolinas, LLC ("DEC") and Progress Energy Carolinas, Inc. ("PEC"). (R pp 14).

While DEC and PEC will remain separate corporations under the merger, they will be operated as one company. Management and operations will be

controlled and coordinated through a Joint Dispatch Agreement entered into by the Applicants. (R pp 312, 1537). Separate annual integrated resource plans are required of Duke and Progress, but the development and implementation of the separate plans will be reconciled and reflect complete common control. (T, Vol 2, p 113). Duke's Treasurer will "oversee[] the capital structure of each of the operating companies." (T, Vol 3, pp 77-78). Ultimately, "someone" at Duke will "tell somebody [at DEC and PEC] what to do." (T, Vol 2, pp 112-13).

Thus the post-merger entity will be subject to common managerial and financial control and will engage in joint planning and development of generation, transmission, and utility services. (T, Vol 2, pp 78, 112-13); (T, Vol 3, pp 77-78); (T, Vol 4, pp 196-97). As stated by William D. Johnson, Progress's Chief Executive Officer and lead witness, the "goal line is to be one company and to think like one company, with one set of practices, one approach to the business." (T, Vol 2, p 113).

Before the evidentiary hearing on the Application, the Applicants and the Public Staff entered into the Stipulation. (R p 377). Among other things, the Stipulation had the Applicants guarantee North Carolina retail consumers an allocable share of fuel cost savings resulting from the merger. (R pp 378-82). The Stipulation also required a $15 million contribution from the Applicants "for purposes such as workforce development and low income energy assistance." (R p

382). That contribution was to "be allocated between [Duke's] and [Progress's] North Carolina service territories in proportion to the number of North Carolina retail customers served by each." *Id.*

Evidentiary hearings were held on 20 September 2011 through 22 September 2011, and on 25 June 2012. (R p 2122). Following those hearings, the Commission entered its Order which allowed the merger. (R pp 1679, 1787). With some exceptions, the Order generally adopted the Stipulation. The Order mandated that "[Duke's] and [Progress's] North Carolina retail customers shall be guaranteed receipt of their allocable share of $650 million in fuel and fuel-related cost savings resulting from the merger." (R p 1787). The Order also required "[Duke] and [Progress] to contribute a total of $15 million during the first year following the close of the merger for workforce development and low-income energy assistance," (R p 1788), and the Order approved the Joint Dispatch Agreement between Duke and Progress, (R p 1790). NC WARN timely appealed this Order. (R pp 2082, 2126).

STANDARD OF REVIEW

The Commission cannot approve a merger affecting a public utility unless the merger is "justified by the public convenience and necessity." N.C. Gen. Stat. § 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 (1990). As a "threshold question," the merger must not have adverse effects. *Id.* at 229, 393 S.E.2d at 115.

In 2000, the Commission issued an order which required merger applicants to submit cost-benefit and market-power analyses. *Order Requiring Filing of Analysis*, Docket No. M-100, Sub 129, at 7 (Nov. 2, 2000). Hence the Commission, when reviewing a merger, must take a comprehensive look at all costs and impacts on the rate payers. *Id.*

In a recent case, the North Carolina Supreme Court stated the standard of review of Commission cases on appeal as follows:

> [T]he test on appeal is whether the Commission's findings of fact are supported by competent, material and substantial evidence in view of the entire record. Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Commission's knowledge, however expert, cannot be considered by this Court unless the facts and findings thereof embraced within that knowledge are in the record. Failure to include all necessary findings of fact is an error of law and a basis for remand . . . because it frustrates appellate review.

State ex rel. Utilities Comm'n v. Cooper, 739 S.E.2d 541, 545 (N.C. 2013) (*quoting State ex rel. Utilities Comm'n v. Carolina Utilities Customers Ass'n*, 348 N.C. 452, 460, 500 S.E.2d 693, 699-700 (1998)).

Put another way, this test requires that "[e]vidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken . . . in logical sequence; each link in the chain of reasoning must appear in the order itself." *State ex. rel. Utilities Comm'n v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987) (*quoting Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980)).

ARGUMENT

The Commission's Order is deficient in at least three ways. First, the Applicants failed to submit an analysis of the risks posed by the merger, even though they were required to perform and submit to the Commission a full cost-benefit analysis of the merger. Second, there is no evidence that the merger will result in benefits to the public. And third, the merger is not in the public interest because it harms low-income families, will cause job losses, and allows the Applicants to manipulate prices and therefore harm local markets within North Carolina. For these reasons, the Commission should be reversed because the Applicants did not satisfy their burden to show that the merger benefits the public.

I. The Applicants did not submit evidence of the risks posed by the merger, despite their duty to present a full cost-benefit analysis.

As noted, applicants for a merger affecting an electric utility are required to engage cost-benefit and market-power analyses prior to approval of the merger. *Order Requiring Filing of Analysis*, Docket No. M-100, Sub 129, at 7 (Nov. 2,

2000). The cost-benefit analysis must include "[a] comprehensive list of . . . expected benefit, detriment, cost, and savings over a specified period (e.g., three to five years) following consummation of the merger and a clear description of each individual item in each area." *Id.* The burden of proving this clearly belongs to the Applicants. *Id.*; *see also* N.C. Gen. Stat. § 62-75. Nonetheless, neither the Application nor the Applicants' witnesses discussed costs, potential detriments, or potential risks.

Studies affixed to the Application analyzed only the benefit that the Applicants hoped would flow from the merger—no dangers were mentioned or scrutinized. (R pp 125-56, 176-214, 265-99). For instance, enclosed with the Application were three quite optimistic reports on the impact of the merger upon stock prices, but those reports did not contemplate potential risks to rates or services. (R pp 125-56). Also included with the Application was an Analysis of Economic Efficiencies Under Joint Dispatch. (R pp 176-214). That analysis focused exclusively upon hoped-for efficiencies, lacking any review of potential dangers posed by those efficiencies. *Id.* This is surprising given that, as will be discussed in detail below, these efficiencies will harm low-income families, (T, Vol 5, pp 79-85, 119-20), and result in significant job losses, (T, Vol 2, p 78-79). In fact, Applicants' witness Paula Sims testified that as much as 45% of the non-fuel-related cost savings will come from job layoffs. (T, Vol 6, p 101).

Finally, the Application provided the Commission with a market power study. (R pp 265-99). This study plagued the Applicants throughout the merger process. For example, the Federal Energy Regulatory Commission ("FERC") rejected the Applicants' market study because it was deficient in that it failed to analyze risks posed by the merger. (T, Vol 6, pp 22-23); *see also Duke Energy Corp. & Progress Energy, Inc.*, Docket No. EC11-60-00, *Order on Disposition of Jurisdictional Facilities and Merger*, 137 FERC ¶ 61,245, at 56-75 (Sept. 30, 2011). Notwithstanding this deficiency, the Applicants submitted with their Application only one single exhibit from the market study presented to and rejected by FERC. (T, Vol 6, pp 22-23).

The Applicants' witnesses likewise never proffered a full cost-benefit analysis. Consider, for example, risks which the merger might present to local markets within the State, such as the market for renewable energy. Professor Joseph P. Kalt, the Applicants' own expert on the market study, stated that he was not asked to perform an analysis on those costs of the merger and accordingly performed no such analysis. (T, Vol 4, p 91). John L. Harris, an economist employed by Progress, testified similarly. Dr. Harris was asked if "there was any study done of the impact of the two dominant procurers of renewable energy resources in North Carolina merging?" (T, Vol 6, p 182). Dr. Harris said, "I am not aware of anything." *Id.*

William D. Johnson, Progress's Chief Executive Officer, was asked similar questions and gave similar answers. Mr. Johnson was questioned about potential negative consequences of the merger at the retail level. (T, Vol 2, p 121). In response, Mr. Johnson essentially stated that he had no answers to those inquiries and requested that Alexander Weintraub, another of Applicants' witnesses, be asked about the matter. *Id.* Mr. Weintraub, however, testified that he was unaware that any such study was performed. (T, Vol 3, p 198). Despite these shortcomings, the Applicants' own witnesses testified that such risks are important to evaluate. *E.g.*, (T, Vol 4, pp 93-94).

True to this pattern, another witness of the Applicants, B. Mitchell Williams, agreed that the "standard that needs to be applied in this proceeding relates *only* to the impacts of the merger on rates and services," which would obviously exclude risks presented to the overall economy and local markets. (T, Vol 6, p 162) (emphasis added). It is true that impacts to rates and services are relevant, but they are merely threshold issues and are not sufficient for approval of a merger. *State ex rel. Utilities Comm'n v. Pinehurst*, 99 N.C. App. 224, 229, 393 S.E.2d 111, 114-15 (1990). Instead, the Commission "must inquire into *all* aspects of anticipated service and rates occasioned and engendered by the proposed transfer, and then determine whether the transfer will serve the public convenience and necessity." *Id.* (emphasis in original).

In light of the above, intervenor witness Ivan K. Urlaub testified that "the market study [submitted by the Applicants in their Application] does not evaluate" "the impacts of the merger on retail markets, and more importantly, does not consider the impact of the merger on those companies that provide goods and services to the operating companies." (T, Vol 6, p 22). "Nowhere in the application or supporting materials," said Mr. Urlaub, "is there any discussion of potential risks, costs or harms of the transaction." (T, Vol 6, p 19). Hence Mr. Urlaub concluded that this "failure to identify and evaluate risks . . . [is] reason alone to deny the [A]pplication." (T, Vol 6, p 21).

Here is yet another instance of the Applicants failing to present evidence of costs and risks: Crystal River 3 Nuclear Power Plant. Crystal River is a plant owned by Progress but which, due to the merger, will be owned and operated by the emerging entity. (T, Vol 2, p 140-41). Mr. Johnson admitted during cross-examination that the plant is damaged and that required repairs will run somewhere between $900 million and $1.3 billion. (T, Vol 2, p 141). This is obviously a major cost of the merger—it places potentially $1.3 billion in costs onto the emerging entity's books. Surprisingly, however, the Application never discussed this as a negative in the cost-benefit analysis of the merger. *See* (R pp 4-299). Unfortunately there were other costs similar to those associated with Crystal River

which were likewise not considered in the Application or otherwise. (R pp 1615-21, 1663-65).

Summarizing, the Commission "must inquire into *all* aspects" of the results of a merger in an effort to "determine whether the transfer will serve the public convenience and necessity." *Pinehurst*, 99 N.C. App. at 229, 393 S.E.2d at 114-15 (emphasis in original). To accomplish this duty, merger applicants are required to submit a cost-benefit analysis which includes "[a] comprehensive list of . . . expected benefit, detriment, cost, and savings . . . and a clear description of each individual item in each area." *Order Requiring Filing of Analysis*, Docket No. M-100, Sub 129, at 7 (Nov. 2, 2000). As shown above, the Applicants submitted a one-sided cost-benefit analysis which examined only benefits, and the Commission was never apprised of nor deliberated over the risks of this merger. It follows that insufficient evidence on the effects of the merger on ratepayers and the economy has been presented to justify an approval of the proposed merger.

II. There is no evidence that the merger will result in benefits to the public.

The Applicants touted two benefits in support of the merger: fuel cost savings and non-fuel cost savings. No evidence, however, was presented that these specious savings will benefit the public. Thus the Applicants did not satisfy their burden of proof. N.C. Gen. Stat. § 62-75.

As to non-fuel cost savings: Throughout the proceeding, the Applicants alleged that the merger will benefit the public because it will improve the financial status of the emerging entity and increase the presence of the emerging entity in North Carolina. (R pp 126-56); (T, Vol 2, p 115). If true, this obviously benefits the emerging entity. But the standard is not how a merger benefits the emerging entity; instead, "[t]he convenience and necessity required are those of the public and *not of an individual or individuals*." *State ex rel. Utilities Comm'n v. Casey*, 245 N.C. 297, 302, 96 S.E.2d 8, 12 (1957) (emphasis added); *see also State ex rel. Utilities Comm'n v. Atl. Coast Line R. Co.*, 233 N.C. 365, 64 S.E.2d 272 (1951). Indeed, no witness during the evidentiary hearings was able to testify that these benefits to Duke were likewise benefits to the public.

For example, Mr. Williams, the Applicants' witness, testified at some length as to why he believed that the merger will benefit Duke and Progress. During cross-examination he was asked how exactly the merger helped the public. (T, Vol 6, p 167). He could not answer the question and referred the matter to another of Applicants' witnesses. (T, Vol 6, pp 167-68). Furthermore, Applicant-witness Paula Sims acknowledged in response to questioning that the Application did not even contain an estimate of these non-fuel cost savings. (T, Vol 6, p 87).

In other words, the Applicants asked the Commission to accept on blind faith that the merger's boon to Duke and Progress shareholders will translate into

benefits for the public. Yet faith is not evidence, especially when the Applicants insisted that the "primary driver" or "significant driver" of the merger is non-fuel cost savings. (T, Vol 2, p 115); *see also* (T, Vol 2, p 116).

The Applicants also alleged that the merger is beneficial to the public because fuel cost savings will be passed on to ratepayers. (R pp 14-20). However, by their very nature these savings are temporary and with limited impact. (T, Vol 4, p 191); *see also* (R p 1787) (one-time allocable share to consumers). All of these savings cannot be called a product of the merger because utilities are always required to pass along fuel savings to consumers. N.C. Gen. Stat. § 62-133.2(a2). Moreover, the Applicants agreed in several settlements to allocate fuel savings not to the ratepayers but to wholesale consumers. (R pp 1617-18). It should also be noted that both Progress and Duke have sought rate increases subsequent to the Order, which suggests that these fuel cost savings are not so meaningful. *In re Application of Duke Energy Carolinas, LLC for Adjustment of Rates*, Docket No. E-7, Sub 1026, and Docket No. E-7, 989.

No doubt there is evidence that the merger will help the Applicants, but that is not what is important. The merger must be shown to further the public convenience and necessity. *Casey*, 245 N.C. at 302, 96 S.E.2d at 12. There is no part of the record which does this, which makes a connection between benefits to the Applicants and benefits to the public, and it is not enough to baldly state that

the merger will help the emerging entity and therefore will help the public. Hence the Order must be reversed because the Applicants failed to carry their burden to prove that the merger benefits the public.

III. The merger is not justified by the public convenience and necessity.

As mentioned above, there are three principal reasons why the merger contradicts the public convenience and necessity: the merger harms low-income families; the merger will cause job losses; and the merger allows the Applicants to manipulate prices and therefore harm local markets within North Carolina. For these reasons, the merger should have been denied by the Commission because the Applicants did not satisfy their burden of proof. N.C. Gen. Stat. § 62-75.

A. The merger allows the Applicants to manipulate prices and therefore harms local markets within North Carolina.

This merger will cause the biggest buyers of utility goods and services—Progress and Duke—to shrink from two to one in our State. (T, Vol 5, p 83); (T, Vol 6, p 95). Significant evidence was presented at the hearing that such a change will result in a monopsony[2] under which the single emerging entity can depress or otherwise manipulate prices. Not even a single shred of evidence was presented by the Applicants to show that the emerging entity's dominance of the utilities market

[2] According to Merriam-Webster Dictionary, a "monopsony" is a "market situation in which there is only one buyer. An example of a pure monopsony is a firm that is the only buyer of labour in an isolated town; such a firm would be able to pay lower wages to its employees than it would if other firms were present." www.merriam-webster.com/dictionary/monopsony (last visited on 17 July 2013).

in North Carolina will avoid the quite likely negative consequences of a monopsony. Thus we are left to conclude that the merger will harm markets local within North Carolina—such as renewable energy markets—and therefore the merger cannot be in the public convenience and necessity.

In its case-in-chief, the Applicants called economics professor Joseph P. Kalt to the stand. (T, Vol 4, p 45). During cross-examination Professor Kalt was asked for the definition of "monopsony," to which he replied: "Monopsony refers to a situation in which a single buyer has the market power to depress the prices of what it buys." (T, Vol 4, p 91). When asked whether "a combination of two very large companies such as what we're seeing here . . . have the potential to create a monopsony," Professor Kalt revealingly said: "of course." *Id.* Professor Kalt also testified that "when there are mergers, we have policies which do look at the market power implications that might be occasioned by a merger." (T, Vol 4, pp 93-94). Hence the Applicants' own expert thought it important to examine the possibility of a monopsony, and he also thought that the merger "of course" presented a danger of a monopsony. (T, Vol 4, pp 91, 93-94).

Several other witnesses testified, like Professor Kalt, that the merger presents quite a risk that the emerging entity will depress prices within the local markets of North Carolina. Take for example Richard S. Hahn, an expert in utility mergers. (T, Vol 5, pp 151-52). Mr. Hahn testified that he was concerned "that

the merged entity's market dominance will impact the procurement of renewable energy to satisfy REPS [Regional Emissions Projection System] requirements." (T, Vol 5, p 191). He continued:

> Under this scenario, the number of buyers of renewable energy has been *reduced to one from two as a result of the merger, which creates the potential for the exercise of market power*. . . . Post-merger, developers could be left with only one potential buyer for their output, and it will mean that there will no longer be a market open to renewable developers in which they are not competing with utility-owned or affiliated resources. Under either possible outcome, *the merger would have an adverse impact on the development and procurement of renewable energy in North Carolina.*

(T, Vol 5, p 193) (emphasis added). It is therefore not surprising that Mr. Hahn stressed that this monopsony issue was an "important thing to evaluate going into the merger." (T, Vol 5, p 233).

Similar testimony was provided by expert Ivan K. Urlaub. Mr. Urlaub explained the dangers of this merger thusly:

> [P]resently DEC and PEC are competing buyers. For example, each has at times issued requests for proposals for renewable energy projects and each has their own programs offered to such service providers. After the merger DEC and PEC are unlikely to remain competing buyers. . . . Thus, planning following the merger can be expected to be cognizant of the combination and affiliation between the operating companies and purchasing decision will not be uninformed of that affiliation as well. *There is likely to be an impact now and there certainly will be an impact when the operating companies combine.* Yet the market study [submitted by the Applicants in their Application] does not evaluate any of that. *It is fair to say that impacts to the market are risks, costs, and harms from the merger that need to be weighed against the putative benefits.* The record does not allow this to occur. . . . It may be worth noting that

> FERC found the entire market study deficient and here the Applicants have submitted one exhibit from the entire study.

(T, Vol 6, p 22-23). Therefore Mr. Urlaub was concerned not only about the potential for a monopsony but he was also concerned that the Applicants had never even considered this crucial issue. *Id.*

This raises an important point which was briefly discussed before but should be mentioned, at least briefly, again: the Applicants not only failed to submit evidence in opposition to concerns about monopsony; indeed, the Applicants never even looked at the issue. The Applicants' witness Dr. Harris said that he was "not aware of" any such study, (T, Vol 6, p 182), and Professor Kalt (also employed by the Applicants) said substantially the same, (T, Vol 4, p 91).

Hence this is a situation in which several experts testified to the importance of such a study, and several experts testified that the merger likely would create monopsony problems, and as noted earlier, even a federal agency, FERC, expressed its concern about market impact, yet the Applicants never analyzed the issue and never presented evidence to rebut testimony of the dangers of the merger upon local markets. This is uncontroverted evidence that the merger is not justified by the public convenience and necessity.

B. The merger will cause job losses.

William D. Johnson, during his testimony for the Applicants, made a point of saying that the North Carolina economy is floundering. (T, Vol 2, p 151). The

Applicants' witness James Rogers said much the same thing, but he added that our State has a significant low-income population and that poverty levels are rising. (T, Vol 2, 151). It is within this context that Mr. Rogers admitted that the Applicants plan to terminate 2,000 jobs or more as a result of the merger. (T, Vol 2, 78-79). Mr. Johnson agreed with Mr. Rogers's assessment: at least 2,000 jobs, maybe more. (T, Vol 2, 95).

When Progress and Duke merge, there will be employees serving "duplicate functions and redundancies." (T, Vol 6, p 100). These lay offs are intended to eliminate the duplication. The overt plan from the Applicants is to terminate employees whose job descriptions duplicate those of employees at the other merging entity. (T, Vol 6, pp 100-01).

On this subject, the Applicants' witness Paula Sims gave some particularly disturbing testimony. Ms. Sims agreed with the assessments of Mr. Rogers and Mr. Johnson that 2,000, or perhaps more, employees will be laid off due to the merger. (T, Vol 6, p 100). To put this in perspective, Ms. Sims noted that these job terminations amount to about 6.7% of the Applicants' total workforce. (T, Vol 6, p 101).

These job losses, in a time of economic crisis, weigh strongly against the merger of Duke and Progress.

C. The merger harms low-income families.

NC WARN's expert witness, Roger D. Colton, testified at length to the manner in which the merger will harm low-income families. This testimony was subject to only the briefest of rebuttals, a terse rebuttal which cannot be said to overcome Mr. Colton's averments. Further, the Commission's Order adopted the Stipulation's allotment of $15 million for workforce development and low-income assistance; however, the Applicants' own witnesses acknowledged that there was no basis for that number other than the fact that it was agreed to as part of settlement negotiations with the Public Staff. Instead of adopting the $15 million payment without supporting testimony, the Commission should have adopted Mr. Colton's recommendation of a $27 million annual payment—which amount was fully supported by substantial evidence.

It will come as no surprise that low-income customers require regular help in managing their troubles paying for electricity. (T, Vol 5, p 122). For this reason, low-income customers require individualized customer service and other assistance from utilities companies. *Id.* Such services amount to the utility taking into account the individual circumstances of each low-income customer. *Id.* For example, utilities commonly entertain negotiations over payment plans, negotiations over deposits, and negotiations over the avoidance of service

disconnections for non-payment. *Id.* Without this help, the low-income families of our State would frequently go without heated homes and refrigerated food.

The merger of Progress and Duke will nix this individualized customer service and thereby wreak harm upon the underprivileged. (T, Vol 5, p 79). This will result for two reasons, consolidation and dilution. (T, Vol 5, p 120). "Consolidation refers to the process of combining functions and offices so that a larger geographic area could be served possibly with a smaller staff and fewer offices using a unified system and unified procedures." *Id.* For example, the Applicants plan to combine their respective business practices, operating procedures, service regulations, computer systems, and rate schedules. (T, Vol 5, p 79).

According to Mr. Colton, an expert in low-income utility issues, this consolidation negatively impacts those with low incomes. (T, Vol 5, p 119). Mr. Colton testified that the impact of consolidation "will be to take discretion away from customer service representatives [who] deliver the very service which the members of the low-income payment-troubled population rely upon." (T, Vol 5, p 80). This will happen because,

> When you move from two companies having two different systems to one company having a single system, where there has been the ability to exercise discretion at the local level in the past, then the consolidation of those systems, whether it's an information system or a billing and collection system, that discretion is constrained.

Id. After the merger, the emerging entity will be the largest utility in the United States. (T, Vol 5, p 83); (T, Vol 6, p 95). It is only natural, according to Mr. Colton, that "[a]n increase in the geographic scope of the markets served by the merged utility can reasonably be expected to lead to a reduced emphasis on, and focus upon, the specific needs of Duke customers." *Id.*

Mr. Colton also described the way in which the merger will dilute customer service resources and therefore harm low-income families. Basically, the merger will "dilute the resources available to low-income payment-troubled customers of Duke as the blending of low-income and customer service resources will divert resources from low-income customers." (T, Vol 5, p 84). Even the Applicants themselves acknowledged that the merger was intended to result in fewer customer service representatives. (T, Vol 2, p 45). The result, says Mr. Colton, is less personal contact with financially troubled customers and therefore reduced assistance to such customers in the event of an inability to pay. (T, Vol 5, p 85).

This testimony of Mr. Colton was mostly uncontroverted. The only Applicant witness to attempt a response to Mr. Colton was Mr. Williams, (T, Vol 6, p 168), but Mr. Williams's response was conclusory at best. Mr. Williams said that the Commission should be unmoved by the merger's impact upon low-income families because the Commission has promulgated some safeguards to assist customers with payment problems. (T, Vol 6, pp 124-26). However Mr. Williams

did not explain how those safeguards would assist in this particular case—instead, he listed a few rules and assumed that it is obvious that this is sufficient protection for low-income families. *See id.*

This conclusory approach is in stark contract to the testimony of Mr. Colton, which relied upon numerous studies and independent research. *E.g.*, (T, Vol 5, pp 94, 123, 129-30). Moreover, in response to cross-examination, Mr. Colton flatly denied that these safeguards will protect low-income families from the impacts of the merger. (T, Vol 5, p 130-32). Among other arguments, Mr. Colton noted that these safeguards consist almost entirely of compliance-related protections, yet consolidation and dilution have nothing whatsoever to do with compliance and therefore would not be ameliorated by these safeguards. (T, Vol 5, pp 131-32). These arguments by Mr. Colton were not addressed by the Applicants.

The Applicants may respond that we should not be worried about low-income families because the Stipulation and the Order require that the Applicants "contribute a total of $15 million during the first year following the close of the merger for workforce development and low-income energy assistance." (R p 1788). This argument should fail. First of all, the $15 million is a one-time payment and is therefore, by its very nature, temporary. *Id.* Secondly, this payment is for both "workforce development and low-income energy assistance." *Id.* No guidance was given by the Commission, or in the Stipulation, as to what

percentage of the payment goes to financially troubled families. Thus there is no guarantee that the $15 million payment will assist even a single indigent household.

But perhaps most importantly, the Applicants never supplied evidence that this contribution is related in any way to the expected impact of the merger upon low-income families. The emerging company's Chief Financial Officer, Lynn Good, was asked how the Applicants determined "what is a reasonable level for contributions" for low-income families? (T, Vol 3, p 69). Ms. Good responded that she did not know and suggested that a different witness should have been asked. *Id.* The Public Staff—a party to the Stipulation—called a witness who was asked these same questions. That witness, James G. Hoard, was asked "whether or not this $15 million contribution . . . bear any relationship to [] what is believed to be the impact of this merger on North Carolina's" "low-income citizens." (T, Vol 5, pp 50-51). Mr. Hoard responded, "I don't know how $15 million—why that number. That's just where the parties arrived at." (T, Vol 5, p 51).

Following the hearing, the Commission issued a Post-Hearing Order Requiring Verified Information. (R p 819). Among other questions, the Commission inquired whether "the Applicants' proposed $15 million contribution to workforce preparedness and low-income energy assistance bear any relationship to what is believed to be the impact of this merger on North Carolina's work

force?" (R p 820). In response, the Applicants submitted verified testimony admitting that "[t]he $15 million is not directly derived from an estimate of the impact of the merger on North Carolina." (R p 848).

The Commission's conclusions must be supported by substantial evidence, of course. The North Carolina Supreme Court has stated emphatically that "[e]vidence must support findings; findings must support conclusions; conclusions must support the judgment." *State ex. rel. Utilities Comm'n v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987). The Commission concluded that $15 million was the right number, (R p 1788), yet there is no evidence as to why $15 million is correct instead of, say, $20 million or $25 million or $30 million or whatever else. The Commission committed error here because its conclusion was not supported by facts.

Conversely, Mr. Colton went into copious detail as to why $15 million is insufficient and why the proper contribution should be $27 million per year. Specifically, Mr. Colton "propose[d] that Duke Energy provide a payment to the NC Housing Finance Agency of $27 million per year for ten (10) years to supplement the funding of low-income weatherization." (T, Vol 5, p 102). This number was based upon a complex study and calculation performed by Mr. Colton which considered the number of low-income customers served by the emerging entity, a cost estimation, and a calculation of merger-created harms to those with

low incomes. (T, Vol 5, p 103). After running these numbers, Mr. Colton concluded that "[t]he $27 million is reasonable in light of the substantive need for mitigation costs [and] in light of the legal obligations of Duke to pursue the activity necessary to mitigate the harms created by the merger," among other reasons. (T, Vol 5, p 104). Mr. Colton also noted that this recommendation is proportionate to conditions placed on mergers within other states. *Id.*

We are left to conclude that the overwhelming evidence shows that the merger will seriously harm low-income families. We are further left to conclude that the $15 million contribution by the Applicants has no evidentiary foundation whatsoever, but the annual contribution of $27 million proposed by Mr. Colton is both well-founded and well-sourced. Each of these points requires reversal of the Commission's Order. Simply put, the Applicants did not meet their burden to show that the merger benefits the public. N.C. Gen. Stat. § 62-75.

CONCLUSION

For the foregoing reasons, NC WARN respectfully requests that the Court of Appeals of North Carolina reverse the North Carolina Utilities Commission's Order Approving Merger Subject to Regulatory Conditions and Code of Conduct and remand the case for further proceedings.

Respectfully submitted, this the 19th day of July, 2013.

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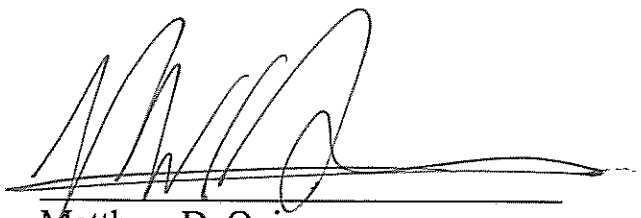
CERTIFICATE OF COMPLIANCE

Counsel for Appellant certifies that pursuant to Rule 28(j)(B) of the Rules of Appellate Procedure, the foregoing Brief, which is prepared using a proportional font, is fewer than 8,750 words (excluding cover, indexes, tables of authorities, certificate of service, this certificate of compliance, and appendices) as reported by the word-processing software, including footnotes and citations.

This the 19th day of July, 2013.



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing BRIEF OF APPELLANT NC WARN was served on the following parties to this action, pursuant to Appellate Rule 26, by depositing the same enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department to:

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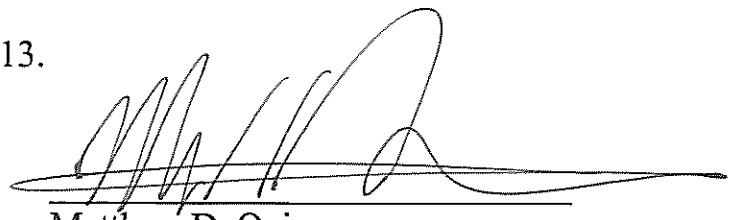

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