

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. G-5, SUB 635

In the Matter of:)	
)	
Application of Public Service)	RESPONSE OF HAW RIVER
Company of North Carolina, Inc. for)	ASSEMBLY IN OPPOSITION TO
Annual Review of Gas Costs)	PUBLIC SERVICE COMPANY OF
Pursuant to N.C.G.S. § 62-133.4(c))	NORTH CAROLINA'S MOTION TO
and Commission Rule R1-17(k)(6))	STRIKE

Haw River Assembly submits this response in opposition to *Public Service Company of North Carolina's Motion to Strike Direct Testimony of Gregory M. Lander and Request for Expedited Treatment*, filed in the above-captioned docket with the North Carolina Utilities Commission on July 29, 2021. Haw River Assembly ("HRA") respectfully ask the Commission to deny the Motion to Strike.

I. Summary of Argument

There is a glaring contradiction in Public Service Company of North Carolina's ("PSNC" or "Company") Motion to Strike. The Company argues that the direct testimony of witness Lander is irrelevant even though it is directly responsive to evidence that PSNC itself first raised in this docket. At only one point does PSNC acknowledge—in a footnote—that it was Company witness Jackson and not witness Lander who first provided testimony on issues that it now claims are irrelevant. Motion to Strike at 2, FN 3. Company witness Jackson provided testimony regarding the Company's precedent agreements with Mountain Valley Pipeline ("MVP") and MVP Southgate, the Company's "best-cost supply strategy," and its process for acquiring capacity to meet future demand. Direct Testimony of Rose Jackson at 4-6; 8-10; 12-14; Jackson Ex. 2.

Evidence on these issues is relevant in this proceeding and is properly before the Commission.

The Commission's Order in Docket No. G-100, Sub 91 expanded the scope of relevant evidence in annual gas cost proceedings to include the issues raised by witness Jackson and witness Lander. Order Requiring Reporting, Docket No. G-100, Sub 91 (June 28, 2013) ("Sub 91 Order"). That Order requires local distribution companies ("LDC") like PSNC to report to the Commission on its contracts for interstate gas supplies—contracts such as the MVP and MVP Southgate precedent agreements referred to above—in annual gas cost dockets such as this one. PSNC's argument that the sole purpose of this proceeding is a review of gas costs incurred by the Company ignores the requirements of the Sub 91 Order.

PSNC witness Jackson complied with these requirements and provided evidence responsive to the Sub 91 Order, which included reporting on the Company's contracts with MVP and MVP Southgate and its gas supply strategy, though notably omitting discussion of the potential costs that those contracts could impose on its customers. *See* Jackson Direct at 3, 4-5, 8-9; 12-14, 14-15; Jackson Direct Ex. 2. The Commission has required LDCs like PSNC to provide such evidence in these annual gas cost proceedings so that it can "exercise an appropriate level of oversight" regarding efforts by gas utilities to, among other things, "balance risks and costs in obtaining interstate capacity." Sub 91 Order at 18. This evidence is relevant to the Commission's proper exercise of its oversight role and is appropriately presented in this docket.

In short, PSNC's Motion to Strike has a "pay no attention to the man behind the curtain" character to it. The Company's Motion fails to acknowledge that its own

testimony and a governing Commission Order make the responsive testimony of witness Lander relevant to issues before the Commission in this docket. The Commission should consider his testimony in the context of reviewing whether PSNC has adequately considered less costly alternatives to its expensive plans to procure firm capacity from MVP/MVP Southgate as a strategy for addressing intermittent winter peaking issues. The Commission's decision to require this kind of evidence in annual gas cost proceedings was reasonable. It provides one of the only opportunities to consider these important issues before the Commission is faced with requests for increased gas costs to an LDC's customers as a result of entering into such contracts.

Even if there were doubt about whether the issues raised in witness Lander's testimony are relevant, PSNC itself opened the door by raising in its testimony the very issues it now says are irrelevant. As noted above, Company witness Jackson introduced PSNC's decision to enter into precedent agreements with MVP and MVP Southgate as well as testimony about its "best-cost supply strategy." PSNC waived any argument that witness Lander's testimony be considered irrelevant after having itself raised those issues in this docket. Intervenors are free to rebut or explain evidence related to the issues introduced by PSNC in its testimony. *See, e.g., State v. Anthony*, 354 N.C. 372, 415, 555 S.E.2d 557, 585-86 (2001).

Finally, while it is true that Haw River Assembly is concerned about the viability and ecological consequences of the underlying MVP Southgate project, as noted in its petition to intervene, that fact is not relevant to any question before the Commission. *See* Motion to Strike at 5-6. Witness Lander's expert testimony raises independent and unrelated concerns regarding cost and prudence relating to the project as well as an

alternative to the Company's best-cost supply strategy. In any event, Haw River Assembly's motivations are irrelevant to the expert testimony of witness Lander, which squarely addresses issues raised by PSNC and made part of this docket by the Commission's Sub 91 Order.

II. ARGUMENT

A. Lander's Testimony Fits the Broad Legal Standard of Relevance

Under the Public Utilities Act, the Commission is directed to "apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable" and its decisions should be supported by "competent material and substantial evidence." N.C. Gen. Stat. § 62-65(a). The standard for what constitutes relevant evidence is broad. Evidence is relevant that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. In other words, evidence is relevant if it has any logical tendency, however slight, to prove or disprove the existence of a material fact in the case. *Brower v. Sorenson-Christian Indus., Inc.*, 61 N.C. App. 337, 338, 300 S.E.2d 561, 563 (1983) (quoting *Martin v. Amusements of America, Inc.*, 38 N.C. App. 130, 247 S.E.2d 639 (1978)).

Witness Lander's testimony is relevant to material issues before the Commission in this docket. As set forth in more detail below, witness Lander placed his testimony in the proper context, as responsive to issues raised in witness Jackson's testimony and relevant to the Commission's consideration of the Company's plans and strategies for acquiring new gas capacity, including from interstate pipelines. *See generally* Sub 91 Order. The Commission ordered that this kind of evidence be submitted in annual gas

cost proceedings so that it can properly exercise its oversight of LDCs pursuant to N.C. Gen. Stat. § 62-36.01, and thus is material evidence that can aid in the Commission's decision-making. Witness Lander's acknowledgment that no costs resulting from PSNC's contracts for capacity on MVP/MVP Southgate have yet been incurred is not any kind of concession of "irrelevance," as the Company argues. Motion to Strike at 6.

Furthermore, PSNC has not demonstrated that the Company would be prejudiced by the admission of witness Lander's testimony. The Company suggests that it will be harmed because it will be "required" to respond to witness Lander's testimony in rebuttal. Motion to Strike at 6-7. But nothing compels the Company to file such testimony. In any event, the Company is not entitled to present its evidence uncontested, and it is not prejudicial to the Company that it must decide whether to respond to arguments and evidence put forth in the due course of this proceeding. The Commission has the ability to admit witness Lander's testimony and to give it the weight it deems appropriate to the relevant issues in this proceeding.

B. The Commission's Order in Docket No. G-100, Sub 91 and PSNC's Compliance with that Order Makes Witness Lander's Testimony Relevant

PSNC faults witness Lander's testimony for evaluating the potential costs of its MVP/MVP Southgate contracts on its customers while only once acknowledging—in a footnote—that it was Company witness Jackson who first raised the issue in her direct testimony. Motion to Strike at 2, FN 3. The Commission's decision in Docket No. G-100, Sub 91 requires LDCs such as PSNC to provide evidence about its contracts for capacity on interstate gas pipelines in annual gas cost dockets and does not prohibit intervenors or the Public Staff from responding to that evidence.

The Commission has thus expanded the scope of relevant issues in these gas cost proceedings by requiring submission of evidence relating to an LDC's plans for meeting future capacity needs. The Commission required this practice in part to provide a regular opportunity for review of a LDC's forecasted needs and options to meet those needs. Sub 91 Order at 9. The Commission explicitly recognized the importance of having such information on a regular basis and early enough "so that alternatives projects can be considered." *Id.* Timely consideration of alternatives is at the center of witness Lander's expert testimony.

A key concern identified by the Commission when it commenced its investigation into issues relating to the regulation of gas service pursuant to former N.C. Gen. Stat. § 62-36B (since re-codified as N.C. Gen. Stat. § 62-36.01) was providing an opportunity to consider projects to contracting "for interstate pipeline" capacity and any alternatives to such contracts. Order Initiating Investigation and Requesting Comments, Docket No. G-100, Sub 91 (April 2, 2012). The Commission noted more than once that information about LDCs pursuing potential contracts for interstate gas service should be provided "well in advance" in part so that any "alternative projects" can be considered. *Id.* at 1-2. In its final order in the Sub 91 docket, the Commission found that it:

has a strategic interest in being made aware of additional interstate capacity opportunities early in the planning process, well before the LDCs must make commitments by entering into service agreements for additional capacity needs. ...Timely and regular receipt of such information from the LDCs will allow the Commission an efficient way **to evaluate and exercise an appropriate level of oversight necessary** to its charge under G.S. 62-36B **regarding LDC efforts to balance risks and costs in obtaining interstate capacity** without having to require hearings at this time.

Sub 91 Order at 17-18 (emphasis added).

The governing statute behind the Sub 91 Order is unique. Sub 91 Order at 15. It grants the Commission authority to direct LDCs to negotiate and potentially enter into service agreements with interstate or intrastate pipelines that could provide increased competition and that could potentially lower costs to consumers or reduce risk of service interruptions without “unduly increasing costs to consumers.” N.C. Gen. Stat. § 62-36.01. The statute directs the Commission to consider both short-term and long-term costs to consumers along with the potential to increase competition. *Id.*

The proper venue for receiving and reviewing information about an LDCs plans to secure capacity on an interstate gas pipeline and any alternatives to such a plan pursuant to the Sub 91 Order are annual gas cost proceedings like this one. *Id.* at 18. PSNC itself requested that the Commission consider evidence relating to these kinds of interstate pipeline contract, alternatives, and capacity procurement issues in these annual gas cost dockets rather than in separate proceedings. *See* Reply Comments of PSNC, Inc., Docket No. G-100, Sub 91 at 2 and 5 (July 20, 2012) (noting that in its initial comments, PSNC had “recommended that the utilities provide the Commission with the same information they typically have provided to the Public Staff in the course of the annual gas cost reviews conducted under G.S. 62-133.4” and noting that other parties’ comments were consistent with its recommendation); *see also* Sub 91 Order at 9-10 (“[i]n general, the Public Staff, PSNC, Piedmont and Frontier all commented that the Annual Review of Gas Costs (ARGCs) could be used to gather the necessary information”).

It was reasonable for the Commission to order consideration of the questions raised in the Sub 91 Order in these annual gas cost proceedings. First, unlike the requirements for electric public utilities, there is no requirement in the Public Utilities

Act for LDCs to submit anything like integrated resource plans to the Commission. Sub 91 Order at 16 (even though the provisions of N.C. Gen. Stat. § 62-36.01 only apply to LDCs, when it comes to electric utilities, there are “other proceedings in which the Commission can examine the prudence of [their] decisions on obtaining pipeline and storage capacity”); *see also* N.C. Gen. Stat. § 62-110.1(c). Nor are LDCs required to secure certificates of public convenience and necessity before constructing pipelines or other infrastructure within their service territories. *Cf.* N.C. Gen. Stat. § 62-110.1(a). But by requiring a regular review of an LDC’s plans to enter into service agreements with interstate gas pipelines and its strategy for securing new capacity in annual gas cost dockets, the Commission has created an opportunity for all parties to review and provide evidence on those issues. There is nothing in the Sub 91 Order that suggests that there is any limitation on intervening parties’ rights to provide evidence on an LDC’s service agreements or to provide an alternatives analysis that could protect consumers from an expensive and potentially unnecessary pipeline options in the future. Nor are there any other reasonable venues for raising those concerns before an LDC has spent large sums of money and seeks recovery from its captive ratepayers and other consumers in future gas cost dockets.

Not surprisingly, the Company has complied with the Sub 91 Order in this docket, providing evidence about the existence of its precedent agreements with MVP/MVP Southgate. Jackson Direct at 12-14. PSNC also provided evidence about its method for determining “which type of resources should be acquired or developed for meeting the Company’s deliverability needs” and “the factors evaluated in deciding whether the Company should acquire pipeline transportation capacity, acquire a storage service, or

develop additional on-system storage deliverability.” Jackson Direct, Ex. 2, para. 5. In addition, the Company provided information responsive to the directive to “describe how the Company determines the amount of pipeline capacity that should be acquired” for various time frames and “each new capacity and storage opportunity that the Company is contemplating” during the next five years. *Id.* paras. 6-7. In response to directive 7, Company witness Jackson referred back to her testimony regarding the Company’s precedent agreements with MVP/MVP Southgate. *Id.* (referring back to Jackson Direct at 11-13). Again, this testimony was referenced as well in response to directive 10, requesting information about any service agreements the Company sought out from “competitive suppliers.” *Id.* at para 10. In addition, witness Jackson’s testimony relating to MVP/MVP Southgate was responsive to the Commission’s directive that “each LDC explicitly address what steps, if any, it took during the review period to seek out service agreements from competitive suppliers.” Sub 91 Order at 17.

Though PSNC does not say so explicitly in its Motion to Strike, it implies that those extensive portions of its filing that are responsive to the Sub 91 Order are somehow off limits for consideration or comment from intervenors. As noted above, intervenors are free to rebut or introduce evidence related to relevant issues raised in this proceeding.

The Commission did not order LDCs like PSNC to provide the information required in the Sub 91 Order so it could just be put on a shelf and collect dust. The reason for requiring review of this kind of evidence in annual gas cost proceedings is to provide the Commission an opportunity to weigh in on these issues early enough to consider alternatives and allow the Commission to meaningfully exercise its authority under N.C. Gen. Stat. § 62-36.01. The Commission recognized that “a competing pipeline into the

State may, in fact, be economically impractical because of increased costs that might be imposed on customers.” Sub 91 Order at 16. But “the Commission cannot make such a finding or draw such conclusion in the absence of being presented with appropriate and sufficient evidence.” *Id.* Witness Lander’s evidence goes directly to the question of whether a new pipeline risks imposing undue costs of PSNC’s customers, a question at the heart of the Sub 91 inquiry, and is relevant to the Commission’s oversight role.

The Commission should not rely on South Carolina Public Service Commission orders declining to weigh issues relating to the MVP on ripeness grounds. Motion to Strike at 6, FN 10 (citing PSC Order No. 2019-316 and 2020-331). The South Carolina Public Service Commission has not, as far as undersigned counsel has been able to determine, adopted any procedure akin to the one followed in North Carolina following the Sub 91 Order. Thus, the South Carolina Public Service Commission’s determinations of the relevance of such issues to its own proceedings are uninformative here.

C. PSNC’s Articulation of its Strategy for Gas Procurement Makes Witness Lander’s Testimony Relevant

Any matter that can be lawfully considered by the Commission in its decision-making or oversight role is relevant to this proceeding. PSNC not only provided evidence of its precedent agreements with MVP/MVP Southgate, it also provided evidence of its gas procurement policy. Jackson Direct at 4-5, 8-9, 14-15. Witness Lander’s testimony provides an alternative to PSNC’s so-called “best-cost supply strategy,” one that provides a more robust apples-to-apples comparison of various gas procurement options available to the Company. Much like its argument with regard to Lander’s testimony regarding

MVP/MVP Southgate, PSNC looks past its own similar testimony in its effort to have all of witness Lander's testimony declared irrelevant.

Witness Lander's testimony regarding All-In Cost Analysis is as relevant as PSNC's testimony regarding its best-cost supply strategy. It can aid the Commission in performing its oversight function as contemplated by the Sub 91 Order pursuant to statute. Central to the Commission's review pursuant to the Sub 91 Order is the governing statute's caution against "undue" increases in costs as a result of an LDC entering into interstate gas pipeline contracts. Witness Lander's All-In Cost Analysis provides the Commission with a viable method for evaluating whether such potential future costs are likely to be "undue" because the LDCs needs could be met with less expensive alternatives, including alternatives that the Company already employs.

As witness Lander testified, PSNC, when it applied for approval of the MVP/MVP Southgate Precedent Agreements (in Docket No. G-5, Sub 593), it did not discuss or provide any consideration of potential alternatives. Witness Lander's testimony also provides the Commission with a methodology for evaluating alternatives that varies from the "best cost supply strategy" described by witness Jackson and is relevant for the Commission's consideration as it performs its oversight role.

D. PSNC opened the door to Mr. Lander's testimony in the direct testimony of Company Witness Jackson

As shown above, Mr. Lander's testimony is directly relevant to issues in this proceeding and PSNC's motion to strike should be denied. But even if the issue was in doubt, the Company is in no position to object to Mr. Lander's testimony because it has itself presented evidence related to its precedent agreements with MVP and MVP

Southgate and its “best-cost supply strategy” in the direct pre-filed testimony of Company witness Jackson. Jackson Direct at 4-5, 8-9, 12-14, 14-15; Ex. 2.

By introducing testimony about its decision to enter into precedent agreements with MVP and MVP Southgate and a description of its “best-cost supply strategy,” PSNC has implicitly conceded that those issues are relevant in this docket. By so doing, PSNC has opened the door to related evidence about the prudence of those precedent agreements, the likely costs that they will impose on PSNC customers, and alternatives to its supply strategy. *State v. Warren*, 347 N.C. 309, 317, 492 S.E.2d 609, 613 (1997) (internal citations omitted) (holding that “[t]he law ‘wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by’ the opposing party). “Where one party introduces evidence as to a particular fact or transaction,” the other party “can introduce evidence in explanation or rebuttal” of that fact even if such evidence would otherwise be deemed irrelevant if offered initially. *State v. McNeil*, 350 N.C. 657, 682, 518 S.E.2d 486, 501 (1999) (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)). By introducing evidence of its precedent agreements for capacity on the MVP/MVP Southgate and its best cost supply strategy, PSNC has opened the door to evidence regarding the likely costs that those agreements will impose on PSNC’s customers and a methodology that the Commission could employ to evaluate alternatives to interstate gas pipeline contracts.

III. CONCLUSION

The testimony in question provides information and recommendations that are not only relevant to issues in this proceeding, but that also respond to issues raised by PSNC in its pre-filed direct testimony. As such, the testimony in question is relevant and should be allowed into the record.

Moreover, PSNC should welcome the opportunity for the Commission to more thoroughly vet these issues before the Company has incurred costs that may be at risk of non-recovery. Though HRA members who are customers of PSNC are also at risk of being asked to bear those costs, it is ultimately the Company that is at the most risk. The underlying issue of the prudence of PSNC's procurement choices is not going away. If PSNC achieves its short-term goal and eliminates any consideration of the Sub 91 Order issues in this proceeding, the Commission will nevertheless have to confront them after PSNC has incurred those costs and seeks to recover them. In other words, if the Company goes through with its plans, the MVP Southgate project is completed, PSNC makes payments, and fails to mitigate its potential and substantial risks, PSNC could face meaningful economic harm. If these issues are not considered before costs are incurred, they will likely return, but with much more at stake for the Company and its shareholders. Even if the Commission cannot fully or finally determine those issues in this proceeding, they are relevant to its consideration of the Company's evidence submitted pursuant to the Sub 91 Order.

Haw River Assembly thus respectfully requests that the Commission deny PSNC's Motion to Strike the direct testimony of Gregory M. Lander.

Respectfully submitted this 2nd day of August, 2021.

s/ David Neal

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Response in Opposition to Motion to Strike as filed today in Docket No. G-5, Sub 935 has been served on all parties of record by electronic mail or by deposit in the U.S. Mail, first-class, postage prepaid.

This the 2nd day of August, 2021.

s/ David L. Neal