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December 11, 2015

***Via Hand-Delivery***

Mr. Jeffrey Derouen  
Executive Director  
Kentucky Public Service Commission  
P.O. Box 615  
211 Sower Boulevard  
Frankfort, KY 40602

RECEIVED

DEC 11 2015

PUBLIC SERVICE  
COMMISSION

Re: In the Matter of: The Application of  
Duke Energy Kentucky, Inc. for Declaratory Order  
PSC Case No. 2015-00413

Dear Mr. Derouen:

Enclosed please find for filing with the Commission in the above-referenced case an original and ten (10) copies of Duke Energy Kentucky, Inc.'s Verified Application. An original of the executed Verification that accompanies the Application will be delivered to the Commission within two (2) business days. Please return a file-stamped copy to me.

Do not hesitate to contact me if you have any questions.

Very truly yours,

David S. Samford

Enclosures

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**RECEIVED**

DEC 11 2015

PUBLIC SERVICE  
COMMISSION

**IN THE MATTER OF:**

**THE APPLICATION OF DUKE ENERGY )**  
**KENTUCKY, INC. FOR DECLARATORY )**  
**ORDER )**

**CASE NO.**  
**2015- 00413**

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**VERIFIED APPLICATION**

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Comes now Duke Energy Kentucky, Inc. (Duke Energy Kentucky), by counsel, pursuant to 807 KAR 5:001, Section 19 and other applicable law, and hereby requests that the Kentucky Public Service Commission (Commission) enter an Order declaring the provisions of KRS 278.020(5) and KRS 278.020(6) inapplicable to the anticipated acquisition by Duke Energy Corporation (Duke Energy Corp.) of Piedmont Natural Gas Company, Inc. (Piedmont) (the Transaction), as described herein, thereby determining that Commission approval of the Transaction is unnecessary under Kentucky law. In support of this Application, Duke Energy Kentucky states as follows:

**I. COMPANY INFORMATION AND  
GENERAL FILING REQUIREMENTS**

1. Duke Energy Kentucky is an investor-owned utility engaged in the business of furnishing natural gas and electric services to various municipalities and unincorporated areas in Boone, Bracken, Campbell, Gallatin, Grant, Kenton, and Pendleton Counties in the Commonwealth of Kentucky.

2. Pursuant to 807 KAR 5:001, Section 14(2), Duke Energy Kentucky states that it was originally incorporated in the Commonwealth of Kentucky on March 20, 1901, and attests that it is currently in good standing in said Commonwealth.

3. Pursuant to 807 KAR 5:001, Section 14(1), Duke Energy Kentucky's business address is 139 East Fourth Street, Cincinnati, Ohio 45202. Duke Energy Kentucky's local office in Kentucky is Duke Energy Envision Center, 4580 Olympic Boulevard, Erlanger, Kentucky 41018, and its electronic mail address is KYfilings@duke-energy.com.

4. Duke Energy Corp. is a corporation organized and existing under the laws of the state of Delaware. Its principal office is located at 550 South Tryon Street, Charlotte, North Carolina 28202. Duke Energy Corp. is the sole owner of Cinergy Corp., a Delaware corporation, which is the sole owner of Duke Energy Ohio, Inc. (Duke Energy Ohio), an Ohio corporation, which, in turn, is the sole owner of Duke Energy Kentucky. Duke Energy Corp. is also the sole owner of Forest Subsidiary, Inc. (Forest), a North Carolina corporation created to accomplish the Transaction. Neither Duke Energy Corp. nor Forest conducts business or provides utility service in Kentucky and neither is subject to the jurisdiction of the Commission.<sup>1</sup>

5. Piedmont is a corporation organized and existing under the laws of the state of North Carolina. Its principal office is located at 4720 Piedmont Row Drive, Charlotte, North Carolina 28210. Piedmont is engaged in the business of furnishing natural gas services to customers in North Carolina, South Carolina, and Tennessee. Piedmont conducts no business in Kentucky, does not provide utility service in Kentucky, and is not subject to the jurisdiction of the Commission.

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<sup>1</sup> The Commission has previously found that Duke Energy Corp. is not a utility as defined in KRS 278.010(3). See, e.g., *In the Matter of the Joint Application of Duke Energy Corporation, Cinergy Corp. Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corporation, and Progress Energy, Inc., for Approval of the Indirect Transfer of Control Duke Energy Kentucky, Inc.*, Order at p. 11, Case No. 2011-00124 (Ky. P.S.C. Aug. 2, 2011).

## II. SUMMARY OF THE TRANSACTION

6. On or about October 24, 2015, Duke Energy Corp., Forest, and Piedmont entered into an agreement setting forth the terms of the Transaction.<sup>2</sup> The Transaction may be fairly summarized as follows:

- a. Forest and Piedmont will merge, with Piedmont being the surviving entity (this surviving entity is referred to herein as Post-Acquisition Piedmont);
- b. The articles of incorporation and bylaws of Post-Acquisition Piedmont will be in the form of the articles of incorporation and bylaws of Forest prior to the Transaction;
- c. The directors of Post-Acquisition Piedmont will be those persons that were the directors of Forest prior to the Transaction;
- d. Many of the officers of Post-Acquisition Piedmont will be those persons that were the officers of Piedmont prior to the Transaction; and
- e. Post-Acquisition Piedmont will be a direct, wholly owned subsidiary of Duke Energy Corp.

7. Upon consummation of the Transaction: (i) each issued and outstanding share of common stock of Piedmont will be converted into and will thereafter represent solely the right to receive an amount in cash; and (ii) each issued and outstanding share of capital stock of Forest will be converted into and become one validly issued, fully paid, and non-assessable share of common stock of Post-Acquisition Piedmont. Thus, as a result of the Transaction: (i) Duke Energy Corp. (which presently owns all the stock of Forest) will own all the stock of Post-Acquisition Piedmont; and (ii) the ownership of stock in Duke Energy Corp. will not be impacted.

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<sup>2</sup> A copy of the Agreement and Plan of Merger is attached hereto and incorporated herein as Exhibit 1.

8. Duke Energy Corp. has agreed, following the Transaction, to expand the size of its board of directors by one seat and appoint a mutually agreeable current member of Piedmont's board of directors as a director to serve on Duke Energy Corp.'s board of directors.<sup>3</sup> Duke Energy Corp. has also agreed to offer to retain Piedmont's existing executive operating management team in order to manage and facilitate best practices within Duke Energy Corp.'s utility subsidiaries' expanded natural gas operations. Duke Energy Corp.'s Chief Executive Officer (CEO), namely Lynn Good, will remain in place and continue to oversee all employees and operations.

9. The Transaction will not impact the corporate structure or local operations of Duke Energy Kentucky. Following the Transaction, as before the Transaction, Duke Energy Kentucky will be a wholly owned, indirect subsidiary of Duke Energy Corp. Duke Energy Kentucky's own board of directors, consisting of CEO Lynn Good, Doug Esamann, Executive Vice President and President – Midwest and Florida Regions, and Dhiaa Jamil, Executive Vice President and President – Generation and Transmission, will not change or be impacted as a result of the Transaction. Further, Duke Energy Kentucky will continue to maintain its current levels of local leadership following the Transaction, including local oversight of all Ohio and Kentucky natural gas utility operations. It is anticipated that there will continue to be at least one regional Duke Energy Kentucky/Duke Energy Ohio executive who will maintain responsibility for Midwest natural gas operations and who will report to the new Duke Energy Corp. executive responsible for all natural gas operations.

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<sup>3</sup> Duke Energy Corp.'s Board of Directors currently consists of fifteen members. Adding an additional Director as a result of this Transaction would otherwise bring the total board composition to sixteen based upon current count and assuming that the four existing members who are eligible for retirement in 2016 are replaced. Even if those four Directors who are eligible for retirement are not replaced, the total number of Duke Energy Corp. Board positions would be eleven, including Lynn Good, prior to closing of this Transaction. Adding one additional member as a result of this Transaction would thus bring the total composition of the Duke Energy Corp. Board of Directors to twelve. This addition of a single Director, at best, equates to 1/12<sup>th</sup> or less than 9% of the total Board vote and cannot confer the power to direct the management of Duke Energy Corp., let alone Duke Energy Kentucky.

### III. DISCUSSION

#### A. Summary of Relevant Law

10. The Commission's authority and jurisdiction to rule upon transfers of control are set forth in KRS 278.020(5) and (6), which provide as follows:

(5) No person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.

(6) No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission. Any acquisition of control without prior authorization shall be void and of no effect. As used in this subsection, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a utility, whether through the ownership of voting securities, by effecting a change in the composition of the board of directors, by contract or otherwise. Control shall be presumed to exist if any individual or entity, directly or indirectly, owns ten percent (10%) or more of the voting securities of the utility. This presumption may be rebutted by a showing that ownership does not in fact confer control. Application for any approval or authorization shall be made to the commission in writing, verified by oath or affirmation, and be in a form and contain the information as the commission requires. The commission shall approve any proposed acquisition when it finds that the same is to be made in accordance with law, for a proper purpose and is consistent with the public interest. The commission may make investigation and hold hearings in the matter as it deems necessary, and thereafter may grant any application under this subsection in whole or in part and with modification and upon terms and conditions as it deems necessary or appropriate. The commission shall grant, modify, refuse, or prescribe appropriate terms and conditions with respect to every such application within sixty (60) days after the filing of the application therefor, unless it is necessary, for good cause shown, to continue the application for up to sixty (60) additional days. The order continuing the application shall state fully the facts that make continuance necessary. In the

absence of that action within that period of time, any proposed acquisition shall be deemed to be approved.

11. KRS 278.020(5) and KRS 278.020(6) are independent and do not necessarily work in concert.<sup>4</sup> Commission precedent has held that subsection (5) “addresses the transfer of ownership or control of a utility,” while subsection (6) “focuses more narrowly on the ‘acquisition of control’ of a utility.”<sup>5</sup>

12. Although the Commission has held that a transaction may require approval under KRS 278.020(5), but not KRS 278.020(6),<sup>6</sup> it does not appear that the Commission has ever held that its approval is required for a transaction under KRS 278.020(6), but not KRS 278.020(5). The discussion that follows begins with an analysis of KRS 278.020(6).

#### **B. KRS 278.020(6) Does Not Apply to the Transaction**

13. In order for approval of the Transaction to be necessary under KRS 278.020(6), the Commission must determine that an individual or entity is acquiring control, either directly or indirectly, of Duke Energy Kentucky.<sup>7</sup> “Control” is defined by subsection (6) to mean “the possession, directly or indirectly, of the power to direct or cause the direction of the management

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<sup>4</sup> See *In the Matter of the Joint Petition of Kentucky-American Water Company, Thames Water Company, Thames Water Aqua Holdings GMBH, RWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc., and American Water Works Company, Inc., for Approval of a Change in Control of Kentucky-American Water Company*, Order, Case No. 2006-00197 (Ky. P.S.C. Apr. 16, 2007).

<sup>5</sup> *Id.*, at p. 7.

<sup>6</sup> *Id.*; see also *In the Matter of the Application of Windstream Kentucky East, LLC and Windstream Kentucky West, LLC for a Declaratory Ruling that Approval is Not Required for the Transfer of a Portion of their Assets; (2) Alternatively for Approval of the Transfer of Assets; (3) for a Declaratory Ruling that Communication Sales and Leasing, Inc. is not subject to KRS 278.020(1); and (4) for all other required Approvals and Relief*, Order at p. 7, n. 29, Case No. 2014-00283 (Ky. P.S.C. Dec. 4, 2014) (noting that the definition of “control” is more narrow under KRS 278.020(6) than KRS 278.020(5)).

<sup>7</sup> Pursuant to the relevant statute’s terms, Commission approval is required only when a person or entity seeks to acquire control of a “utility furnishing utility service in this state.” Because Piedmont has absolutely no operations in the Commonwealth of Kentucky and furnishes no utility service in this state, its acquisition by Duke Energy Corp. is not subject to Commission approval under KRS 278.020(6).

and policies of a utility,” and it can be acquired “through the ownership of voting securities, by effecting a change in the composition of the board of directors, by contract or otherwise.”

14. Because an acquisition of control cannot take place unless there is an “acquirer”<sup>8</sup> of a jurisdictional utility, a threshold issue under the terms of KRS 278.020(6) necessitates the identification of the individual or entity acquiring control of a jurisdictional utility. At present, control of Duke Energy Kentucky ultimately rests with Duke Energy Corp.,<sup>9</sup> and following consummation of the Transaction, control of Duke Energy Kentucky will continue to rest with Duke Energy Corp. For this reason, there is no “acquirer,” and therefore KRS 278.020(6) is inapplicable to the Transaction.

15. Any attempt to identify Piedmont as the “acquirer” under KRS 278.020(6) is unsupported and cannot be sustained. First, the terms of the parties’ agreement provide that, upon consummation of the Transaction: (i) all the stock of Piedmont will be converted into cash and automatically canceled; (ii) Duke Energy Corp. will own all the outstanding stock of Post-Acquisition Piedmont; and (iii) neither Piedmont nor its stockholders will acquire any interest in or control over Duke Energy Corp. These facts distinguish the Transaction from *all* previous transactions over which the Commission has exercised authority pursuant to KRS 278.020.<sup>10</sup>

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<sup>8</sup> See Case No. 2006-00197 (Ky. P.S.C. Apr. 16, 2007), *supra* at n. 3.; see also *In the Matter of the Joint Application of Consumers Water District, Fancy Farm Water District, Hardeman Water District, and South Graves Water District for Approval of Merger and Formation of Graves County Water District*, Order at p. 9, n. 30, Case No. 2007-00496 (Ky. P.S.C. May 21, 2008) (“We note that while four water districts are transferring control of their property to a new entity, the new entity does not yet exist. As there is no acquirer, KRS 278.020(6) is not applicable.”).

<sup>9</sup> Of course, Duke Energy Kentucky’s direct parent, namely Duke Energy Ohio, could also be considered in “possession...of the power to direct or cause the direction of the management and policies of” Duke Energy Kentucky, as could Duke Energy Kentucky, itself. Because the Transaction does not involve those entities in any way, however, it is appropriate to focus analysis under KRS 278.020(5) and (6) solely on Duke Energy Corp.

<sup>10</sup> See, e.g., *In the Matter of the Joint Application of Kentucky Power Company, American Electric Power Company, Inc. and Central and South West Corporation Regarding a Proposed Merger*, Order at p. 3, Case No. 99-149 (Ky. P.S.C. June 14, 1999) (merger whereby Central and South West Corporation (CSW) shareholders acquired 40 percent of American Electric Power Company, Inc.’s (AEP) common stock); Case No. 2011-00124 (Ky. P.S.C. Aug. 2, 2011), *supra* at n. 1 (merger whereby each share of Progress Energy common stock was converted into the right to receive 2.6125 shares of Duke Energy Corporation common stock, ultimately resulting in Duke Energy Corporation’s

Moreover, Piedmont will no longer exist as a separately traded and independent investor-owned corporation following consummation of the Transaction; it simply does not comport with the law or common sense to conclude that an entity may acquire something at the same moment it ceases to exist as an independent entity.<sup>11</sup> Finally, it must be noted that the corporation created as a result of the Transaction, specifically Post-Acquisition Piedmont, will be wholly owned by Duke Energy Corp. and have no direct or indirect control over Duke Energy Kentucky. All fiduciary duties of the Post-Acquisition Piedmont will be to Duke Energy Corp. shareholders. There is simply no entity acquiring control of Duke Energy Kentucky as a result of the Transaction and thus approval under KRS 278.020(6) is unnecessary.

16. The fact that Duke Energy Corp. will expand its board of directors by one seat following consummation of the Transaction does not render KRS 278.020(6) applicable thereto. Again, the threshold question presented by the relevant statutory provision is whether the new director, in this case an individual,<sup>12</sup> can be considered an “acquirer” of control of Duke Energy

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shareholders owning approximately 63 percent of the common stock of the combined company and Progress Energy shareholders owning 37 percent); *In the Matter of the Joint Application of Duke Energy Corporation, Duke Energy Holding Corp., Deer Acquisition Corp., Cougar Acquisition Corp., Cinergy Corp., the Cincinnati Gas & Electric Company and the Union Light, Head and Power Company for Approval of a Transfer and Acquisition of Control*, Order at pp. 3-4, Case No. 2005-00228 (Ky. P.S.C. Nov. 29, 2005) (merger whereby each shareholder of the existing Duke Energy Corporation received one share of common stock in a new holding company and each shareholder of Cinergy received 1.56 shares of common stock, ultimately resulting in the existing Duke Energy Corporation shareholders owning approximately 76 percent of the new holding company and Cinergy shareholders owning approximately 24 percent); Case No. 2006-00197 (Ky. P.S.C. Apr. 16, 2007), *supra* at n. 3 (divestiture whereby up to 100 percent of Kentucky-American’s parent company’s stock was sold through initial public offering).

<sup>11</sup> An entity that ceases to exist following a transaction cannot be considered an “acquirer,” especially considering that the Commission has held that an entity that only comes into existence as a result of a transaction is not an “acquirer.” See Case No. 2007-00496 (Ky. P.S.C. May 21, 2008), *supra* at n. 6; see also *In the Matter of the Application of Black Mountain Utility District and Green Hills Water District for Merger Pursuant to KRS 74.363*, Order at p. 8, n. 31, Case No. 2012-00095 (Ky. P.S.C. July 13, 2012); *In the Matter of the Joint Application of Hickory Water District and Graves County Water District for Approval of Proposed Merger*, Order at p. 7, n. 26, Case No. 2012-00358 (Ky. P.S.C. Sept. 27, 2012).

<sup>12</sup> Although the new director will have formerly served on the board of directors of Piedmont, the director cannot be considered an agent or representative of Piedmont because, as heretofore discussed, Piedmont is being acquired by Duke Energy Corp. and will no longer exist as a separate investor-owned corporation following the Transaction. The new director, like all other directors, will owe a fiduciary duty to Duke Energy Corp., which is the same entity that had control of Duke Energy Kentucky before the Transaction. See, e.g., *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del.

Kentucky. The answer to this inquiry is irrefutably “no.” The new director will represent just a fraction of Duke Energy Corp.’s board of directors; no lone member of a board of such a size, regardless of his or her background or presumed allegiances, possesses “the power to direct or cause the direction of the management and policies” of the corporation and its subsidiaries.<sup>13</sup> Furthermore, the addition of a board member or a change in the composition of a board of directors, whether or not related to a transaction, does not alone trigger Commission approval under KRS 278.020(6). Indeed, the Commission has never held that its approval is required for every change to the board of directors of a jurisdictional utility (let alone a jurisdictional utility’s out-of-state parent company), likely because KRS 278.020 is not so broad as to consider every newly elected or newly added board member an “acquirer” of “control” of a utility providing utility service in Kentucky. In the situation presented, Duke Energy Corp. has deemed it appropriate to add a new director to its board so that the board will better reflect the corporation following the Transaction (*i.e.*, a corporation that includes Post-Acquisition Piedmont as a wholly owned subsidiary). The new director has not acquired control of Duke Energy Kentucky under any reasonable construction of KRS 278.020(6) and thus the Transaction does not require Commission approval under that statutory provision.

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1939) (noting that corporate officers and directors “stand in a fiduciary relation to the corporation and its stockholders.”).

<sup>13</sup> This fact also distinguishes the Transaction from all previous transactions under which the Commission has exercised authority under KRS 278.020. For example, prior to the 2011 merger of Duke Energy Corp. and Progress Energy, Inc., Duke Energy Corp.’s board of directors consisted of eleven members. Following the merger, the merged corporation’s board consisted of eighteen members, eleven being the then current members of the Duke Energy Corp. board of directors and seven being the then current Progress Energy board of directors. This significant reconstitution of Duke Energy Corporation’s board of directors, combined with the stock-swap nature of the transaction and the naming of Progress Energy’s CEO as the new CEO of the merged corporation, resulted in a change in control of Duke Energy Kentucky. Here, the facts are simply different. *See* Case No. 2011-00124, Order at p. 9 (Ky. P.S.C. Aug. 2, 2011); *see also* Case No. 99-149 (Ky. P.S.C. June 14, 1999), *supra* at n. 7 (merger resulted in expansion of AEP’s board from twelve to fifteen members, with five of those fifteen coming from CSW).

17. Finally, Duke Energy Corp.'s anticipated retention of certain former Piedmont employees does not render KRS 278.020(6) applicable to the Transaction. All such personnel, including the person named to head Duke Energy Corp.'s expanded natural gas operations, will be employees of Duke Energy Business Services, LLC (DEBS),<sup>14</sup> or a sister company and subject to the oversight of Duke Energy Corp.'s existing CEO, its board of directors, and, ultimately, its shareholders. Thus, the Transaction does not impact in any way Duke Energy Corp.'s "power to direct or cause the direction of the management and policies of" Duke Energy Kentucky. Moreover, and consistent with the above discussion regarding modifications to boards of directors, it is simply unreasonable to consider each new employee an "acquirer" of control of Duke Energy Kentucky for purposes of KRS 278.020(6); if such a construction is taken to its logical conclusion, Commission approval would be required each time a utility or its parent company replaced or added any personnel with any modicum of management responsibility. Clearly, there are limits in both law and practice to the Commission's jurisdiction under KRS 278.020, and the facts attendant to Duke Energy Corp.'s acquisition of Piedmont render Commission approval of the Transaction unnecessary.

18. Importantly, the Transaction is fundamentally different than previous transactions brought before this Commission involving Duke Energy Corp. and Duke Energy Kentucky. For example, as part of the 2011 merger of Duke Energy Corp. and Progress Energy, the CEO of Progress Energy was appointed CEO of Duke Energy Corp. and at least one additional Progress Energy executive was named to Duke Energy Kentucky's board of directors. Similarly, as part of

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<sup>14</sup> Duke Energy Kentucky and many of its affiliates are parties to Commission-approved service agreements that permit transactions and services between and among the parties under defined pricing terms and conditions. DEBS is an affiliate service company that provides numerous services to Duke Energy Kentucky pursuant to the terms of the Service Company Service Agreement previously approved by the Commission. See Case No. 2011-00124, *supra* at n. 1.

the 2006 merger of Duke Energy Corp. and Cinergy Corp., the transaction contemplated, among other things, that new executive leadership would be named to Duke Energy Kentucky's board of directors. In contrast to these previous mergers, the Transaction will result in no change to Duke Energy Corp.'s CEO and no change to Duke Energy Kentucky's board of directors.

19. Additionally, the very structure of the Transaction is markedly different than the two previous merger transactions involving Duke Energy Corp. As described above, Piedmont stockholders will acquire no interest in or control of Duke Energy Corp. or Duke Energy Kentucky as a result of the Transaction. Conversely, as part of the Duke Energy Corp./Progress Energy merger, each share of Progress Energy common stock was converted into the right to receive 2.6125 shares of Duke Energy Corp. common stock resulting in Progress Energy shareholders receiving stock to reflect 37% ownership in the combined company.<sup>15</sup> Similarly, as part of the Duke Energy Corp./Cinergy merger, Duke Energy Corp. shareholders received one share of common stock in the new holding company for each share owned, and Cinergy shareholders received 1.56 shares of common stock in the new holding company, resulting in Duke Energy Corp. shareholders owning 76% of the merged company and Cinergy shareholders owning 24%. Because the Transaction involves no acquisition of ownership by Piedmont or its shareholders, KRS 278.020(6) is simply inapplicable.

### **C. KRS 278.020(5) Does Not Apply to the Transaction**

20. In order for approval of the Transaction to be necessary under KRS 278.020(5), the Commission must determine that a person<sup>16</sup> is: (i) acquiring or transferring ownership of Duke

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<sup>15</sup> Case No. 2005-00228 (Ky. P.S.C. Nov. 29, 2005), *supra* at n. 8.

<sup>16</sup> Pursuant to KRS 278.010(2), "person" includes "natural persons, partnerships, corporations, and two (2) or more persons having a joint or common interest."

Energy Kentucky; or (ii) acquiring or transferring control of, or the right to control, Duke Energy Kentucky.

21. At the outset, it is quickly apparent that no person is acquiring or transferring ownership of Duke Energy Kentucky in connection with the Transaction. Duke Energy Kentucky is presently a wholly owned, indirect subsidiary of Duke Energy Corp. and will remain so following the Transaction. Additionally, and unlike most all past transactions that have faced Commission scrutiny under KRS 278.020,<sup>17</sup> the Transaction involves no stock-swap or other conveyance of ownership of a utility or its parent company. Duke Energy Corp. is acquiring Piedmont in exchange for cash to Piedmont's owners and those persons and/or entities that owned Piedmont prior to the Transaction will have no direct or indirect ownership of Duke Energy Corp. or Duke Energy Kentucky following the Transaction. Put simply, the ownership of Duke Energy Kentucky is not disturbed or altered in any way by the Transaction and thus there is no acquisition or transfer of ownership to necessitate Commission approval under KRS 278.020(5).

22. The second question presented by KRS 278.020(5) — whether control of (or the right to control) Duke Energy Kentucky will be acquired or transferred as a result of the Transaction — must also be answered in the negative. Although the Commission has summarily stated that “control” for purposes of KRS 278.020(5) is broader than “control” for purposes of KRS 278.020(6),<sup>18</sup> similar considerations and conclusions under both provisions render KRS 278.020(5) inapplicable to the Transaction.

23. The terms of KRS 278.020(5) plainly require that some person obtain or convey “the power to direct the management or policies” of a jurisdictional utility before Commission approval

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<sup>17</sup> See n. 8, *supra*.

<sup>18</sup> See Case No. 2014-00283 (Ky. P.S.C. Dec. 4, 2014), *supra* at n. 5.

is mandated.<sup>19</sup> Because the statutory provision addresses the *transfer* of control of a utility, and not merely the *acquisition* of control of utility, the Commission has construed it more broadly than KRS 278.020(6) and has held that there can be a transfer without an “acquirer.”<sup>20</sup> However, the unambiguous language of KRS 278.020(5) and Commission precedent reveal that there must be some actual change in terms of utility control for the statutory provision to be implicated.<sup>21</sup>

24. Control of Duke Energy Kentucky will not change as a result of the Transaction. As discussed *supra*, control of Duke Energy Kentucky ultimately rests with Duke Energy Corp., both before and after the Transaction. Because the Transaction is an acquisition, Duke Energy Corp. and its shareholders will not transfer any of their power to direct the management or policies of Duke Energy Kentucky. Following the Transaction, Post-Acquisition Piedmont and Duke Energy Kentucky will have an affiliated relationship, but they will not reside in the same chain of ownership and Duke Energy Kentucky will gain no new parent company. Essentially, the

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<sup>19</sup> *Id.* Pursuant to KRS 278.010(19), “control” means “the power to direct the management or policies of a person through ownership, by contract, or otherwise.”

<sup>20</sup> See Case No. 2006-00197 (Ky. P.S.C. Apr. 16, 2007), *supra* at n. 3.

<sup>21</sup> See *In the Matter of The Joint Application of Com/Nav Marine, Inc. and Mobile Communications Corporation of America for Approval of the Distribution of All of its Shares of Com/Nav Marine, Inc., to the Shareholders of its Parent Mobile Communications Corporation of America*, Order, Case No. 10393 (Ky. P.S.C. Oct. 26, 1988) (finding approval unnecessary when the owners of a utility’s parent corporation become direct owners of the utility because the “spin-off will not effect a change of ownership or control”). Notably, both the text of KRS 278.020(5) and the provision’s origins support the notion that some actual, identifiable change in control must occur to render necessary the Commission’s approval. As stated by the Commission in Case No. 2006-00197, KRS 278.020(5) “represents the codification of the holding of *Public Service Commission v. Cities of Southgate, Highland Heights*, 268 S.W.2d 19, 21 (Ky. 1954).” Order at pp. 7-8 (Ky. P.S.C. Apr. 16, 2007). In *Southgate*, the Kentucky Court of Appeals concluded that the Commission embraced the then-implied power “to determine whether a proposed purchaser of a utility system is ready, willing and able to provide adequate service.” 268 S.W.2d at 21. Similarly, KRS 278.020(5) requires the Commission to evaluate whether “the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.” These authorities make clear that the Commission’s role and duty under the law is based on the protection of consumers from unwise or unreasonable changes in control of utilities. If there is no such change in control, however, Commission review is neither required nor justified.

Transaction will result in no change whatsoever to the control of Duke Energy Kentucky and thus KRS 278.020(5) is inapplicable.<sup>22</sup>

25. The fact that Duke Energy Corp. will add a single seat to its board of directors following the Transaction does not render necessary Commission approval under KRS 278.020(5). As aforementioned, the new director, who will be just one of many members of the board, will not acquire the power to direct the management or policies of Duke Energy Corp. or Duke Energy Kentucky.<sup>23</sup> Moreover, Duke Energy Corp. and its existing board of directors are not transferring their control of Duke Energy Kentucky to the new director as a result of the Transaction; if such were the case, Commission approval would be required each time a utility or its parent company elected, appointed, or removed an individual board member. The expansion of Duke Energy Corp.'s board of directors does not change the fact that Duke Energy Corp. will continue to control Duke Energy Kentucky, and, without a change in control, Commission approval under KRS 278.020(5) is neither necessary nor warranted.

26. Finally, Duke Energy Corp. is not transferring control of Duke Energy Kentucky simply by employing certain former Piedmont personnel following the Transaction. As discussed, all individuals who accept employment offered by Duke Energy Corp. will become an employee of DEBS or one of its sister companies and be subject to the oversight of the corporation's existing leadership. Additionally, the jurisdiction conferred by the provisions of KRS 278.020 is not so

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<sup>22</sup> Cf. *In the Matter of Notice of MCI Communications Corporation-British Telecommunications PLC Equity Transaction and Petition for Declaratory Ruling*, Order, Case No. 93-383 (Ky. P.S.C. Dec. 13, 1993). In that case, an outside entity sought to purchase up to 20 percent of the common stock of MCI Communications Corporation (MCI) and add three of its own directors to MCI's twelve-member board. Despite the fact that MCI wholly owned two subsidiaries which provided utility service in Kentucky, the Commission held that the subject transaction would not result in a change in control for which Commission approval is required under the relevant subsections of KRS 278.020.

<sup>23</sup> Of course, corporate power rests in no individual director; instead, corporations act through their boards as a whole. See, e.g., *Kentucky-Pennsylvania Oil & Gas Corp. v. Clark*, 57 S.W.2d 65, 70 (Ky. App. 1933) ("The governing power of a corporation is vested in its board of directors, and they can bind it only when acting as a body.").

far-reaching as to require Commission approval for every adjustment to the operational management of a utility or its parent company, especially when, as here, there will be no significant change to the utility's local operations or to the parent company's CEO, board of directors, or shareholders. Notably, "control" for purposes of both KRS 278.020(5) and KRS 278.020(6) is not defined as "the power *to manage*" a utility, but rather "the power *to direct the management*" of a utility. This seemingly minor difference in wording strongly suggests that "control" under the relevant statutory provisions is only held (and thus transferable) by the highest levels of authority (the shareholders, board of directors, and possibly CEO). To claim otherwise would put the Commission in the impossible position of having to approve every managerial-personnel decision made by a jurisdictional utility or its corporate parent(s). For these reasons, KRS 278.020(5) is not applicable to the Transaction.

**D. KRS 278.020(5) and (6), as Applied to the Transaction, are an Unconstitutional Impairment of Interstate Commerce**

27. The Commerce Clause of the United States Constitution authorizes Congress "[t]o regulate Commerce ... among the several States."<sup>24</sup> The negative, or dormant, implication of the Commerce Clause "prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace."<sup>25</sup>

28. The "Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."<sup>26</sup> Additionally, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid

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<sup>24</sup> Art. I, § 8, cl. 3.

<sup>25</sup> *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (citations and quotation omitted).

<sup>26</sup> *Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982) (plurality opinion).

regardless of whether the statute's extraterritorial reach was intended by the legislature."<sup>27</sup> A state law that directly regulates interstate commerce is virtually *per se* invalid under Commerce Clause jurisprudence.<sup>28</sup>

29. In addition to prohibiting direct state regulation of interstate commerce, the Commerce Clause also restricts the ability of states to indirectly impact interstate commerce. If a state law falls in this latter category, courts have applied a balancing test that weighs the interests of the state against the burdens that result from the state's regulation: "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."<sup>29</sup> Essentially, the question is "one of degree," and "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."<sup>30</sup>

30. The Transaction, agreed to by corporations that are citizens of Delaware and North Carolina, involves facilities utilized for the transportation and distribution of natural gas in North

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<sup>27</sup> *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989) (also noting that "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State") (citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986)). In *Brown-Forman*, the Supreme Court stated that "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." 476 U.S. at 582 (citation omitted).

<sup>28</sup> See *Brown-Forman, supra*, 476 U.S. at 578-79.

<sup>29</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)).

<sup>30</sup> *Id.* Notably, this balancing test was employed by the United States Court of Appeals for the Sixth Circuit in a case involving a Michigan law which required public utilities operating in Michigan to obtain the approval of the Michigan Public Service Commission before issuing certain long-term securities. Ultimately, the Court concluded that "the burdens of expense, delay, and administrative hassle of 'advance approval' securities regulation far outweigh the benefits, if any, of Michigan's interests in protecting consumers and investors," and therefore held that the statute unconstitutionally burdened interstate commerce. See *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228 (6th Cir. 1986) (*affirmed on other grounds in Schneidewind v. ANR Pipeline Co.*, 485 U.S. 291, (1988)).

Carolina, South Carolina, and Tennessee, as well as employees, contracts, and assets that relate to and substantially affect interstate commerce. As discussed herein, Duke Energy Kentucky — and, more generally, the Commonwealth of Kentucky — are not implicated in any way by the Transaction. In light of these facts, KRS 278.020(5) and KRS 278.020(6) are not only inapplicable to the Transaction under those provisions' terms, but any attempt by the Commonwealth to enforce the statute with respect to the Transaction would run afoul of the Commerce Clause.<sup>31</sup>

31. Even if some connection between the Transaction and the Commonwealth of Kentucky is assumed, application of the aforementioned balancing test reveals that KRS 278.020(5) and KRS 278.020(6) would be unconstitutional as applied to the Transaction. Although, undoubtedly, the Commonwealth has a considerable interest in regulating the public utility sector, this interest would not be furthered or promoted in the situation presented because of the tangential and insignificant relationship between the Transaction and the Commonwealth. Moreover, Kentucky's enforcement of KRS 278.020(5) and KRS 278.020(6) vis-à-vis the Transaction would substantially and unduly burden interstate commerce by, among other things, creating unnecessary expense, delay, and uncertainty.<sup>32</sup> For these reasons, Kentucky cannot regulate this Transaction consistent with the Commerce Clause.

32. Subjecting the Transaction to Commission scrutiny would be an unconstitutional impairment of interstate commerce. Accordingly, the Commission should avoid construing

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<sup>31</sup> See n. 22 and n. 23, *supra*.

<sup>32</sup> See *ANR Pipeline Co.*, *supra*, 801 F.2d at 237-38; see also *Healy*, *supra*, 491 U.S. at 336-37 (“Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.”).

Kentucky law in such a manner as to create a question as to the constitutionality of the statute<sup>33</sup> and decline to apply KRS 278.020(5) and (6) to the Transaction.

#### **IV. REQUEST FOR RELIEF ON AN EXPEDITED BASIS**

33. Duke Energy Kentucky requests that the Commission enter a final order in this matter within sixty days, *to wit*, on or before February 9, 2016. Obtaining a decision from the Commission within this timeframe will allow the Transaction to proceed without unreasonable delay and afford Duke Energy Corp. sufficient time to take whatever other actions may be deemed appropriate to ensure timely consummation of the Transaction.

#### **V. CONCLUSION**

34. KRS 278.020(5) and KRS 278.020(6) ensure that the public is protected when there is a change to the ownership or control of a utility providing service in Kentucky. Indeed, when a Kentucky utility is directly or indirectly acquired by some individual or entity, or when an individual or entity that owns or controls a Kentucky utility transfers its ownership or control of that utility to some individual or entity, applicable law requires Commission oversight and approval. The Transaction described herein, however, involves no such situation. Duke Energy Corp. intends to acquire a corporation that does no business in Kentucky, has no facilities in Kentucky, and provides no utility service in Kentucky. Neither the ownership nor control of Duke Energy Kentucky will change as a result of the Transaction. For the reasons described herein, Commission approval of the Transaction is not necessary under KRS 278.02(5) or KRS 278.020(6).

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<sup>33</sup> See, e.g., *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 806 (Ky. 2009) (“In Kentucky, a statute carries with it the presumption of constitutionality; therefore, when we consider it, we are obligated to give it, if possible, an interpretation which upholds its constitutional validity.”).

WHEREFORE, on the basis of the foregoing, Duke Energy Kentucky respectfully requests that the Commission enter an Order:

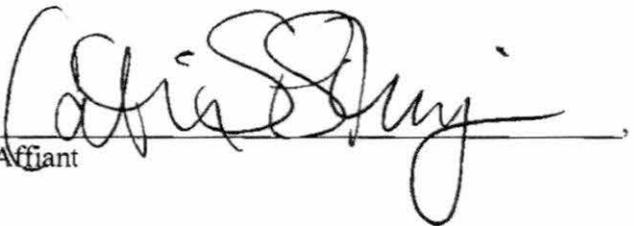
1. Declaring that neither KRS 278.020(5) nor KRS 278.020(6) is applicable to the Transaction, thereby determining that Commission approval of the Transaction is not required;
2. Granting the relief requested herein within sixty days, *to wit*, on or before February 9, 2016; and
3. Granting Duke Energy Kentucky all other additional relief to which it may appear entitled.

This 11<sup>th</sup> day of December, 2015.

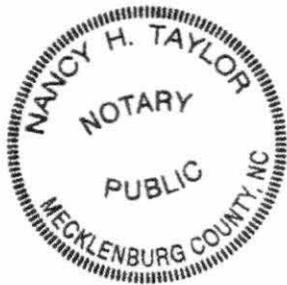
**VERIFICATION**

State of North Carolina     )  
  )  
County of Mecklenburg     )     SS:

The undersigned, Catherine S. Stempien, being duly sworn, deposes and says that she is the Senior Vice President of Corporate Development for Duke Energy Corporation and that the matters set forth in the foregoing Application are true and correct to the best of her information, knowledge and belief.

  
Affiant

Subscribed and sworn to me by Catherine on this 11<sup>th</sup> day of December, 2015.  
Stempien



Nancy H. Taylor  
NOTARY PUBLIC

My Commission expires: January 26, 2017

Respectfully submitted,



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*Counsel for Duke Energy Kentucky, Inc.*

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing has been served, by delivering same to the custody and care of the U.S. Postal Service, postage pre-paid, this 11<sup>th</sup> day of December, 2015, addressed to the following:

Jack Conway, Attorney General  
Jennifer Black Hans, Deputy Attorney General  
1024 Capital Center Dr., Suite 200  
Frankfort, KY 40601-8204



*Counsel for Duke Energy Kentucky, Inc.*



*EXECUTION VERSION*

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AGREEMENT AND PLAN OF MERGER

Dated as of October 24, 2015

by and among

DUKE ENERGY CORPORATION,

FOREST SUBSIDIARY, INC.

and

PIEDMONT NATURAL GAS COMPANY, INC.

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## AGREEMENT AND PLAN OF MERGER

This AGREEMENT AND PLAN OF MERGER, dated as of October 24, 2015 (this "Agreement"), is entered into by and among Duke Energy Corporation, a Delaware corporation ("Parent"), Forest Subsidiary, Inc., a North Carolina corporation and a wholly owned Subsidiary of Parent ("Merger Sub"), and Piedmont Natural Gas Company, Inc., a North Carolina corporation (the "Company"). Defined terms used herein have the respective meanings set forth in Section 8.13.

### WITNESSETH

WHEREAS, the parties intend that, at the Effective Time, Merger Sub will, in accordance with the North Carolina Business Corporation Act (the "NCBCA"), merge with and into the Company, with the Company continuing as the surviving corporation (the "Merger") on the terms and subject to the conditions set forth in this Agreement;

WHEREAS, the board of directors of the Company (the "Company Board") has (a) determined that it is in the best interests of the Company and its shareholders for the Company to enter into this Agreement, (b) adopted this Agreement and approved the Company's execution, delivery and performance of this Agreement and the consummation of the transactions contemplated by this Agreement (including the consummation of the Merger upon the terms and subject to the conditions set forth in this Agreement and in accordance with the relevant provisions of the NCBCA) and (c) resolved to submit this Agreement to the Company's shareholders and recommend that the Company's shareholders approve this Agreement;

WHEREAS, the board of directors of Parent has (a) determined that it is in the best interests of Parent and its stockholders for Parent to enter into this Agreement and (b) adopted this Agreement and approved Parent's execution, delivery and performance of this Agreement and the consummation of the transactions contemplated by this Agreement (including the consummation of the Merger upon the terms and subject to the conditions set forth in this Agreement and in accordance with the relevant provisions of the NCBCA);

WHEREAS, the board of directors of Merger Sub has (a) determined that it is in the best interests of Merger Sub and its sole shareholder for Merger Sub to enter into this Agreement, (b) adopted this Agreement and approved Merger Sub's execution, delivery and performance of this Agreement and the consummation of the transactions contemplated by this Agreement (including the consummation of the Merger upon the terms and subject to the conditions set forth in this Agreement and in accordance with the relevant provisions of the NCBCA) and (c) resolved to submit this Agreement to Parent and recommend that Parent, in its capacity as Merger Sub's sole shareholder, approve this Agreement;

WHEREAS, Parent, in its capacity as the sole shareholder of Merger Sub, has approved this Agreement by written consent; and

WHEREAS, Parent, Merger Sub and the Company desire to make certain representations, warranties, covenants and agreements specified herein in connection with this Agreement.

NOW, THEREFORE, in consideration of the representations, warranties, covenants and agreements contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, Parent, Merger Sub and the Company hereby agree as follows:

## ARTICLE I

### THE MERGER

**Section 1.1 The Merger.** Upon the terms and subject to the conditions set forth in this Agreement, and in accordance with the NCBCA, at the Effective Time, Merger Sub shall be merged with and into the Company, and the separate existence of Merger Sub shall thereupon cease, and the Company shall be the surviving corporation in the Merger (the "Surviving Corporation") and shall become, as a result of the Merger, a direct, wholly-owned subsidiary of Parent. At the Effective Time, as a result of the Merger, the name of the Surviving Corporation shall be Piedmont Natural Gas Company, Inc.

**Section 1.2 Closing.** The consummation of the Merger (the "Closing") shall take place at the offices of Kirkland & Ellis LLP, 655 Fifteenth Street, N.W., Washington, D.C. 20005 at 10:00 a.m. (local time) on the date that is two (2) Business Days following the satisfaction or waiver (to the extent permitted by applicable Law) of the conditions set forth in Article VI (other than those conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of those conditions at such time), or on such other date and at such other time or place as is agreed to in writing by the parties hereto. The date on which the Closing occurs is referred to herein as the "Closing Date."

**Section 1.3 Effective Time.** Subject to the provisions of this Agreement, on the Closing Date the parties hereto shall file with the Secretary of State of the State of North Carolina articles of merger (the "Articles of Merger") executed in accordance with, and containing such information as is required by, Section 55-11-05 of the NCBCA and on or after the Closing Date shall make all other filings or recordings required under the NCBCA to effectuate the Merger. The Merger shall become effective at such time as the Articles of Merger are duly filed with the Secretary of State of the State of North Carolina or at such later time as is permissible under the NCBCA and is specified in the Articles of Merger (the time the Merger becomes effective being hereinafter referred to as the "Effective Time").

**Section 1.4 Effects of the Merger.** The Merger shall have the effects set forth in this Agreement, the Articles of Merger and the applicable provisions of the NCBCA.

**Section 1.5 Articles of Incorporation and Bylaws of the Surviving Corporation.** At the Effective Time, the articles of incorporation and bylaws of the Company, in each case as amended to date and as in effect immediately prior to the Effective Time (the "Company Charter Documents"), shall be amended as of the Effective Time to be in the form of (except with respect to the name of the Company (which shall be "Piedmont Natural Gas Company, Inc.") the articles of incorporation and bylaws of Merger Sub as of the date hereof and as so amended shall be the articles of incorporation and bylaws of Surviving Corporation until thereafter amended as provided therein or by applicable Law.

**Section 1.6 Directors and Officers of the Surviving Corporation.**

(a) The directors of Merger Sub immediately prior to the Effective Time shall be the directors of the Surviving Corporation immediately following the Effective Time, to serve until their respective successors are duly elected or appointed and qualified or until their earlier death, resignation or removal in accordance with the articles of incorporation and bylaws of the Surviving Corporation.

(b) The officers of the Company immediately prior to the Effective Time shall be the officers of the Surviving Corporation immediately following the Effective Time, to serve until their respective successors are duly appointed and qualified or until their earlier death, resignation or removal in accordance with the articles of incorporation and bylaws of the Surviving Corporation.

**Section 1.7 Post-Merger Commitments.** Parent hereby confirms that, subject to the occurrence of the Effective Time, it:

(a) intends to cause the Surviving Corporation to maintain its headquarters in 4720 Piedmont Row Drive, Charlotte, North Carolina 28210 and to maintain a significant presence in the immediate location of such headquarters;

(b) intends to cause each of its Subsidiaries that is regulated as a public utility or gas utility under applicable Law of the State of North Carolina, the State of South Carolina or the State of Tennessee or is subject to such regulation by any other state to maintain its headquarters in the location of its headquarters as of immediately prior to the Closing and to maintain a significant presence in the immediate location of such headquarters;

(c) will take all necessary action so that, as soon as practicable after the Effective Time, Parent will expand the size of its board of directors by one seat and appoint a mutually agreeable current member of the Company Board as a director to serve on Parent's board of directors;

(d) intends to offer to retain the existing executive operating management team of the Company to manage Parent's and the Company's combined natural gas operations and to offer other senior Company executives the opportunity to join Parent's executive leadership team, and expects the head of such combined operations to report directly to the Chief Executive Officer of Parent and serve on Parent's Senior Management Committee;

(e) intends to establish a newly formed advisory board for its operations (the "Advisory Board"), which would meet several times a year to receive information and provide feedback on financial and operating results, customer service performance, community and government relations and economic development and investment opportunities that affect Parent's and the Company's local stakeholders;

(f) intends to nominate a minimum of six (6) current members of the Company Board for election to the Advisory Board;

(g) intends to cause the Surviving Corporation and its Subsidiaries to maintain the Company brand and continue to operate their business thereunder.

(h) intends to cause the Surviving Corporation and its Subsidiaries to maintain historic levels of community involvement, charitable contributions, low income funding, economic development and support efforts in the existing service territories of the Company and its Subsidiaries; and

(i) intends to maintain historic levels of community involvement, charitable contributions, low income funding, economic development and support efforts in the existing service territories of the Parent and its Subsidiaries.

**Section 1.8 Plan of Merger.** This Article I and Article II and, solely to the extent necessary under the NCBCA, the other provisions of this Agreement shall constitute a “plan of merger” for the purposes of the NCBCA, including Section 55-11-01 thereof.

## ARTICLE II

### EFFECT OF THE MERGER ON CAPITAL STOCK

**Section 2.1 Effect on Capital Stock.** At the Effective Time, by virtue of the Merger and without any action on the part of the Company, Parent or Merger Sub or any holder of any shares of common stock, no par value per share, of the Company (“Company Common Stock”) or any shares of capital stock of Merger Sub:

(a) Capital Stock of Merger Sub. Each issued and outstanding share of capital stock of Merger Sub shall be converted into and become one validly issued, fully paid and non-assessable share of common stock, no par value per share, of the Surviving Corporation.

(b) Cancellation of Parent-Owned Stock. Any shares of Company Common Stock that are owned by Parent or Merger Sub or any of their respective wholly-owned Subsidiaries, in each case immediately prior to the Effective Time, shall be automatically canceled and shall cease to exist and no consideration shall be delivered in exchange therefor.

(c) Conversion of Company Common Stock. Each issued and outstanding share of Company Common Stock (other than shares to be canceled in accordance with Section 2.1(b)) shall thereupon be converted automatically into and shall thereafter represent solely the right to receive an amount in cash equal to \$60.00 without interest (the “Merger Consideration”). As of the Effective Time, all such shares of Company Common Stock shall no longer be outstanding and shall automatically be canceled and shall cease to exist, and the holders immediately prior to the Effective Time of shares of Company Common Stock not represented by certificates (“Book-Entry Shares”) and the holders of certificates that immediately prior to the Effective Time represented any such shares of Company Common Stock (each, a “Certificate”) shall cease to have any rights with respect thereto, except the right to receive the Merger Consideration to be paid in consideration therefor upon surrender of such Book-Entry Share or Certificate in accordance with Section 2.2(b) without interest (subject to any applicable withholding Tax).

## **Section 2.2 Exchange of Certificates.**

(a) **Paying Agent: Investment by Paying Agent of Funds.** Prior to the Effective Time, Parent shall designate a bank or trust company reasonably acceptable to the Company (the "**Paying Agent**") for the purpose of exchanging shares of Company Common Stock for the Merger Consideration and enter into an agreement reasonably acceptable to the Company with the Paying Agent relating to the services to be performed by the Paying Agent. Parent shall deposit, or cause to be deposited, the aggregate Merger Consideration with respect to all shares of Company Common Stock (other than shares to be cancelled in accordance with **Section 2.1 (b)**) with the Paying Agent at or prior to the Effective Time. The aggregate Merger Consideration deposited with the Paying Agent shall, pending its disbursement to such holders, be invested by the Paying Agent in (i) short-term commercial paper obligations of issuers organized under the Laws of a state of the United States of America, rated A-1 or P-1 or better by Moody's Investors Service, Inc. or Standard & Poor's Ratings Service, respectively, or in certificates of deposit, bank repurchase agreements or bankers' acceptances of commercial banks with capital exceeding \$10,000,000,000, or in mutual funds investing in such assets, or (ii) short-term obligations for which the full faith and credit of the United States of America is pledged to provide for the payment of principal and interest, or in mutual funds investing in such assets. Any interest and other income from such investments shall become part of the funds held by the Paying Agent for purposes of paying the Merger Consideration. No investment or investment losses resulting from such investment by the Paying Agent of the aggregate Merger Consideration shall relieve Parent, the Surviving Corporation or the Paying Agent from making the payments required by this **Article II** and Parent shall promptly replace any funds deposited with the Paying Agent lost through any investment made pursuant to this **Section 2.2(a)**. No investment by the Paying Agent of the aggregate Merger Consideration shall have maturities that could prevent or delay payments to be made pursuant to this Agreement. Following the Effective Time, Parent agrees to make available to the Paying Agent, from time to time as needed, additional cash to pay the Merger Consideration as contemplated by this **Article II** without interest.

(b) **Payment Procedures.** As promptly as practicable after the Effective Time (but in no event more than three (3) Business Days thereafter), the Surviving Corporation shall cause the Paying Agent to mail to each holder of record of Company Common Stock (i) a letter of transmittal (which, in the case of shares of Company Common Stock represented by Certificates, shall specify that delivery shall be effected, and risk of loss and title to the Certificates shall pass, only upon delivery of the Certificates to the Paying Agent, and shall be in such form and have such other provisions as Parent and the Company may reasonably agree and shall be prepared prior to Closing) and (ii) instructions for use in effecting the surrender of the Certificates or Book-Entry Shares in exchange for payment of the Merger Consideration. Upon surrender of Certificates for cancellation to the Paying Agent or, in the case of Book-Entry Shares, receipt of an "agent's message" by the Paying Agent (or such other evidence, if any, of transfer as the Paying Agent may reasonably request), together with such letter of transmittal, duly completed and validly executed in accordance with the instructions (and such other customary documents as may reasonably be required by the Paying Agent), the holder of such Certificates or Book-Entry Shares shall be entitled to receive in exchange therefor, subject to any required withholding Taxes, the Merger Consideration, without interest, for each share of Company Common Stock surrendered, and any Certificates surrendered shall forthwith be

canceled. If payment of the Merger Consideration is to be made to a Person other than the Person in whose name the surrendered Certificate or Book-Entry Share in exchange therefor is registered, it shall be a condition of payment that (A) the Person requesting such exchange present proper evidence of transfer or shall otherwise be in proper form for transfer and (B) the Person requesting such payment shall have paid any transfer and other Taxes required by reason of the payment of the Merger Consideration to a Person other than the registered holder of such Certificate or Book-Entry Share surrendered or shall have established to the reasonable satisfaction of the Surviving Corporation and the Paying Agent that such Tax either has been paid or is not applicable. Until surrendered as contemplated by this Section 2.2, each Certificate and Book-Entry Share shall be deemed at any time after the Effective Time to represent only the right to receive the Merger Consideration as contemplated by this Article II, without interest.

(c) Transfer Books; No Further Ownership Rights in Company Stock. The Merger Consideration paid in respect of shares of Company Common Stock upon the surrender for exchange in accordance with the terms of this Article II shall be deemed to have been paid in full satisfaction of all rights pertaining to the shares of Company Common Stock, and at the Effective Time, the stock transfer books of the Company shall be closed and thereafter there shall be no further registration of transfers on the stock transfer books of the Surviving Corporation of the shares of Company Common Stock that were outstanding immediately prior to the Effective Time. From and after the Effective Time, the holders of Certificates or Book-Entry Shares that evidenced ownership of shares of Company Common Stock outstanding immediately prior to the Effective Time shall cease to have any rights with respect to such shares of Company Common Stock other than the right to receive the Merger Consideration, except as otherwise provided for herein or by applicable Law. If, at any time after the Effective Time, Certificates are presented to the Surviving Corporation for any reason, they shall be canceled and exchanged as provided in this Article II.

(d) Lost, Stolen or Destroyed Certificates. If any Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the Person claiming such Certificate to be lost, stolen or destroyed and, if required by the Surviving Corporation or the Paying Agent, the posting by such Person of a bond, in such reasonable amount as Parent may direct, as indemnity against any claim with respect to such Certificate, the Paying Agent will pay, in exchange for such lost, stolen or destroyed Certificate, the applicable Merger Consideration to be paid in respect of the shares of Company Common Stock formerly represented by such Certificate, as contemplated by this Article II.

(e) Termination of Fund. At any time following the first (1st) anniversary of the Closing Date, the Surviving Corporation shall be entitled to require the Paying Agent to deliver to it any funds (including any interest received with respect thereto) that had been made available to the Paying Agent and which have not been disbursed in accordance with this Article II, and thereafter Persons entitled to receive payment pursuant to this Article II shall be entitled to look only to the Surviving Corporation (subject to abandoned property, escheat or other similar Laws) as general creditors thereof with respect to the payment of any Merger Consideration that may be payable upon surrender of any Company Common Stock held by such holders, as determined pursuant to this Agreement, without any interest thereon. Any amounts remaining unclaimed by such holders at such time at which such amounts would otherwise escheat to or become property of any Governmental Authority shall become, to the extent permitted by applicable Law, the property of the Surviving Corporation, free and clear of all claims or interest of any Person previously entitled thereto.

(f) No Liability. Notwithstanding any other provision of this Agreement, none of Parent, the Merger Sub, the Surviving Corporation, the Company or the Paying Agent shall be liable to any Person for Merger Consideration delivered to a public official pursuant to any applicable abandoned property, escheat or similar Law.

(g) Withholding Taxes. Parent, the Company, the Surviving Corporation and the Paying Agent shall be entitled to deduct and withhold from the consideration otherwise payable to a holder of shares of Company Common Stock, Company RSUs or Company Performance Share Awards pursuant to this Agreement such amounts as may be required to be deducted and withheld with respect to the making of such payment under the Internal Revenue Code of 1986 (the "Code"), or under any applicable provision of state, local or foreign Law related to Taxes. To the extent amounts are so withheld and timely paid over to the appropriate Taxing authority, the withheld amounts shall be treated for all purposes of this Agreement as having been paid to the Person in respect of which such deduction and withholding was made. Parent, the Company, the Surviving Corporation, and the Paying Agent shall reasonably cooperate with such holders in all reasonable respects, and in compliance with applicable Law, at their request and expense to minimize the amount of any applicable withholding.

### **Section 2.3 Treatment of Equity Awards.**

(a) Company RSUs. Immediately prior to the Effective Time, each (x) Company RSU that was granted prior to the date of this Agreement and is outstanding immediately prior to the Effective Time and (y) each Company RSU that would result, pursuant to the terms of the applicable Company RSU award agreement, from crediting to an award recipient's account the amount of cash dividends accrued, but not yet credited, in respect of each share of Company Common Stock subject to such Company RSU, shall be converted into a vested right to receive cash in an amount equal to the Merger Consideration.

(b) Currently Outstanding Company Performance Share Awards. Immediately prior to the Effective Time, each Company Performance Share Award that was granted prior to the date of this Agreement and is outstanding and subject to an incomplete performance period immediately prior to the Effective Time shall be converted into a vested right to receive cash in an amount equal to the target number of shares of Company Common Stock subject to such Company Performance Share Award, multiplied by the Merger Consideration, subject to proration consistent with past practice with respect to Applicable Retired Company Employees. In addition, to the extent that the Effective Time occurs within 2 1/2 months following the end of the applicable performance period with respect to a Company Performance Share Award but prior to settlement of such Company Performance Share Award, such Company Performance Share Award shall be converted into a vested right to receive cash in an amount equal to the greater of (x) the target number of shares of Company Common Stock subject to such Company Performance Share Award, multiplied by the Merger Consideration and (y) the actual number of shares of Company Common Stock to which the holder of such Company Performance Share Award would be entitled based on actual performance with respect to the applicable performance period, multiplied by the Merger Consideration, subject to proration consistent with past practice with respect to Applicable Retired Company Employees.

(c) Future Company Performance Share Awards. Each Company Performance Share Award that is granted after the date of this Agreement and is outstanding immediately prior to the Effective Time shall cease to represent an award that can be settled in shares of Company Common Stock, shall be assumed by Parent and shall be converted into a Parent restricted stock unit award (a "Parent RSU Award"), with the number of Parent Shares subject to such Parent RSU Award being equal to the product (rounded down to the nearest whole number) of (x) one hundred twenty-five percent (125%) of the target number of shares of Company Common Stock subject to such Company Performance Share Award immediately prior to the Effective Time multiplied by (y) the Equity Award Conversion Ratio. Any performance-related vesting conditions applicable to each such Company Performance Share Award shall cease to apply upon the conversion to Parent RSU Awards and the Parent RSU Awards shall be subject to time-based vesting only and shall fully vest at the time the incomplete performance period applicable to such Company Performance Share Awards would otherwise have ended (the "Parent RSU Award Vesting Date"), subject to the holder of the Parent RSU Award (the "Parent RSU Award Recipient") remaining continuously employed by the Surviving Corporation or its affiliates through the applicable Parent RSU Award Vesting Date; provided that in the event, at any time prior to the Parent RSU Award Vesting Date, a Parent RSU Award Recipient is terminated by the Surviving Corporation without "Cause" or resigns for "Good Reason," each as defined in the Company Stock Plan, any Parent RSU Awards held by the Parent RSU Award Recipient that would have vested on such Parent RSU Award Vesting Date shall fully and immediately vest as of the termination date. Except as provided herein, including with respect to vesting conditions, each such Company Performance Share Award that is assumed by Parent hereunder shall continue to be subject to the same terms and conditions that apply to such Company Performance Share Award immediately prior to the Effective Time; provided, however, that the compensation committee of Parent's board of directors shall succeed to the authority and responsibility of the Company Board or any committee thereof with respect to such Company Performance Share Award and such Company Performance Share Award shall be subject to administrative procedures consistent with those in effect under Parent's equity compensation plan. Parent shall register on a Form S-8 (or other appropriate form) all Parent Shares subject to the Parent RSU Awards.

(d) The Surviving Corporation shall be entitled to deduct and withhold from the amounts otherwise payable pursuant to this Section 2.3 to any holder of Company RSUs or Company Performance Share Awards such amounts as the Surviving Corporation is required to deduct and withhold with respect to the making of such payment under the Code, or any applicable provision of state, or local Law related to Tax, and the Surviving Corporation shall timely make any required filings and payments to Tax authorities relating to any such deduction or withholding. To the extent that amounts are so deducted and withheld by the Surviving Corporation, such withheld amounts shall be treated for the purposes of this Agreement as having been paid to the holder of Company RSUs or Company Performance Share Awards in respect of which such deduction and withholding was made by the Surviving Corporation.

(e) No later than the Effective Time, Parent shall provide, or shall cause to be provided, to the Surviving Corporation all funds necessary to fulfill the obligations under this Section 2.3. All payments required under this Section 2.3 shall be made through the Company's payroll not later than the first payroll date following the Effective Time.

**Section 2.4 Treatment of Employee Stock Purchase Plan.** Except as otherwise provided in this Section 2.4, each current “Payroll Deduction Period” (as defined in the Company ESPP) (a “Payroll Deduction Period”) in progress as of the date of this Agreement under the Company ESPP will continue, and the shares of Company Common Stock will be issued to participants thereunder on the next currently scheduled purchase dates thereunder occurring after the date of this Agreement as provided under, and subject to the terms and conditions of, the Company ESPP. New Payroll Deduction Periods under the Company ESPP will be permitted to commence following the date of this Agreement in the ordinary course of business. Any Payroll Deduction Period in progress as of the Effective Time will be shortened, and the last day of each such Payroll Deduction Period will be a date specified by Parent that is not more than thirty (30) days preceding the Effective Time or such other time as the parties otherwise agree, at which time each participant in the Company ESPP shall have purchased for his or her account as many shares of Company Common Stock as his or her payroll deductions that have accumulated during the relevant Payroll Deduction Period can purchase under the terms of the Company ESPP. Notwithstanding any restrictions on transfer of stock in the Company ESPP, the treatment in the Merger of any shares of Company Common Stock under this provision will be in accordance with Section 2.1. The Company will terminate the Company ESPP as of or prior to the Effective Time. The Company will, promptly after the date of this Agreement, take all actions (including, if appropriate, amending the terms of the Company ESPP) that are necessary to give effect to the transactions contemplated by this Section 2.4.

**Section 2.5 Adjustments.** If at any time during the period between the date of this Agreement and the Effective Time, any change in the outstanding shares of capital stock of the Company (or any other securities convertible or exchangeable therefor) shall occur as a result of any reclassification, stock split (including a reverse stock split) or combination, exchange or readjustment of shares, or any stock dividend or stock distribution with a record date during such period, or any similar event, the Merger Consideration shall be equitably adjusted; provided, however, that nothing in this Section 2.5 shall be deemed to permit or authorize any party hereto to effect any such change that it is not otherwise authorized or permitted to undertake pursuant to this Agreement.

### ARTICLE III

#### **REPRESENTATIONS AND WARRANTIES OF THE COMPANY**

Except (a) as set forth in the disclosure schedule delivered by the Company to Parent simultaneously with the execution of this Agreement (the “Company Disclosure Schedule”) (which schedule sets forth, among other things, items the disclosure of which is necessary or appropriate either in response to an express disclosure requirement contained in a provision hereof or as an exception to one or more representations or warranties contained in this Article III, or to one or more of the Company’s covenants contained in Article V, except that any information set forth in one section of the Company Disclosure Schedule will be deemed to apply to all other sections or subsections thereof to the extent that such information is reasonably applicable) or (b) as set forth in any of the Company SEC Documents filed prior to the date of

this Agreement, but excluding in the case of this clause (b) any risk factor disclosure under the headings “Risk Factors” or “Forward Looking Statements”, the Company represents and warrants to Parent and Merger Sub as follows:

**Section 3.1 Organization, Standing and Corporate Power.**

(a) The Company is a corporation duly organized, validly existing and in good standing under the Laws of the State of North Carolina and has all requisite corporate power and authority necessary to own or lease all of its properties and assets and to carry on its business as it is now being conducted. The Company is duly qualified to do business and is in good standing in each jurisdiction in which the nature of the business conducted by it or the character or location of the properties and assets owned or leased by it makes such qualification necessary, except where the failure to be so qualified or in good standing would not reasonably be expected to have, a Company Material Adverse Effect. The Company has made available to Parent true and complete copies of the Company Charter Documents as in effect on the date of this Agreement.

(b) Each of the Company’s subsidiaries that constitutes a “significant subsidiary” of the Company within the meaning of Rule 1-02 of Regulation S-X under the Exchange Act (each, a “Significant Subsidiary”) is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization, except in each case as would not reasonably be expected to have a Company Material Adverse Effect. Each of the Significant Subsidiaries is duly qualified to do business and is in good standing in each jurisdiction in which the nature of the business conducted by it or the character or location of the properties and assets owned or leased by it makes such qualification necessary, except where the failure to be so qualified or in good standing would not reasonably be expected to have a Company Material Adverse Effect. All the outstanding shares of capital stock of, or other equity interests in, each Subsidiary of the Company have been validly issued and are fully paid and non-assessable and are owned directly or indirectly by the Company free and clear of all liens, pledges, security interests and transfer restrictions, except for such transfer restrictions as are contained in the articles of incorporation or bylaws (or any equivalent constituent documents) of such Subsidiary of the Company or for such transfer restrictions of general applicability as may be provided under the Securities Act of 1933 (the “Securities Act”) and other applicable Laws. The Company has made available to Parent true and complete copies of the articles of incorporation and bylaws (or equivalent constituent documents) of each Significant Subsidiary as in effect on the date of this Agreement.

(c) Each of the Company and the Significant Subsidiaries has all requisite entity power and authority to enable it to own, operate, lease or otherwise hold its properties and assets and to conduct its businesses as presently conducted, except where the failure to have such power or authority would not reasonably be expected to have a Company Material Adverse Effect.

(d) Section 3.1(d) of the Company Disclosure Schedule sets forth a list of the Company Joint Ventures, including the name of each such entity and the Company’s percentage ownership interest thereof. The Company has made available to Parent true and complete copies of the articles of formation and limited liability company agreement (or equivalent constituent documents) of each Company Joint Venture.

### **Section 3.2 Capitalization.**

(a) The authorized capital stock of the Company consists of 200,000,000 shares of Company Common Stock and 175,000 shares of preferred stock (the "Company Preferred Stock"). At the close of business on October 22, 2015, (a) 79,354,828 shares of Company Common Stock were issued and outstanding, (b) no shares of Company Preferred Stock were issued and outstanding, (c) Company RSUs with respect to an aggregate of 59,769 shares of Company Common Stock were issued and outstanding (including shares of Company Common Stock issuable in respect of dividends declared through such date), and (d) Company Performance Share Awards with respect to an aggregate of 500,478 shares of Company Common Stock based on achievement of applicable performance criteria at target level were issued and outstanding. From October 22, 2015 through the date of this Agreement, the Company has not issued any shares of Company Common Stock, shares of Company Preferred Stock, Company RSUs, Company Performance Share Awards or any other Equity Securities.

(b) All outstanding shares of Company Common Stock are, and all shares of Company Common Stock that may be issued upon the settlement of Company RSUs and Company Performance Share Awards will be, when issued, duly authorized, validly issued, fully paid and nonassessable and not subject to, or issued in violation of, any preemptive right. Except as set forth in (x) Section 3.2(b) of the Company Disclosure Schedule, (y) in Section 3.2(a), or (z) pursuant to the terms of this Agreement, as of the date hereof, there are not issued, reserved for issuance or outstanding, and there are not any outstanding obligations of the Company or any Subsidiary of the Company to issue, deliver or sell, or cause to be issued, delivered or sold, (i) any capital stock of the Company or any Subsidiary of the Company or any securities of the Company or any Subsidiary of the Company convertible into or exchangeable or exercisable for shares of capital stock or voting securities of, or other equity interests in, the Company or any Subsidiary of the Company or (ii) any warrants, calls, options or other rights to acquire from the Company or any Subsidiary of the Company, or any other obligation of the Company or any Subsidiary of the Company to issue, deliver or sell, or cause to be issued, delivered or sold, any capital stock or voting securities of, or other equity interests in, the Company or any Subsidiary of the Company (the foregoing clauses (i) and (ii), collectively, "Equity Securities"). Except pursuant to the Company Stock Plan, there are not any outstanding obligations of the Company or any Subsidiary of the Company to repurchase, redeem or otherwise acquire any Equity Securities. There is no outstanding Indebtedness of the Company having the right to vote (or convertible into, or exchangeable for, securities having the right to vote) on any matters on which shareholders of the Company may vote.

(c) Section 3.2(c) of the Company Disclosure Schedule sets forth a complete and accurate list of the following information with respect to each Company RSU and each Company Performance Share Award outstanding as of the date of this Agreement: (i) the name of the holder of each Company RSU or Company Performance Share Award; (ii) the number of shares of Company Common Stock subject to each such Company RSU or Company Performance Share Award, with the number of such shares subject to Company Performance Share Awards listed at both target and maximum levels; (iii) the grant date of each such

Company RSU or Company Performance Share Award and (iv) the Company Stock Plan pursuant to which each such Company RSU or Company Performance Share Award was granted.

**Section 3.3 Authority; Non-contravention**

(a) The Company has all necessary corporate power and authority to execute and deliver this Agreement and, subject to obtaining the Company Shareholder Approval, to perform its obligations hereunder and to consummate the Transactions. The Company Board, at a meeting duly called and held, unanimously adopted resolutions (i) determining that it is in the best interests of the Company and its shareholders for the Company to enter into this Agreement, (ii) adopting this Agreement and approving the Company's execution, delivery and performance of this Agreement and the consummation of the Transactions, and (iii) resolving to recommend that the shareholders of the Company approve this Agreement and directing that this Agreement be submitted to the shareholders of the Company for approval at a duly held meeting of such shareholders for such purpose (the "Company Board Recommendation"). As of the date of this Agreement, such resolutions have not been amended or withdrawn. Except for obtaining the Company Shareholder Approval, no other corporate action on the part of the Company is necessary to authorize the execution and delivery of and performance by the Company under this Agreement and the consummation by it of the Transactions. This Agreement has been duly executed and delivered by the Company and, assuming due authorization, execution and delivery hereof by the other parties hereto, constitutes a legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, except that such enforceability (i) may be limited by bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and other similar laws of general application affecting or relating to the enforcement of creditors' rights generally and (ii) is subject to general principles of equity, whether considered in a proceeding at law or in equity (the "Bankruptcy and Equity Exception").

(b) The execution and delivery of this Agreement by the Company does not, and neither the consummation by the Company of the Transactions nor compliance by the Company with any of the terms or provisions hereof will, (i) assuming the Company Shareholder Approval is obtained, conflict with or violate any provision of the Company Charter Documents or the organizational documents of any Subsidiary of the Company, (ii) assuming that each of the consents, authorizations and approvals referred to in Section 3.4 and the Company Shareholder Approval are obtained (and any condition precedent to any such consent, authorization or approval has been satisfied) and each of the filings referred to in Section 3.4 are made and any applicable waiting periods referred to therein have expired, violate any Law applicable to the Company or any of its Subsidiaries or (iii) assuming that each of the consents and notices specified in Section 3.3(b)(iii) of the Company Disclosure Schedule is obtained or given, as applicable, result in any breach of, or constitute a default (with or without notice or lapse of time, or both) under, or give rise to any right of termination, amendment, acceleration or cancellation of or payment under, any Company Material Contract to which the Company or any of its Subsidiaries is a party or any Company Permit, or result in the creation of a Lien (other than any Permitted Lien) upon any of the properties or assets of the Company or any of its Subsidiaries, other than, in the case of clauses (ii) and (iii), as would not reasonably be expected to have a Company Material Adverse Effect.

**Section 3.4 Governmental Approvals.** Except for (a) the filing with the SEC of a proxy statement, in preliminary and definitive form, relating to the Company Shareholders Meeting (as amended or supplemented from time to time, the "Proxy Statement"), and other filings required under, and compliance with other applicable requirements of, the Securities Exchange Act of 1934 (the "Exchange Act") and the rules of the NYSE in connection with this Agreement and the Merger, (b) the filing of the Articles of Merger with the Secretary of State of the State of North Carolina pursuant to the NCBCA, (c) approvals or filings required under, and compliance with other applicable requirements of, the NCUC (such approvals and filings described in this clause (c), the "Required Statutory Approvals"), (d) the approvals or filings set forth on Section 3.4(d) of the Company Disclosure Schedule, and (e) filings required under, and compliance with other applicable requirements of, the HSR Act, no consents or approvals of, or filings, declarations or registrations with, any Governmental Authority are necessary for the execution and delivery of this Agreement by the Company and the consummation by the Company of the Transactions, other than as would not reasonably be expected to have a Company Material Adverse Effect.

**Section 3.5 Company SEC Documents; Undisclosed Liabilities.**

(a) The Company has filed with or furnished to the SEC, on a timely basis, all registration statements, reports, proxy statements and other documents with the SEC required to be filed or furnished since October 31, 2013 (collectively, and in each case including all exhibits and schedules thereto and documents incorporated by reference therein, as such statements, reports and documents may have been amended since the date of their filing, the "Company SEC Documents"). As of their respective effective dates (in the case of Company SEC Documents that are registration statements filed pursuant to the requirements of the Securities Act) and as of their respective filing dates (in the case of all other Company SEC Documents), or in the case of amendments thereto, as of the date of the last such amendment (but only amendments prior to the date of this Agreement in the case of any Company SEC Document with a filing or effective date prior to the date of this Agreement), the Company SEC Documents complied in all material respects with the requirements of the Exchange Act, the Securities Act or the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act"), as the case may be, and the rules and regulations of the SEC promulgated thereunder, applicable to such Company SEC Documents, and none of the Company SEC Documents as of such respective dates (or, if amended, the date of the filing of such amendment, with respect to the disclosures that are amended) contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading.

(b) Except to the extent updated, amended, restated or corrected by a subsequent Company SEC Document (but only amendments, restatements or corrections prior to the date of this Agreement in the case of any Company SEC Document with a filing or effective date prior to the date of this Agreement), as of their respective dates of filing with the SEC, the consolidated financial statements of the Company included in the Company SEC Documents (i) complied as to form in all material respects with all applicable accounting requirements and with the published rules and regulations of the SEC with respect thereto (except, in the case of unaudited statements, as permitted by Form 10-Q of the SEC), (ii) have been prepared in accordance with GAAP applied on a consistent basis during the periods involved (except (A) as

may be indicated in the notes thereto or (B) as permitted by Regulation S-X) and (iii) present fairly, in all material respects, the consolidated financial position of the Company and its Subsidiaries, and the consolidated results of their operations and cash flows, as of each of the dates and for the periods shown, as applicable, in conformity with GAAP.

(c) The Company has established and maintains disclosure controls and procedures and internal control over financial reporting (as such terms are defined in paragraphs (e) and (f), respectively, of Rule 13a-15 under the Exchange Act) as required by Rule 13a-15 under the Exchange Act. The Company's disclosure controls and procedures are reasonably designed to ensure that all material information required to be disclosed by the Company in the reports that it files or furnishes under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in the rules and forms of the SEC, and that all such material information is accumulated and communicated to the Company's management as appropriate to allow timely decisions regarding required disclosure and to make the certifications required pursuant to Sections 302 and 906 of the Sarbanes-Oxley Act.

(d) Neither the Company nor any of its Subsidiaries has any liabilities which would be required to be reflected or reserved against on a consolidated balance sheet of the Company prepared in accordance with GAAP or the notes thereto, except for liabilities (i) reflected or reserved against on the balance sheet of the Company and its Subsidiaries as of July 31, 2015 (the "Balance Sheet Date") (including the notes thereto) included in the Company SEC Documents, (ii) incurred after the Balance Sheet Date in the ordinary course of business, (iii) as contemplated by this Agreement or otherwise arising in connection with the Transactions or (iv) as would not reasonably be expected to have a Company Material Adverse Effect.

(e) All filings (other than immaterial filings) required to be made by the Company or any of its Subsidiaries since January 1, 2014 under applicable state Laws specifically governing the regulation of public utilities have, to the Knowledge of the Company, been filed with the applicable state public utility commissions (including, to the extent required, the North Carolina Utilities Commission ("NCUC"), the South Carolina Public Service Commission and the Tennessee Regulatory Authority as the case may be, including all forms, statements, reports, agreements (oral or written) and all documents, exhibits, amendments and supplements appertaining thereto (collectively, "Regulatory Filings"), and all such Regulatory Filings complied, in all material respects, as of their respective dates, with all applicable requirements of the applicable statute and the rules and regulations thereunder, except for Regulatory Filings the failure of which to make or the failure of which to make in compliance with all applicable requirements of the applicable statute and the rules and regulations thereunder have not had and would not reasonably be expected to have a Company Material Adverse Effect.

**Section 3.6 Absence of Certain Changes.** From November 1, 2014 to the date of this Agreement, (a) except in connection with the Transactions, the business of the Company and its Subsidiaries has been conducted in all material respects in the ordinary course of business consistent with past practice and (b) there has not been any fact, circumstance, change, event, development, occurrence or effect that has had or would reasonably be expected to have a Company Material Adverse Effect.

**Section 3.7 Legal Proceedings.** There is no pending or, to the Knowledge of the Company, threatened, Claim against the Company or any of its Subsidiaries, nor is there any injunction, order, judgment, ruling or decree imposed upon the Company or any of its Subsidiaries, in each case, by or before any Governmental Authority, that would reasonably be expected to have a Company Material Adverse Effect.

**Section 3.8 Compliance With Laws; Permits.** The Company and its Subsidiaries are in compliance with all laws, statutes, ordinances, codes, rules, regulations, rulings, decrees, judgments, injunctions and orders of Governmental Authorities (collectively, "Laws") applicable to the Company or any of its Subsidiaries, except for instances of non-compliance as would not reasonably be expected to have a Company Material Adverse Effect. The Company and each of its Subsidiaries hold, and are in compliance with, all licenses, franchises, permits, certificates, approvals and authorizations from Governmental Authorities required by Law for the conduct of their respective businesses as they are now being conducted (collectively, "Company Permits"), except as would not reasonably be expected to have a Company Material Adverse Effect.

**Section 3.9 Tax Matters.**

(a) Each of the Company and its Subsidiaries has timely filed, or has caused to be timely filed on its behalf (taking into account any extension of time within which to file), all Tax Returns required to be filed by it, and all such filed Tax Returns are correct and complete, except as would not reasonably be expected to have a Company Material Adverse Effect. Each of the Company and its Subsidiaries has paid all Taxes that are required to be paid by it (whether or not shown or required to be shown as due on any Tax Returns), except as would not reasonably be expected to have a Company Material Adverse Effect. Each of the Company and its Subsidiaries has withheld and timely remitted to the appropriate Governmental Authority all material Taxes required to be withheld from amounts owing to any employee, creditor or third party. No material deficiency with respect to Taxes has been proposed, asserted or assessed against the Company or any of its Subsidiaries which has not been fully paid or otherwise finally resolved or adequately reserved for in the Company's financial statements included in the Company SEC Documents. No material audit or other administrative or court proceedings are pending with any Governmental Authority with respect to Taxes of the Company or any of its Subsidiaries, and no written notice thereof has been received. With respect to any Tax years open for audit, neither the Company nor any of its Subsidiaries has granted in writing any material waiver of any statute of limitations with respect to, or any extension of a period for the assessment of, any Tax, except, with respect to the federal income tax return for the 2011 tax year, for the extension of the statute of limitations to June 30, 2016. Neither the Company nor any of its Subsidiaries has incurred any liability for Taxes since the Balance Sheet Date except in the ordinary course of business.

(b) Neither the Company nor any of its Subsidiaries has any material liability for Taxes of any Person (except for the Company or any of its Subsidiaries) arising from the application of Treasury Regulation Section 1.1502-6 or any analogous provision of state, local or foreign Law, or as a transferee or successor, by contract or otherwise.

(c) Neither the Company nor any of its Subsidiaries is a party to or is otherwise bound by any material Tax sharing, allocation or indemnification agreement or

arrangement, except for such an agreement or arrangement (1) exclusively between or among the Company and its Subsidiaries, or (2) with customers, vendors, lessors or other third parties entered into in the ordinary course of business and not primarily related to Taxes.

(d) No closing agreements, private letter rulings, technical advice memoranda, advance Tax rulings, advance pricing agreements, or similar written agreements or rulings have been entered into or issued by any Governmental Authority with respect to Taxes of the Company or any of its Subsidiaries in each case that could reasonably be expected to have a material effect on the Tax liability of the Company or any of its Subsidiaries after the Closing Date.

(e) There are no material Liens on any of the assets of the Company or any of its Subsidiaries that arose in connection with any failure (or alleged failure) to pay any Tax.

(f) In any Taxable period ending after the Closing Date, neither the Company nor any of its Subsidiaries will be required to include or accelerate the recognition of any material item of income, or exclude or defer any material item of deduction or other Tax benefit, in either case as a result of any change in method of Tax accounting made prior to the Closing Date, any installment sale prior to the Closing Date, any closing agreement entered into prior to the Closing Date, or any prepaid amount received prior to the Closing Date.

(g) Within the past three (3) years, neither the Company nor any of its Subsidiaries has been a “distributing corporation” or a “controlled corporation” in a distribution intended to qualify for tax-free treatment under Section 355 of the Code.

(h) Neither the Company nor any of its Subsidiaries has engaged in any “listed transaction” as defined in Treasury Regulations Section 1.6011-4(b)(2) or Treasury Regulations Section 301.6111-2(b) in any Tax year for which the statute of limitations has not expired.

(i) This Section 3.9 and Section 3.10 constitute the sole and exclusive representations and warranties of the Company regarding Tax matters.

(j) For purposes of this Agreement: (i) “Taxes” shall mean all federal, state, local or foreign taxes, customs, tariffs, duties, charges, fees, imposts, levies or other assessments imposed by a Governmental Authority, including all income, gross receipts, franchise, estimated, alternative minimum, add on minimum, sales, use, transfer, value added, excise, severance, stamp, customs, duties, escheat, unclaimed property, real property, personal property, capital stock, social security, unemployment, payroll, employee, withholding, or other tax imposed by a Governmental Authority, including any interest, penalties or additions to tax imposed by any Governmental Authority in connection with any of the foregoing and (ii) “Tax Returns” shall mean any return, report, claim for refund, estimate, information return or statement or other similar document relating to or required to be filed with any Governmental Authority with respect to Taxes, including any schedule or attachment thereto, and including any amendment thereof.

**Section 3.10 Employee Benefits Matters.** Section 3.10(a) of the Company Disclosure Schedule sets forth a complete and accurate list, as of the date of this Agreement, of each

material Company Plan. The Company has made available to Parent correct and complete copies of (a) the current plan document for each material Company Plan (or, if such Company Plan is not in writing, a written description of the material terms thereof), (b) the most recent annual reports on Form 5500 required to be filed with the Department of Labor with respect to each Company Plan (if any such report was required), (c) the most recent summary plan description for each material Company Plan for which such summary plan description is required, (d) each trust agreement relating to any Company Plan, (e) the most recent audited financial statement and the actuarial or other valuation report prepared for the most recently completed plan year with respect thereto and (f) any material and non-routine correspondence with a Governmental Authority regarding any pending audit, investigation, claim or dispute under any Company Plan. Each Company Plan is in compliance with its terms and the applicable provisions of ERISA, the Code and all other applicable laws, except where such noncompliance would not reasonably be expected to have a Company Material Adverse Effect. There are no pending or, to the Knowledge of the Company, threatened claims (other than claims for benefits in the ordinary course) with respect to any Company Plans, nor is any Company Plan under (and the Company has received no notice that there is any threatened) audit or administrative proceeding by the IRS, the Department of Labor, or any other Governmental Authority with respect to any Company Plan that, in each case, would reasonably be expected to have a Company Material Adverse Effect. All Company Plans that are "employee pension plans" (as defined in Section 3(3) of ERISA) that are intended to be tax qualified under Section 401(a) of the Code (each, a "Company Pension Plan") have received a favorable determination letter from the IRS or has filed a timely application therefor and, to the Knowledge of the Company, such Company Pension Plan qualifies in all material respects under Section 401(a) of the Code in operation. The Company has made available to Parent a correct and complete copy of the most recent determination letter received with respect to each Company Pension Plan, as well as a correct and complete copy of each pending application for a determination letter, if any. Except as set forth on Section 3.10(b) of the Company Disclosure Schedule, neither the Company nor any ERISA Affiliate sponsors, maintains or contributes to, nor has any liability with respect to, a multiemployer plan (as defined in Section 3(37) of ERISA) or a plan subject to section 302 or Title IV of ERISA or section 412 of the Code. With respect to each Company Pension Plan set forth on Section 3.10(b) of the Company Disclosure Schedule, (i) no proceeding has been initiated to terminate such plan under Sections 4041 or 4042 of ERISA; (ii) there has been no "reportable event" (as such term is defined in Section 4043(b) of ERISA) for which a reporting waiver does not apply that would reasonably be expected to have a Company Material Adverse Effect; (iii) no such plan has been required to file information pursuant to Section 4010 of ERISA for the current or most recently completed year; (iv) each required installment or any other payment required under Section 412 of the Code or Section 303 of ERISA has been made before the applicable due date except as would not reasonably be expected to have a Company Material Adverse Effect; (v) no such plan has applied for or received a waiver of the minimum funding standards or an extension of any amortization period within the meaning of Section 412 of the Code or Sections 302 or 303 of ERISA that is currently in effect; and (vi) there are no funding-based benefit limitations (within the meaning of Section 436 of the Code) currently in effect. Other than as would not reasonably be expected to have a Company Material Adverse Effect, the Company and its Subsidiaries have reserved the right and power to terminate, suspend, discontinue and amend all Company Plans that provide for post-termination health, medical or other welfare benefits. Except as set forth on Section 3.10(c) of the Company

Disclosure Schedule, the consummation of the Transactions will not, either alone or in combination with another event, except as expressly provided in this Agreement, (i) entitle any employee of the Company to severance pay, unemployment compensation or any other payment, or (ii) accelerate the time of payment or vesting, or increase the amount of compensation due any such employee or officer. Except as set forth on Section 3.10(d) of the Company Disclosure Schedule, no amounts payable under the Company Plans will fail to be deductible for federal income tax purposes by virtue of section 280G of the Code. This Section 3.10 constitutes the sole and exclusive representation and warranty of the Company regarding pension and employee benefit liabilities, obligations, or compliance with Laws.

**Section 3.11 Environmental Matters.** Except for those matters that would not reasonably be expected to have a Company Material Adverse Effect, (a) each of the Company and its Subsidiaries is and for the last five (5) years has been in compliance with all applicable Environmental Laws, which compliance includes obtaining, maintaining or complying with all Company Permits required under Environmental Laws for the operation of their respective businesses, and all such Company Permits are valid and in full force and effect, (b) (i) there is no Claim relating to or arising under Environmental Laws (including, without limitation, relating to or arising from the Release, threatened Release or exposure to any Hazardous Material or alleging violation of or challenging the validity of any environmental Company Permit) that is pending or, to the Knowledge of the Company, threatened against the Company or any of its Subsidiaries, or any real property currently owned or operated by the Company or any of its Subsidiaries, and (ii) to the Knowledge of the Company, there is no Claim relating to or arising under Environmental Laws (including, without limitation, relating to or arising from the Release, threatened Release or exposure to any Hazardous Material) that is pending or threatened against any real property currently leased by the Company or any of its Subsidiaries or formerly owned, operated or leased by the Company or any of its Subsidiaries, (c) neither the Company nor any of its Subsidiaries has received any written notice of, or entered into any order, settlement, judgment, injunction or decree involving uncompleted, outstanding or unresolved liabilities or corrective or remedial obligations relating to or arising under Environmental Laws (including, without limitation, relating to or arising from the Release, threatened Release or exposure to any Hazardous Material) and to the Knowledge of the Company, there are no facts or conditions relating to the Company's or any of its Subsidiaries' properties or operations that would reasonably be expected to give rise to any such liability or corrective or remedial obligation, (d) there have been no ruptures or explosions in the Company's or any Company Subsidiary's natural gas, liquefied natural gas, natural gas liquid and other pipelines, lateral lines, pumps, pump stations, storage facilities, terminals and other related operations, assets, machinery and equipment (collectively, "Systems") that have resulted in Claims, including Claims for personal injury, loss of life or property damage, except to the extent any such Claims have been resolved, and (e) there are no defects, corrosion or other damage to any of the Company's or any Company Subsidiary's Systems that would reasonably be expected to result in a pipeline integrity failure, and the Company is in compliance in all material respects with all appropriate inspection and recordkeeping requirements relating thereto. Section 3.4, Section 3.5, Section 3.6 and this Section 3.11 constitute the exclusive representations and warranties of the Company regarding environmental matters, including without limitation all matters arising under Environmental Laws.

**Section 3.12 Intellectual Property.** Except as would not reasonably be expected to have a Company Material Adverse Effect, (a) (i) the conduct of the Company's business as currently conducted does not infringe or otherwise violate any Person's Intellectual Property and (ii) there is no Claim of such infringement or other violation pending, or to the Knowledge of the Company, threatened in writing, against the Company, and (b) (i) to the Knowledge of the Company, no Person is infringing or otherwise violating any Intellectual Property owned by the Company and (ii) no Claims of such infringement or other violation are pending or, to the Knowledge of the Company, threatened in writing against any Person by the Company. This Section 3.12 constitutes the sole and exclusive representation and warranty of the Company with respect to any actual or alleged infringement or other violation of any Intellectual Property of any other Person.

**Section 3.13 Articles 9 and 9A of the NCBCA Not Applicable; Other Takeover Statutes; Appraisal Rights.** The Company is not subject to the prohibitions on certain business combinations set forth in Article 9 or Article 9A of the NCBCA. Assuming that the representations and warranties of Parent and Merger Sub contained in Section 4.7 are true and correct, the Company has taken all necessary actions, if any, so that the Transactions are not subject to any "fair price," "moratorium," control share acquisition," interested shareholder," "affiliated transaction" or similar anti-takeover Law (each, a "Takeover Statute") or any similar provision (including any supermajority shareholder approval requirement) in the Company Charter Documents. No holder of Company Common Stock is entitled to appraisal or dissenters' rights under the NCBCA in connection with the Transactions.

**Section 3.14 Real Property.** Except as would not reasonably be expected to have a Company Material Adverse Effect, the Company or a Subsidiary of the Company owns and has either good and valid title, in fee, or valid leasehold, easement or other rights, to the land, buildings, structures and other improvements thereon and fixtures thereto necessary to permit it to conduct its business as currently conducted, in each case free and clear of all Liens (except in all cases for Permitted Liens). Except as would not reasonably be expected to have a Company Material Adverse Effect and except as may be limited by the Bankruptcy and Equity Exception, all leases, easements or other agreements under which the Company or any of its Subsidiaries lease, access or use real property are valid, binding and in full force and effect against the Company or any of its Subsidiaries and, to the Knowledge of the Company, the counterparties thereto, in accordance with their respective terms, and neither the Company nor any of its Subsidiaries are in default under any of such leases, easements or other agreements.

**Section 3.15 Contracts.**

(a) For purposes of this Agreement, "Company Material Contract" means any Contract which is required to be filed by the Company as a "material contract" pursuant to Item 601(b)(10) of Regulation S-K under the Securities Act.

(b) Each Company Material Contract is valid and binding on the Company and any of its Subsidiaries to the extent the Company or such Subsidiary is a party thereto, as applicable, and to the Knowledge of the Company, each other party thereto, and is in full force and effect and enforceable in accordance with its terms (subject to the Bankruptcy and Equity Exception), except where the failure to be valid, binding, enforceable and in full force and effect,

would not reasonably be expected to have a Company Material Adverse Effect. The Company and each of its Subsidiaries, and, to the Knowledge of the Company, any other party thereto, has performed all obligations required to be performed by it under each Company Material Contract, except where such noncompliance would not reasonably be expected to have a Company Material Adverse Effect.

**Section 3.16 Labor.** Except as set forth in Section 3.16 of the Company Disclosure Schedule, neither the Company nor any of its Subsidiaries is party to any collective bargaining agreement. Since September 30, 2013, there has been no labor strike, lockout, work stoppage, or picketing, or, to the Knowledge of the Company, threat thereof, by or with respect to any employee of the Company or any of its Subsidiaries, except where such strike, lockout, work stoppage, or picketing has not had or would not reasonably be expected to have a Company Material Adverse Effect. Except as set forth in Section 3.16 of the Company Disclosure Schedule or as has not had and would not reasonably be expected to have a Company Material Adverse Effect, since September 30, 2013, the Company and each of its Subsidiaries (a) has complied and is in compliance with all applicable legal, administrative and regulatory requirements relating to wages, hours, employee and independent contractor classification, immigration, discrimination in employment, collective bargaining, as well as the Workers Adjustment and Retraining Notification Act and comparable local, state, and federal Laws (“WARN”), and all other local, state, and federal Laws pertaining to employment and labor, and (b) are not liable for any arrears of wages or any taxes or penalties for failure to comply with any of the foregoing. Furthermore, except as set forth in Section 3.16 of the Company Disclosure Schedule or as has not had and would not reasonably be expected to have a Company Material Adverse Effect, there are no actions, charges, arbitrations, complaints, or investigations pending or, to the Knowledge of the Company, threatened by or on behalf of any employee or group of employees of the Company or any of its Subsidiaries alleging violations of local, state, or federal Laws pertaining to employment and labor or WARN.

**Section 3.17 Opinion of Financial Advisor.** The Company Board has received the opinion of Goldman, Sachs & Co., dated as of the date of this Agreement, to the effect that, as of such date, and subject to the various assumptions and qualifications set forth therein, the Merger Consideration to be received in the Merger by holders of the Company Common Stock is fair from a financial point of view to the holders of the Company Common Stock.

**Section 3.18 Brokers and Other Advisors.** Except for Goldman, Sachs & Co. (the “Company Financial Advisor”), no broker, investment banker, financial advisor or other Person is entitled to any broker’s, finder’s, financial advisor’s or other similar fee, in connection with the Transactions based upon arrangements made by or on behalf of the Company or any of its Subsidiaries.

**Section 3.19 Company Shareholder Approval.** Assuming the accuracy of the representations and warranties of Parent and Merger Sub set forth in Section 4.7, approval of this Agreement by the affirmative vote (in person or by proxy) of the holders of a majority of the outstanding shares of Company Common Stock entitled to vote at the Company Shareholders Meeting (the “Company Shareholder Approval”) is the only vote or approval of the holders of any class or series of capital stock of the Company necessary to adopt or approve this Agreement and the Transactions.

## ARTICLE IV

### **REPRESENTATIONS AND WARRANTIES OF PARENT AND MERGER SUB**

Parent and Merger Sub jointly and severally represent and warrant to the Company as follows:

**Section 4.1 Organization, Standing and Corporate Power.** Parent is a corporation duly organized, validly existing and in good standing under the Laws of Delaware and Merger Sub is a corporation duly organized, validly existing and in good standing under the Laws of North Carolina. Each of Parent and Merger Sub has all requisite corporate power and authority necessary to own or lease all of its properties and assets and to carry on its business as it is now being conducted. Parent is duly qualified to do business and is in good standing in each jurisdiction in which the nature of the business conducted by it or the character or location of the properties and assets owned or leased by it makes such qualification necessary, except where the failure to be so qualified or in good standing would not reasonably be expected to have a Parent Material Adverse Effect.

**Section 4.2 Authority; Noncontravention.**

(a) Each of Parent and Merger Sub has all necessary corporate power and authority to execute and deliver this Agreement, to perform their respective obligations hereunder and to consummate the Transactions. The execution and delivery of and performance by Parent and Merger Sub under this Agreement, and the consummation by Parent and Merger Sub of the Transactions, have been duly authorized and approved by all necessary corporate action by Parent and Merger Sub (including by the Parent Board and the board of directors of Merger Sub) and, promptly after the execution and delivery hereof, approved by Parent as the sole shareholder of Merger Sub, and no other corporate action on the part of Parent and Merger Sub is necessary to authorize the execution and delivery of and performance by Parent and Merger Sub under this Agreement and the consummation by them of the Transactions. This Agreement has been duly executed and delivered by Parent and Merger Sub and, assuming due authorization, execution and delivery hereof by the Company, constitutes a legal, valid and binding obligation of each of Parent and Merger Sub, enforceable against each of them in accordance with its terms, subject to the Bankruptcy and Equity Exception. No vote or approval of the holders of any class or series of capital stock of Parent is necessary to adopt or approve this Agreement and the Transactions.

(b) The execution and delivery of this Agreement by Parent and Merger Sub do not and neither the consummation by Parent or Merger Sub of the Transactions, nor compliance by Parent or Merger Sub with any of the terms or provisions hereof, will (i) conflict with or violate any provision of the certificate of incorporation and bylaws of Parent, in each case as amended to the date of this Agreement or (ii) assuming that each of the consents, authorizations and approvals referred to in Section 4.3 (and any condition precedent to any such consent, authorization or approval has been satisfied) is obtained or given, as applicable, and each of the filings referred to in Section 4.3 are made and any applicable waiting periods referred to therein have expired, violate any Law applicable to Parent, Merger Sub or any of their respective Subsidiaries or (iii) result in any breach of, or constitute a default (with or without

notice or lapse of time or both) under, or give rise to any right of termination, amendment, acceleration or cancellation of, any permit or Contract to which Parent, Merger Sub or any of their respective Subsidiaries is a party, except, in the case of clauses (ii) and (iii), as would not reasonably be expected to have a Parent Material Adverse Effect.

**Section 4.3 Governmental Approvals.** Except for (a) the filing with the SEC of the Proxy Statement, in preliminary and definitive form, and other filings required under, and compliance with other applicable requirements of, the Exchange Act and the rules of the NYSE in connection with this Agreement and the Merger, (b) the filing of the Articles of Merger with the Secretary of State of the State of North Carolina pursuant to the NCBCA, (c) the Required Statutory Approvals, (d) the approvals or filings set forth on Section 3.4(d) of the Company Disclosure Schedule and (e) filings required under, and compliance with other applicable requirements of, the HSR Act, no consents or approvals of, or filings, declarations or registrations with, any Governmental Authority are necessary for the execution and delivery of this Agreement by Parent and Merger Sub and the consummation by Parent and Merger Sub of the Transactions, other than as would not reasonably be expected to have a Parent Material Adverse Effect.

**Section 4.4 Brokers and Other Advisors.** Except for Barclays Capital Inc., the fees of which will be paid by Parent, no broker, investment banker, financial advisor or other Person is entitled to any broker's, finder's, financial advisor's or other similar fee, in connection with the Transactions based upon arrangements made by or on behalf of Parent or any of its Subsidiaries.

**Section 4.5 Ownership and Operations of Merger Sub.** Parent owns beneficially and of record all of the outstanding capital stock of Merger Sub, all of which is duly authorized, validly issued, fully paid and non-assessable. Merger Sub was formed solely for the purpose of engaging in the Transactions. Merger Sub has no assets, liabilities or obligations and, since the date of its formation has not engaged in any business activities or conducted any operations except, in each case as arising from the execution of this Agreement and the performance of its covenants and agreements hereunder.

**Section 4.6 Sufficient Funds.** Parent and Merger Sub shall have available at or before the Effective Time, sufficient cash and cash equivalents and other sources of immediately available funds to deliver the aggregate Merger Consideration and make the payments required under Section 2.3, and any other amounts incurred or otherwise payable by Parent, Merger Sub or the Surviving Corporation in connection with the Transactions, and there is no restriction on the use of such cash for such purposes. Parent has, or shall have, the financial resources and capabilities to fully perform its obligations under this Agreement. Parent and Merger Sub acknowledge and agree that their obligations hereunder are not subject to any conditions regarding Parent's, Merger Sub's or any other Person's ability to obtain financing for the consummation of the Transactions.

**Section 4.7 Share Ownership.** Neither Parent nor Merger Sub "beneficially owns" (as such term is defined for purposes of Article 7 of the articles of incorporation of the Company) a number of shares of Company Common Stock equal to or greater than five percent (5%) of the number of issued and outstanding shares of Company Common Stock.

**Section 4.8 Legal Proceedings.** There is no pending or, to the Knowledge of Parent, threatened, Claim against Parent, Merger Sub or any of their respective Subsidiaries, nor is there any injunction, order, judgment, ruling or decree imposed upon Parent, Merger Sub or any of their respective Subsidiaries, in each case, by or before any Governmental Authority, that would reasonably be expected to have a Parent Material Adverse Effect.

**Section 4.9 Non-Reliance on Company Estimates, Projections, Forecasts, Forward-Looking Statements and Business Plans.** In connection with the due diligence investigation of the Company by Parent and Merger Sub, Parent and Merger Sub have received and may continue to receive from the Company certain estimates, projections, forecasts and other forward-looking information, as well as certain business plans and cost-related plan information, regarding the Company, its Subsidiaries and their respective businesses and operations. Parent and Merger Sub hereby acknowledge that there are uncertainties inherent in attempting to make such estimates, projections, forecasts and other forward-looking information, with which Parent and Merger Sub are familiar, that Parent and Merger Sub are taking full responsibility for making their own evaluation of the adequacy and accuracy of all estimates, projections, forecasts and other forward-looking information, as well as such business plans and cost-related plans, furnished to them (including the reasonableness of the assumptions underlying such estimates, projections, forecasts, forward-looking information, business plans or cost-related plans based on current state and federal rules and regulations), and that neither Parent nor Merger Sub has relied upon or will have any claim against the Company or any of its Subsidiaries, or any of their respective shareholders, directors, officers, employees, Affiliates, advisors, agents or representatives, or any other Person, with respect thereto. Accordingly, each of Parent and Merger Sub hereby acknowledge that neither the Company nor any of its Subsidiaries, nor any of their respective shareholders, directors, officers, employees, Affiliates, advisors, agents or representatives, nor any other Person, has made or is making any representation or warranty or has or shall have any liability (whether pursuant to this Agreement, in tort or otherwise) with respect to such estimates, projections, forecasts, forward-looking information, business plans or cost-related plans (including the reasonableness of the assumptions underlying such estimates, projections, forecasts, forward-looking information, business plans or cost-related plans based on current state and federal rules and regulations).

## ARTICLE V

### COVENANTS

#### **Section 5.1 Conduct of Business.**

(a) Except as contemplated or permitted by this Agreement, as required by applicable Laws, as contemplated by any of the matters set forth in Section 5.1(a) of the Company Disclosure Schedule, or with the prior written consent of Parent (which consent shall not be unreasonably withheld, delayed or conditioned), during the period from the date of this Agreement until the earlier of the Effective Time and the termination of this Agreement in accordance with Article VII, (x) the Company shall, and shall cause each of its Subsidiaries to, use reasonable best efforts to conduct its business in all material respects in the ordinary course and to preserve intact its present lines of business, maintain its rights and franchises and preserve satisfactory relationships with Governmental Authorities, employees, customers and suppliers, and (y) the Company shall not, and shall not permit any of its Subsidiaries to:

(i) issue, sell, or grant any shares of its capital stock, or any securities or rights convertible into, exchangeable or exercisable for, or evidencing the right to subscribe for any shares of its capital stock, or any rights, warrants or options to purchase any shares of its capital stock, or any securities or rights convertible into, exchangeable or exercisable for, or evidencing the right to subscribe for, any shares of its capital stock, except as set forth on Section 5.1(a)(i) of the Company Disclosure Schedule;

(ii) redeem, purchase or otherwise acquire any of its outstanding shares of capital stock, or any rights, warrants or options to acquire any shares of its capital stock, except (A) pursuant to Company Material Contracts set forth on Section 5.1(a)(ii) of the Company Disclosure Schedule as in effect as of the date hereof or (B) in connection with withholding to satisfy Tax obligations with respect to Company RSUs or Company Performance Share Awards, acquisitions in connection with the forfeiture of equity awards, or acquisitions in connection with the settlement of Company RSUs or Company Performance Share Awards;

(iii) (A) declare, authorize, set aside for payment or pay any dividend on, or make any other distribution in respect of, any shares of its capital stock, other than (1) dividends paid by any Subsidiary of the Company to the Company or to any wholly-owned Subsidiary of the Company, (2) quarterly cash dividends with respect to the Company Common Stock not to exceed the current annual per share dividend rate by more than \$0.04 per fiscal year, with record dates and payment dates consistent with the Company's current dividend practice, or (3) a "stub period" dividend to holders of record of Company Common Stock as of immediately prior to the Effective Time equal to the product of (x) the number of days from the record date for payment of the last quarterly dividend paid by the Company prior to the Effective Time, multiplied by (y) a daily dividend rate determined by dividing the amount of the last quarterly dividend prior to the Effective Time by ninety-one (91) or (B) adjust, split, combine, subdivide or reclassify any shares of its capital stock;

(iv) incur any Indebtedness (or amend any Contract relating to Indebtedness) except for Indebtedness (1) incurred to replace, renew, extend, refinance or refund any existing Indebtedness, in the same principal amount of such existing Indebtedness and upon the maturity of such existing Indebtedness in accordance with its terms (2) incurred in accordance with Section 5.1(a)(iv) of the Company Disclosure Schedule, or (3) among the Company and any of its wholly-owned Subsidiaries or among any of such wholly-owned Subsidiaries; provided that, in no event shall any Indebtedness incurred pursuant hereto (or any Contract relating to such Indebtedness) include any term or provision pursuant to which the consummation of the Merger or the other transactions contemplated by this Agreement would reasonably be expected to result in a breach, default or event of default with respect to such Indebtedness (or any Contract relating to such Indebtedness) or permit the holders of any Indebtedness of the Company or any of its Subsidiaries to accelerate the payment of any Indebtedness or require the Company or any of its Subsidiaries to, voluntarily or involuntarily, redeem, repurchase or repay any Indebtedness prior to its scheduled maturity;

(v) sell, pledge, dispose of, transfer, lease, license or encumber any of its properties, assets or business (including by merger, consolidation or disposition of stock or assets), other than (A) immaterial assets in the ordinary course of business consistent with past practice, (B) pursuant to Company Material Contracts set forth on Section 5.1(a)(v) of the Company Disclosure Schedule as in effect on the date of this Agreement, or (C) transfers among the Company and its wholly owned Subsidiaries;

(vi) make capital expenditures except as budgeted in the Company's current long term plan (plus a 20% variance) that was made available to Parent;

(vii) make any acquisition (including by merger or share exchange) of the capital stock, equity securities, membership interests or a material portion of the assets of any other Person, or make any loans, advances or capital contributions to, or investments in, any other person (other than any wholly owned Subsidiary of the Company), except (A) acquisitions not in excess of \$25,000,000 individually or \$50,000,000 in the aggregate or (B) pursuant to Company Material Contracts set forth on Section 5.1(a)(vii) of the Company Disclosure Schedule as in effect on the date of this Agreement;

(viii) increase in any respect the compensation of any of its directors or employees (provided that payments of bonuses and other grants and awards made in the ordinary course consistent with past practice shall not constitute an increase in compensation), except (A) as required pursuant to applicable Law or the terms of Company Plans or other employee benefit plans or arrangements in effect on the date of this Agreement and (B) increases in salaries, wages and benefits of employees and director fees made in the ordinary course of business;

(ix) adopt or amend any Company Plan except as required by Law or for immaterial or ministerial amendments;

(x) make any material change to its methods of accounting, except as required by GAAP (or any interpretation thereof), Regulation S-X of the Exchange Act, as required by a Governmental Authority or quasi-Governmental Authority (including the Financial Accounting Standards Board or any similar organization) or as required by applicable Law;

(xi) amend the Company Charter Documents, amend the organizational documents of any Subsidiary, or exercise any approval or consent right within its discretion to amend any organizational documents of any Company Joint Venture;

(xii) adopt a plan or agreement of complete or partial liquidation or dissolution;

(xiii) enter into, modify or amend in any material respect, or terminate or waive any material right under, any Company Material Contract, except for any new agreement, modification, amendment, termination or waiver in the ordinary course of business consistent with past practice;

(xiv) waive, release, assign, settle or compromise any material Claim against the Company or any of its Subsidiaries, other than waivers, releases, assignments, settlements or compromises that (A) with respect to the payment of monetary damages, involve only the payment of monetary damages (i) equal to or less than the amounts specifically reserved with respect thereto on the consolidated financial statements of the Company included in the Company SEC Documents (including the notes thereto) or (ii) do not exceed \$5,000,000 in the aggregate during any consecutive twelve-month period, and (B) except as contemplated by Section 5.9, with respect to any non-monetary terms and conditions therein, impose or require actions that would not reasonably be expected to be material and adverse to the Company and its Subsidiaries, taken as a whole;

(xv) make or change any material Tax election, change any material method of Tax accounting (except as required by applicable Law including the adoption of the tangible property regulations and disposition rules), settle or compromise any material Tax liability or refund, amend any material Tax Return (except that the Company and its Subsidiaries may amend any Tax Return in order to effectuate the carryback of specified liability losses, net operating losses, capital losses or tax credits), enter into any written agreement with a Governmental Authority with respect to Taxes, consent to the extension or waiver of the limitation period applicable to any Tax matter, or materially amend or change any of its methods for reporting income, deductions or accounting for Tax purposes, except, in each case, as required in relation to the items referenced in Section 3.9 of the Company Disclosure Schedule;

(xvi) effectuate a "plant closing" or "mass layoff," as those terms are defined in WARN;

(xvii) enter into a new line of business;

(xviii) materially change any of its energy price risk management and marketing of energy parameters, limits and guidelines (the "Company Risk Management Guidelines") or enter into any physical commodity transactions, exchange-traded futures and options transactions, over-the-counter transactions and derivatives thereof or similar transactions other than as permitted by the Company Risk Management Guidelines;

(xix) take any action that would reasonably be expected to prevent or materially impede, interfere with, hinder or delay the consummation by Parent or any of its Subsidiaries of the Transactions; or

(xx) agree or commit to take any of the foregoing actions.

(b) During the period from the date of this Agreement until the Effective Time, Parent and Merger Sub shall not, and Parent shall cause its Subsidiaries not to, take any action that would reasonably be expected to prevent or materially impede, interfere with, or delay the consummation by Parent or Merger Sub of the Transactions.

(c) Notwithstanding anything to the contrary herein, the Company may, and may cause any of its Subsidiaries to, take reasonable actions in compliance with applicable Law with respect to any operational emergencies (including any restoration measures in response to any hurricane, tornado, tsunami, flood, earthquake or other natural disaster or weather-related event, circumstance or development), equipment failures, outages or an immediate and material threat to the health or safety of natural Persons.

(d) Notwithstanding anything to the contrary contained herein, between the date of this Agreement and the Effective Time, the Company and its Subsidiaries may (i) continue to make Regulatory Filings in the ordinary course of business, including without limitation those filings described on Section 5.1(d) of the Company Disclosure Schedule, and (ii) take any other action contemplated by or described in any such state or federal filings or other submissions filed or submitted in connection with such Regulatory Filings prior to the date of this Agreement in the ordinary course of business.

#### **Section 5.2 Preparation of the Proxy Statement; Shareholders Meeting.**

(a) As promptly as reasonably practicable following the date of this Agreement, the Company shall prepare and file with the SEC the Proxy Statement, and Parent shall cooperate with the Company with the preparation of the foregoing. The Company, with Parent's cooperation, shall use commercially reasonable efforts to respond as promptly as reasonably practicable to and resolve all comments received from the SEC or its staff concerning the Proxy Statement. The Company agrees that (i) except with respect to any information supplied in writing to the Company by Parent or Merger Sub for inclusion or incorporation by reference in the Proxy Statement, the Proxy Statement will comply in all material respects with the applicable provisions of the Exchange Act and the rules and regulations thereunder and (ii) none of the information supplied or to be supplied by the Company for inclusion or incorporation by reference in the Proxy Statement will, on the date it is first mailed to shareholders of the Company or at the time of the Company Shareholders Meeting, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading. The Company will cause the Proxy Statement to be mailed to the Company's shareholders, as promptly as reasonably practicable after the SEC confirms that it has no further comments on the Proxy Statement. No filing of, or amendment or supplement to, or correspondence with the SEC with respect to, the Proxy Statement will be made by the Company without providing Parent a reasonable opportunity to review and comment thereon and with the Company considering in good faith such comments; provided, however, that the foregoing shall not apply with respect to a Takeover Proposal, a Superior Proposal, a Company Adverse Recommendation Change or any matters relating thereto. Each of Parent and Merger Sub shall cooperate with the Company in connection with the preparation and filing of the Proxy Statement, including promptly furnishing to the Company in writing upon request any and all information relating to it as may be required to be set forth in the Proxy Statement under applicable Law. Each of the Parent and Merger Sub agrees that such information supplied by it in writing for inclusion (or incorporation by reference) in the Proxy Statement will not, on the date it is first mailed to shareholders of the Company and at the time of the Company Shareholders Meeting, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in

light of the circumstances under which they were made, not misleading. If, at any time prior to the Effective Time, any information relating to Parent or Merger Sub or any of their respective Affiliates, officers or directors, should be discovered by Parent or Merger Sub which should be set forth in an amendment or supplement to the Proxy Statement so that the Proxy Statement would not include any misstatement of a material fact or omit to state any material fact necessary to make the statements therein, in light of the circumstances under which they were made, not misleading, Parent (or Merger Sub, as the case may be) shall promptly notify the Company so that it may file with the SEC an appropriate amendment or supplement describing such information and, to the extent required by Law, disseminate such amendment or supplement to the shareholders of the Company. If, at any time prior to the Effective Time, any information relating to the Company or any of its respective Affiliates, officers or directors, should be discovered by the Company which should be set forth in an amendment or supplement to the Proxy Statement so that the Proxy Statement would not include any misstatement of a material fact or omit to state any material fact necessary to make the statements therein, in light of the circumstances under which they were made, not misleading, the Company shall promptly notify Parent and the Company shall file with the SEC an appropriate amendment or supplement describing such information and, to the extent required by Law, disseminate such amendment or supplement to the shareholders of the Company.

(b) The Company shall, as promptly as reasonably practicable after the date of the mailing of the definitive Proxy Statement to the Company's shareholders, in accordance with applicable Law, the Company Charter Documents and the NYSE rules, duly give notice of, convene and hold a meeting of its shareholders to consider the approval of this Agreement and such other matters as may be then reasonably required (including any adjournment or postponement thereof, the "Company Shareholders Meeting"); provided, however, that the Company shall be permitted to delay or postpone convening the Company Shareholders Meeting (i) with the consent of Parent, (ii) for the absence of a quorum, (iii) to allow reasonable additional time for any supplemental or amended disclosure which the Company has determined in good faith (after consultation with outside legal counsel) is necessary under applicable Law and for such supplemental or amended disclosure to be disseminated and reviewed by the Company's shareholders prior to the Company Shareholders Meeting as necessary under applicable Law or (iv) to allow additional solicitation of votes in order to obtain the Company Shareholder Approval. Except if there has been a Company Adverse Recommendation Change in accordance with Section 5.3(d), the Company shall use its reasonable best efforts to solicit and secure the Company Shareholder Approval as promptly as practicable.

(c) Subject to Section 5.3 and the right of the Company Board to make a Company Adverse Recommendation Change pursuant thereto, unless and until there has been a Company Adverse Recommendation Change in accordance with Section 5.3, the Company shall include the Company Board Recommendation in the preliminary and definitive Proxy Statement. The Company agrees that, unless this Agreement has been terminated pursuant to Section 7.1, a Company Adverse Recommendation Change shall not relieve the Company of its obligation hereunder to submit this Agreement to the Company's shareholders at the Company Shareholders Meeting.

**Section 5.3 No Solicitation; Change in Recommendation.**

(a) The Company agrees that it shall, and shall cause its Subsidiaries and its and its Subsidiaries' directors, officers and employees to, and shall use its reasonable best efforts to cause its other Representatives to, immediately cease all existing discussions or negotiations with any Person conducted heretofore with respect to any Takeover Proposal, immediately request the prompt return or destruction of all confidential information previously furnished and immediately terminate all physical and electronic data room access previously granted to any such Person or its Representatives. Except as otherwise provided in this Agreement, from the date of this Agreement until the earlier of the Effective Time or the date, if any, on which this Agreement is terminated pursuant to Section 7.1, the Company shall not, and shall cause its Subsidiaries and its and its Subsidiaries' directors, officers and employees not to, and shall use its reasonable best efforts to cause its other Representatives not to, directly or indirectly, (i) solicit, initiate, knowingly encourage or knowingly facilitate any Takeover Proposal or the making or consummation thereof or (ii) enter into, or otherwise participate in any discussions (except to notify such Person of the existence of the provisions of this Section 5.3) or negotiations regarding, or furnish to any Person any information in connection with, any Takeover Proposal.

(b) Notwithstanding anything to the contrary contained in this Agreement, if the Company or any of its Subsidiaries, or any of its or their respective Representatives receives an unsolicited *bona fide* written Takeover Proposal made after the date of this Agreement, the Company, the Company Board (or a duly authorized committee thereof) and the Company's Representatives may engage in negotiations and discussions with, or furnish any information and other access to, any Person making such Takeover Proposal and any of its Representatives or potential sources of financing if the Company Board determines in good faith, after consultation with the Company's outside legal and financial advisors, that such Takeover Proposal is or could reasonably be expected to lead to a Superior Proposal; provided that prior to engaging in any negotiations or discussions with, or furnishing any information to, any such Person or its Representatives, the Company and the Person making such Takeover Proposal shall have entered into an Acceptable Confidentiality Agreement. The Company will promptly (and in any event within the later of twenty-four (24) hours or 5:00 p.m. New York City time on the next Business Day) notify Parent in writing of the receipt of such Takeover Proposal, the material terms and conditions of any such Takeover Proposal and the identity of the Person making such Takeover Proposal. The Company will keep Parent informed in all material respects on a prompt basis (and in any event within the later of twenty-four (24) hours or 5:00 p.m. New York City time on the next Business Day) of the material terms and status of such Takeover Proposal (including any change in the price or any other material terms thereof). The Company shall not terminate, amend, modify, waive or fail to enforce any provision of any "standstill" or similar obligation of any Person unless the Company Board (or a duly authorized committee thereof) determines in good faith, after consultation with its outside legal counsel, that the failure to take such action would reasonably be expected to be inconsistent with its fiduciary duties under applicable Law.

(c) Except as otherwise provided in this Agreement, neither the Company Board nor any committee thereof shall (i)(A) withdraw, change, qualify, withhold or modify, or publicly propose to withdraw, change, qualify, withhold or modify, in a manner adverse to Parent, the Company Board Recommendation, (B) adopt, approve or recommend, or publicly propose to adopt, approve or recommend, any Takeover Proposal, (C) fail to include in the Proxy Statement the Company Board Recommendation, (D) fail to recommend against any Takeover

Proposal subject to Regulation 14D under the Exchange Act in any solicitation or recommendation statement made on Schedule 14D-9 within ten (10) Business Days after Parent so requests reaffirmation in writing (provided, that Parent shall be entitled to make such a written request for reaffirmation only once for each Takeover Proposal and once for each material amendment to such Takeover Proposal), or (E) resolve or publicly propose to do any of the foregoing (any action described in this clause (i) being referred to herein as a "Company Adverse Recommendation Change") or (ii) cause or permit the Company or any of its Affiliates to execute or enter into, any letter of intent, memorandum of understanding, agreement in principle, agreement or commitment (other than an Acceptable Confidentiality Agreement) constituting, or that would reasonably be expected to lead to, any Takeover Proposal (a "Company Acquisition Agreement").

(d) Notwithstanding anything to the contrary in this Agreement, at any time prior to obtaining the Company Shareholder Approval, the Company Board (or a duly authorized committee thereof) may make a Company Adverse Recommendation Change (and, solely with respect to a Superior Proposal, terminate this Agreement pursuant to Section 7.1(d)(ii)), if (i) (A) a Company Intervening Event has occurred or (B) the Company has received a Superior Proposal other than as a result of a breach of this Section 5.3 (other than immaterial breach), in each case, if the Company Board (or a duly authorized committee thereof) determines in good faith, after consultation with its outside legal counsel, that the failure to make a Company Adverse Recommendation Change as a result of the occurrence of such Company Intervening Event or in response to the receipt of such Superior Proposal, as the case may be, would reasonably be expected to be inconsistent with its fiduciary duties under applicable Law and (ii) (A) the Company provides Parent prior written notice of its intent to make any Company Adverse Recommendation Change or terminate this Agreement pursuant to Section 7.1(d)(ii) at least four (4) Business Days prior to taking such action to the effect that, absent any modification to the terms and conditions of this Agreement, the Company Board has resolved to effect a Company Adverse Recommendation Change or to terminate this Agreement pursuant to Section 7.1(d)(ii), which notice shall specify the basis for such Company Adverse Recommendation Change or termination and attaching the most current draft of any Company Acquisition Agreement with respect to, the Superior Proposal (or, if no such draft exists, a summary of the material terms and conditions of such Superior Proposal), if applicable (a "Notice of Recommendation Change") (it being understood that such Notice of Recommendation Change shall not in itself be deemed a Company Adverse Recommendation Change and that any change in price or material revision or amendment to the terms of a Superior Proposal, if applicable, shall require a new notice to which the provisions of clauses (ii)(A), (B) and (C) of this Section 5.3(d) shall apply *mutatis mutandis* except that, in the case of such a new notice, all references to four (4) Business Days in this Section 5.3(d) shall be deemed to be two (2) Business Days); (B) during such four (4) Business Day period, if requested by Parent, the Company shall make its Representatives available to negotiate in good faith with Parent and its Representatives regarding any modifications to the terms and conditions of this Agreement that Parent proposes to make; and (C) at the end of such four (4) Business Day period and taking into account any modifications to the terms of this Agreement proposed by Parent, if any, in a written, binding and irrevocable offer, the Company Board determines in good faith (after consultation with outside legal counsel) that the failure to make such a Company Adverse Recommendation Change would reasonably be expected to be inconsistent with its fiduciary duties under applicable Law, and that, in the case of a Company Adverse Recommendation Change with respect to a Takeover Proposal, such Takeover Proposal still constitutes a Superior Proposal.

(e) Nothing contained in this Agreement shall prohibit the Company or the Company Board (or a duly authorized committee thereof) from (i) taking and disclosing to the shareholders of the Company a position contemplated by Rule 14e-2(a) under the Exchange Act or making a statement contemplated by Item 1012(a) of Regulation M-A or Rule 14d-9 under the Exchange Act, (ii) making any disclosure to the shareholders of the Company if the Company Board (or a duly authorized committee thereof) determines in good faith, after consultation with its outside legal counsel, that the failure to make such disclosure would be reasonably likely to be inconsistent with applicable Law, (iii) informing any Person of the existence of the provisions contained in this Section 5.3 or (iv) making any “stop, look and listen” communication to the shareholders of the Company pursuant to Rule 14d-9 (f) under the Exchange Act.

(f) As used in this Agreement, “Takeover Proposal” shall mean any inquiry, proposal or offer (whether or not in writing) from any Person (other than Parent, Merger Sub and any of its Affiliates thereof) to purchase or otherwise acquire, directly or indirectly, in a single transaction or series of related transactions, (a) assets of the Company and its Subsidiaries (including securities of Subsidiaries) that account for 15% or more of the Company’s consolidated assets or from which 15% or more of the Company’s revenues or earnings on a consolidated basis are derived or (b) 15% or more of the outstanding Company Common Stock pursuant to a merger, consolidation or other business combination, sale or issuance of shares of capital stock, tender offer, share exchange, other business combination, recapitalization, liquidation, dissolution or similar transaction involving the Company, in each case other than the Merger.

(g) As used in this Agreement, “Superior Proposal” shall mean any unsolicited *bona fide* written Takeover Proposal on terms which the Company Board (or a duly authorized committee thereof) determines in good faith, after consultation with the Company’s outside legal counsel and independent financial advisors, to be more favorable to the holders of Company Common Stock than the Transaction (after taking into account any revisions to the terms of this Agreement that are proposed by Parent pursuant to Section 5.3(d)), taking into account, to the extent applicable, the legal, financial, regulatory and other aspects of such proposal and this Agreement that the Company Board considers relevant; provided that for purposes of the definition of Superior Proposal, the references to “15%” in the definition of Takeover Proposal shall be deemed to be references to “50%.”

(h) As used in this Agreement, “Company Intervening Event” means any fact, circumstance, effect, change, event, occurrence or development that (1) is unknown to or by the Company Board as of the date hereof (or if known, the magnitude or material consequences of which were not known by the Company Board as of the date of this Agreement) and (2) becomes known to or by the Company Board prior to obtaining the Company Shareholder Approval.

#### **Section 5.4 Reasonable Best Efforts.**

(a) Subject to the terms and conditions of this Agreement, each of the Company, Parent and Merger Sub shall use its respective reasonable best efforts to (i) cause the

Transactions to be consummated as soon as practicable, (ii) make promptly any required submissions and filings under applicable Antitrust Laws or to Governmental Authorities with respect to the Transactions, (iii) cooperate with the other parties and promptly furnish information required in connection with such submissions and filing to such Governmental Authorities or under such Antitrust Laws, (iv) keep the other parties reasonably informed with respect to the status of any such submissions and filings to such Governmental Authorities or under Antitrust Laws, including with respect to: (A) the receipt of any non-action, action, clearance, consent, approval or waiver, (B) the expiration of any waiting period, (C) the commencement or proposed or threatened commencement of any investigation, litigation or administrative or judicial action or proceeding under Antitrust Laws or other applicable Laws, and (D) the nature and status of any objections raised or proposed or threatened to be raised under Antitrust Laws or other applicable Laws with respect to the Transactions and (v) obtain all actions or non-actions, approvals, consents, waivers, registrations, permits, authorizations and other confirmations from any third party and/or Governmental Authority necessary to consummate the Transactions as soon as practicable. For purposes hereof, "Antitrust Laws" means the Sherman Act, the Clayton Act, the HSR Act, the Federal Trade Commission Act, and all applicable foreign Antitrust Laws and all other applicable Laws issued by a Governmental Authority that are designed or intended to prohibit, restrict or regulate actions having the purpose or effect of monopolization or restraint of trade or lessening of competition through merger or acquisition.

(b) In furtherance and not in limitation of the foregoing: (i) each party hereto agrees to (A) make an appropriate filing of a Notification and Report Form pursuant to the HSR Act with respect to the Transactions as soon as reasonably practicable after the date hereof (and in any event within twenty-one (21) days after the date hereof, unless the parties otherwise agree to a different date), (B) supply as soon as practicable any additional information and documentary material that may be requested pursuant to the HSR Act and (C) use its reasonable best efforts to take, or cause to be taken, all other actions consistent with this Section 5.4 necessary to cause the expiration or termination of the applicable waiting periods under the HSR Act (including any extensions thereof) as soon as practicable, and (ii) each party agrees to (A) make or cause to be made the appropriate filings as soon as practicable with the NCUC relating to the Merger, (B) supply as soon as practical any additional information and documentary material that may be required or requested by the NCUC and (C) use its reasonable best efforts to take or cause to be taken all other actions consistent with this Section 5.4 as necessary to obtain any necessary approvals, consents, waivers, permits, authorizations or other actions or non-actions from the NCUC as soon as practicable.

(c) The Company, Parent and Merger Sub shall, subject to applicable Law relating to the exchange of information: (i) promptly notify the other parties hereto of (and if in writing, furnish the other parties with copies of) any communication to such Person from a Governmental Authority regarding the filings and submissions described in Section 5.4(a) and permit the others to review and discuss in advance (and to consider in good faith any comments made by the others in relation to) any proposed written response to any communication from a Governmental Authority regarding the filings and submissions described in Section 5.4(a), (ii) keep the others reasonably informed of any developments, meetings or discussions with any Governmental Authority in respect of any filings, investigation, or inquiry concerning the Transactions and (iii) not independently participate in any meeting or discussions with a

Governmental Authority in respect of any filings, investigation or inquiry concerning the Transactions without giving the other party prior notice of such meeting or discussions and, unless prohibited by such Governmental Authority, the opportunity to attend or participate; provided, that the parties shall be permitted to redact any correspondence, filing, submission or communication to the extent such correspondence, filing, submission or communication contains competitively or commercially sensitive information, including information relating to the valuation of the Transactions.

(d) In furtherance and not in limitation of the foregoing, but subject to the other terms and conditions of this Section 5.4, Parent and Merger Sub agree to take promptly any and all steps necessary to avoid, eliminate or resolve each and every impediment and obtain all clearances, consents, approvals and waivers under Antitrust Laws or other applicable Laws that may be required by any Governmental Authority, so as to enable the parties to close the Transactions as soon as practicable (and in any event no later than three (3) Business Days prior to the End Date), including committing to and effecting, by consent decree, hold separate orders, trust, or otherwise, (i) the sale, license, holding separate or other disposition of assets or businesses of Parent or Company or any of their respective Subsidiaries, (ii) terminating, relinquishing, modifying, or waiving existing relationships, ventures, contractual rights, obligations or other arrangements of Parent or Company or their respective Subsidiaries and (iii) creating any relationships, ventures, contractual rights, obligations or other arrangements of Parent or Company or their respective Subsidiaries (each a "Remedial Action"); provided, however, that any Remedial Action may, at the discretion of the Company or Parent, be conditioned upon consummation of the Transactions.

(e) In furtherance and not in limitation of the foregoing, but subject to the other terms and conditions of this Section 5.4, in the event that any litigation or other administrative or judicial action or proceeding is commenced, threatened or is reasonably foreseeable challenging any of the Transactions and such litigation, action or proceeding seeks, or would reasonably be expected to seek, to prevent, materially impede or materially delay the consummation of the Transactions, Parent shall use reasonable best efforts to take any and all action, including a Remedial Action, to avoid or resolve any such litigation, action or proceeding as promptly as practicable and in any event no later than three (3) Business Days prior to the End Date. In addition, each of the Company, Parent and Merger Sub shall cooperate with each other and use its respective reasonable best efforts to contest, defend and resist any litigation, action or proceeding and to have vacated, lifted, reversed or overturned any ruling, decree, judgment, injunction or other order, whether temporary, preliminary or permanent, that is in effect and that prohibits, prevents, delays, interferes with or restricts consummation of the Transactions as promptly as practicable and in any event no later than three (3) Business Days prior to the End Date.

(f) From the date hereof until the earlier of the Effective Time and the date this Agreement is terminated pursuant to Article VII, neither Parent nor Merger Sub shall, nor shall they permit their respective Subsidiaries to, acquire or agree to acquire any rights, assets, business, Person or division thereof (through acquisition, license, joint venture, collaboration or otherwise), if such acquisition, would reasonably be expected to materially increase the risk of not obtaining any applicable clearance, consent, approval or waiver under Antitrust Laws or other applicable Laws with respect to the Transactions, or would reasonably be expected to

materially prevent or prohibit or impede, interfere with or delay obtaining any applicable clearance, consent, approval or waiver under Antitrust Laws or other applicable laws with respect to the Transactions.

(g) Notwithstanding the obligations set forth in this Agreement, Parent and its Affiliates shall not be required to, and, without the prior written consent of Parent (which consent may be withheld at Parent's sole discretion) the Company shall not, and shall cause its Subsidiaries not to, in connection with obtaining any consent or approval of any Governmental Authority in connection with this Agreement or the transactions contemplated hereby, offer or accept, or agree, commit to agree or consent to, any undertaking, term, condition, liability, obligation, commitment, sanction or other measure (including any Remedial Action), that constitutes a Burdensome Condition. For purposes of this Agreement, "Burdensome Condition" shall mean any undertakings, terms, conditions, liabilities, obligations, commitments, sanctions or other measures (including any Remedial Action) that, in the aggregate, would have or would be reasonably likely to have, a material adverse effect on the financial condition, assets, liabilities, businesses or results of operations of the Company and its Subsidiaries, taken as a whole, or of Parent and its Subsidiaries, taken as a whole (and after giving effect to the Merger such that Parent and its Subsidiaries for this purpose shall be deemed to be a consolidated group of entities of the size and scale of a hypothetical company that is 100% of the size and scale of the Company and its Subsidiaries, taken as a whole); provided, however, that any such undertakings, terms, conditions, liabilities, obligations, commitments, sanctions or other measures shall not constitute or be taken into account in determining whether there has been or is such a material adverse effect to the extent such undertakings, terms, conditions, liabilities, obligations, commitments, sanctions or other measures are described in Section 1.7.

(h) Parent shall promptly notify the Company and the Company shall notify Parent of any notice or other communication from any Governmental Authority alleging that such Governmental Authority's consent is or may be required in connection with or as a condition of the Merger.

**Section 5.5 Public Announcements.** The initial press release with respect to the execution of this Agreement shall be a joint press release to be reasonably agreed upon by Parent and the Company. Following such initial press release, Parent and the Company shall consult with each other before issuing, and give each other the opportunity to review and comment upon, any press release or other public statements with respect to the Transactions and shall not issue any such press release or make any such public statement prior to such consultation, except as such party may reasonably conclude may be required by applicable Law, court process or by obligations pursuant to any listing agreement with any national securities exchange or national securities quotation system (and then only after as much advance notice and consultation as is feasible); provided, however, that the restrictions set forth in this Section 5.5 shall not apply to any release or public statement (a) made or proposed to be made by the Company in connection with a Takeover Proposal, a Superior Proposal or a Company Adverse Recommendation Change or any action taken pursuant thereto, (b) in connection with any dispute between the parties regarding this Agreement or the Transactions or (c) not inconsistent in any material respects with the prior public disclosures regarding the Transactions.

#### **Section 5.6 Access to Information; Confidentiality.**

(a) From the date hereof until the earlier of the Effective Time or the date on which this Agreement is terminated in accordance with its terms, the Company shall afford to the Parent and its Representatives reasonable access (at Parent's sole cost and expense) during normal business hours and upon reasonable advance notice to the Company's properties (but excluding for the conduct of Phase I or Phase II environmental assessments or testing), books, Contracts and records and the Company shall furnish promptly to the other party such information concerning its business and properties as such party may reasonably request (other than any publicly available document filed by it pursuant to the requirements of federal or state securities Laws); provided that the Parent and its Representatives shall conduct any such activities in such a manner as not to interfere unreasonably with the business or operations of the other party; provided, further, (x) that the Company shall not be obligated to provide such access or information if the Company determines, in its reasonable judgment, that doing so would violate applicable Law or a Contract or obligation of confidentiality owing to a third party, jeopardize the protection of the attorney-client privilege, or expose such party to risk of liability for disclosure of sensitive or personal information (provided that the Company shall use its reasonable best efforts to provide such access or information (or as much of it as possible) in a manner that does not result in the events set out in this clause (x)), and (y) the conduct of such activities shall be subject to the rights and obligations of the Company referred to in the final proviso of the final sentence of Section 5.4(c) hereof. Until the Effective Time, the information provided will be subject to the terms of the confidentiality letter agreement, dated as of October 2, 2015, between Parent and the Company (as it may be amended from time to time, the "Confidentiality Agreement").

(b) If this Agreement is terminated pursuant to Section 7.1, the Confidentiality Agreement shall automatically be deemed to be amended and restated such that (i) the "Restricted Period" for all purposes of the Confidentiality Agreement shall be the period of eighteen (18) months from the date of such termination, as if the Parties had never entered into this Agreement, and (ii) the other provisions of the Confidentiality Agreement shall remain in force and effect for a period of two (2) years after such termination, as if the parties hereto had never entered into this Agreement.

**Section 5.7 Takeover Laws.** If any Takeover Statute or similar statute or regulation becomes applicable to the Transactions, the Company and the Company Board will use reasonable best efforts to ensure that such Transactions may be consummated as promptly as practicable on the terms contemplated by this Agreement and otherwise to minimize the effect of such statute or regulation on the Transactions.

#### **Section 5.8 Indemnification and Insurance.**

(a) From and after the Effective Time, Parent shall, and shall cause the Surviving Corporation to, (i) indemnify, defend and hold harmless each current and former director, officer and employee of the Company and any of its Subsidiaries and each person who served as a director, officer, member, trustee or fiduciary of another corporation, partnership, joint venture, trust, pension or other employee benefit plan or enterprise if such service was at the request or for the benefit of the Company or any of its Subsidiaries (each, an "Indemnitee" and, collectively, the "Indemnitees") against all claims, liabilities, losses, damages, judgments, fines, penalties, costs (including amounts paid in settlement or compromise) and expenses

(including fees and expenses of legal counsel) in connection with any actual or threatened claim, suit, action, proceeding or investigation (whether civil, criminal, administrative or investigative) (each, a "Claim"), whenever asserted, arising out of, relating to or in connection with any action or omission relating to their position with the Company or its Subsidiaries occurring or alleged to have occurred before or at the Effective Time (including any Claim relating in whole or in part to this Agreement or the Transactions), to the fullest extent permitted under applicable Law and (ii) assume all obligations of the Company and its Subsidiaries to the Indemnitees in respect of limitation of liability, exculpation, indemnification and advancement of expenses as provided in (A) the Company Charter Documents and the respective organizational documents of each of the Company's Subsidiaries as currently in effect and (B) any indemnification agreements with an Indemnitee (but only to the extent such indemnification agreement was made available to Parent prior to the date hereof), which shall in each case survive the Transactions and continue in full force and effect to the extent permitted by applicable Law.

(b) From and after the Effective Time, Parent shall, and shall cause the Surviving Corporation to, pay and advance to an Indemnitee any expenses (including fees and expenses of legal counsel) in connection with any Claim relating to any acts or omissions covered under this Section 5.8 or the enforcement of an Indemnitee's rights under this Section 5.8 as and when incurred to the fullest extent permitted under applicable Law, provided that the person to whom expenses are advanced provides an undertaking in accordance with applicable Law to repay such expenses if it is ultimately determined by a court of competent jurisdiction that such Indemnitee is not entitled to indemnification for such matter (but only to the extent such repayment is required by applicable Law, the Company Charter Documents, applicable organizational documents of Subsidiaries of the Company or applicable indemnification agreements).

(c) For a period of six (6) years from the Effective Time, Parent shall cause to be maintained in effect coverage not materially less favorable than the coverage provided by the policies of directors' and officers' liability insurance and fiduciary liability insurance in effect as of the date hereof maintained by the Company and its Subsidiaries with respect to matters arising on or before the Effective Time either through the Company's existing insurance provider or another provider reasonably selected by Parent; provided, however, that, after the Effective Time, Parent shall not be required to pay annual premiums in excess of 300% of the annual premium currently paid by the Company in respect of the coverages required to be obtained pursuant hereto, but in such case shall purchase as much coverage as reasonably practicable for such amount; provided, further, that in lieu of the foregoing insurance coverage, the Company may purchase "tail" insurance coverage, at a cost no greater than the aggregate amount which Parent would be required to spend during the six-year period provided for in this Section 5.8(c), that provides coverage not materially less favorable than the coverage described above to the insured persons than the directors' and officers' liability insurance and fiduciary liability insurance coverage currently maintained by the Company and its Subsidiaries as of the date hereof with respect to matters arising on or before the Effective Time.

(d) The provisions of this Section 5.8 are (i) intended to be for the benefit of, and shall be enforceable by, each Indemnitee, his or her heirs and his or her representatives from and after the Effective Time, and (ii) in addition to, and not in substitution for or limitation of, any other rights to indemnification or contribution that any such Person may have by contract or

otherwise. The obligations of Parent and the Surviving Corporation under this Section 5.8 shall not be terminated or modified in such a manner as to adversely affect the rights of any Indemnitee to whom this Section 5.8 applies unless (A) such termination or modification is required by applicable Law or (B) the affected Indemnitee shall have consented in writing to such termination or modification (it being expressly agreed that the Indemnitees to whom this Section 5.8 applies shall be third party beneficiaries of this Section 5.8).

(e) In the event that Parent, the Surviving Corporation or any of their respective successors or assigns (i) consolidates with or merges into any other Person and is not the continuing or surviving corporation or entity of such consolidation or merger or (ii) transfers or conveys all or substantially all of its properties and assets to any Person, then, and in each such case, proper provision shall be made so that the successors and assigns of Parent and the Surviving Corporation shall assume all of the obligations thereof set forth in this Section 5.8.

**Section 5.9 Transaction Litigation.** Each of Parent and the Company shall notify the other promptly of the commencement of any shareholder litigation relating to this Agreement or the Transactions of which it has received notice ("Transaction Litigation"). The Company shall give Parent the opportunity to participate in, but not control, the defense or settlement of any shareholder litigation against the Company or any of its directors or officers relating to this Agreement or the Transactions, and no such settlement of any shareholder litigation shall be agreed to by the Company or any of its Representatives without Parent's prior written consent, such consent not to be unreasonably withheld, conditioned or delayed.

**Section 5.10 Section 16.** Prior to the Effective Time, each of the Company, Parent and Merger Sub shall take all such steps reasonably necessary to cause any dispositions of Company Common Stock (including derivative securities with respect to Company Common Stock) directly resulting from the Merger by each individual who will be subject to the reporting requirements of Section 16 (a) of the Exchange Act with respect to the Company immediately prior to the Effective Time to be exempt under Rule 16b-3 promulgated under the Exchange Act.

**Section 5.11 Employee Matters.**

(a) Until the later of twelve (12) months from the Closing Date or December 31, 2017 (the "Continuation Period"), Parent shall provide, or shall cause to be provided, to each individual who is employed by the Company or any of its Subsidiaries (including the Surviving Corporation and its Subsidiaries) immediately prior to the Effective Time (each, a "Company Employee"), annual base salary and base wages, annual target bonus opportunities (based on target amounts calculated as an applicable percentage of annual base salary for the bonus opportunities established for the most recent Company fiscal year commencing before the Effective Time), and the target value (based on target amounts calculated as an applicable percentage of annual base salary) of the annual Company Performance Share Award granted during the most recent Company fiscal year commencing before the Effective Time (without taking into account any discount to the value of Company Stock for purposes of applying such target value to a long-term incentive compensation opportunity granted by Parent) (the "LTIP Target Amount"), provided that the LTIP Target Amount may be paid in cash rather than granted in equity, and aggregate employee benefits, in each case, that are no less favorable than such annual base salary and base wages, annual target bonus opportunities, LTIP Target Amounts and

aggregate employee benefits provided to the Company Employees immediately prior to the Effective Time. Notwithstanding any other provision of this Agreement to the contrary and without limiting the generality of the foregoing, Parent shall or shall cause the Surviving Corporation to provide any Company Employee whose employment terminates following the Effective Time and during the applicable protected period, as described on Section 5.11(b) of the Company Disclosure Schedule, either without "Cause" or for "Good Reason," in each case as defined on Section 5.11(a) of the Company Disclosure Schedule, with severance benefits no less favorable than as set forth on Section 5.11(a) of the Company Disclosure Schedule.

(b) For all purposes (including purposes of vesting, eligibility to participate and level of benefits, but not for purposes of defined benefit pension plan accrual or, for the avoidance of doubt, with respect to the vesting or restoration of any otherwise forfeited benefits accrued prior to the Effective Time under a defined benefit pension plan maintained by Parent or its Subsidiaries (except as required by Law)) under the employee benefit plans of Parent and its Subsidiaries providing benefits to any Company Employee after the Effective Time (including the Company Plans) (the "New Plans"), each Company Employee shall be credited with his or her years of service with the Company and its Subsidiaries and their respective predecessors before the Effective Time, to the same extent as such Company Employee was entitled, before the Effective Time, to credit for such service under any Company Plan in which such Company Employee participated or was eligible to participate immediately prior to the Effective Time, provided that the foregoing shall not apply to the extent that its application would result in a duplication of benefits with respect to the same period of service. Furthermore, to the extent a Company Employee or a "Company Retired Employee" (as defined below) becomes eligible to participate in Parent's retiree medical plan, for all purposes (including purposes of vesting, eligibility to participate and level of benefits) under the retiree medical plan of Parent and its Subsidiaries, each (x) Company Employee and (y) former employee of the Company or any of its Subsidiaries whose employment with the Company or any of its Subsidiaries ended as a result of such former employee's retirement and who is eligible to participate in the Company's retiree medical plan as of the Effective Time (the "Company Retired Employees"), shall be credited with his or her years of service with the Company and its Subsidiaries and their respective predecessors before the Effective Time, to the same extent as such Company Employee or Company Retired Employee was entitled, immediately before the Effective Time, to credit for such service under the Company's retiree medical plan as of the Effective Time. Parent shall, or shall cause an Affiliate to, provide post-retirement medical benefits to Eligible Retirees (as defined below) that are no less favorable than those provided (i) under the Company's post-retirement medical program in effect as of January 1, 2016 (the "Company's Retiree Health Plan") or (ii) to similarly situated, as applicable, employees and retirees who participate in the post-retirement programs of Parent or its Subsidiaries (other than the Surviving Corporation). "Eligible Retirees" means Company Retired Employees and Company Employees who are or become eligible to participate in the Company's Retiree Health Plan as in effect on January 1, 2016. In addition, and without limiting the generality of the foregoing, (i) each Company Employee shall be immediately eligible to participate, without any waiting time, in any and all New Plans to the extent coverage under such New Plan is replacing comparable coverage under a Company Plan in which such Company Employee participated immediately before the Effective Time (such plans, collectively, the "Old Plans"), and (ii) for purposes of each New Plan providing medical, dental, pharmaceutical and/or vision benefits to any Company Employee, Parent shall cause all pre-existing condition exclusions and actively-at-work

requirements of such New Plan to be waived for such Company Employee and his or her covered dependents, to the extent such conditions were inapplicable or waived under the comparable Old Plans of the Company or its Subsidiaries in which such Company Employee participated immediately prior to the Effective Time. Parent shall cause any eligible expenses incurred by any Company Employee and his or her covered dependents during the portion of the plan year of the Old Plan ending on the date such Company Employee's participation in the corresponding New Plan begins to be taken into account under such New Plan for purposes of satisfying all deductible, coinsurance and maximum out-of-pocket requirements applicable to such Company Employee and his or her covered dependents for the applicable plan year as if such amounts had been paid in accordance with such New Plan.

(c) Without limiting the generality of Section 5.11(a), from and after the Effective Time, Parent shall cause the Surviving Corporation and its Subsidiaries to assume, honor, and continue all obligations under the Company Plans and compensation and severance arrangements and agreements in accordance with their terms as in effect immediately before the Effective Time and the Transactions shall be deemed to constitute a "change in control," "change of control", "corporate transaction" or similar words to such effect under such Company Plans, arrangements or agreements.

(d) At the Effective Time, Parent shall cause the Surviving Corporation to pay to each Company Employee and each Applicable Retired Company Employee a pro-rata portion of any bonus that such Company Employee or Applicable Retired Company Employee would have been entitled to receive under the Company's Annual Incentive Plans and any other applicable annual bonus plan for the performance period during which the Effective Time occurs, consistent with past practice and based on achievement of applicable performance criteria at target level. In addition, to the extent that the Effective Time occurs within 2.5 months following the end of a performance period with respect to the Annual Incentive Plans or any other applicable annual bonus plan, but prior to payment of the bonuses for such completed performance, Parent shall cause the Surviving Corporation to pay to each Company Employee, and to each Applicable Retired Company Employee on a prorated basis consistent with past practice, the greater of (i) the Company Employee's or Applicable Retired Company Employee's, as applicable, target bonus for such performance period and (ii) the bonus to which the Company Employee or Applicable Retired Company Employee, as applicable, would be entitled for such performance period based on actual performance.

(e) Notwithstanding anything to the contrary herein, the provisions of this Section 5.11 are solely for the benefit of the parties to this Agreement, and no provision of this Section 5.11 is intended to, or shall, constitute the establishment or adoption of or an amendment to any Company Plans for purposes of ERISA or otherwise and no Company Employee or any other individual associated therewith shall be regarded for any purpose as a third-party beneficiary of this Agreement or have the right to enforce the provisions hereof including in respect of continued employment (or resumed employment). Nothing contained herein shall alter the at-will employment relationship of any Company Employee.

(f) Without limiting the generality of the foregoing provisions of this Section 5.11, the parties hereby agree to take the additional actions set forth in Section 5.11(f) of the Company Disclosure Schedule.

**Section 5.12 Merger Sub and Surviving Corporation.** Parent shall take all actions necessary to (a) cause Merger Sub and the Surviving Corporation to perform promptly their respective obligations under this Agreement and (b) cause Merger Sub to consummate the Merger on the terms and conditions set forth in this Agreement. Prior to the Effective Time, Merger Sub shall not engage in any activity of any nature except for activities related to or in furtherance of the Transactions.

**Section 5.13 No Control of Other Party's Business.** Nothing contained in this Agreement is intended to give Parent or Merger Sub, directly or indirectly, the right to control or direct the Company's or its Subsidiaries' operations prior to the Effective Time. Prior to the Effective Time, the Company shall exercise, consistent with the terms and conditions of this Agreement, complete control and supervision over its and its Subsidiaries' respective operations.

**Section 5.14 Financing Cooperation.**

(a) The Company shall, and shall cause the Subsidiaries of the Company to, (i) provide commercially reasonable assistance with the preparation of and any discussions regarding the business, financial statements, projections, and management discussion and analysis of the Company and the Subsidiaries of the Company, all for use in connection with any debt financing to be obtained by Parent in connection with the Merger (the "Financing"), and (ii) request that its independent accountants provide customary and reasonable assistance to Parent in connection with providing customary comfort letters in connection with the Financing; provided, further, that nothing in this Agreement shall require the Company to cause the delivery of (1) legal opinions or reliance letters or any certificate as to solvency or any other certificate necessary for the Financing, other than as allowed by the preceding clause (ii), (2) any audited financial information or any financial information prepared in accordance with Regulation S-K or Regulation S-X under the Securities Act of 1933, as amended, or any financial information in a form not customarily prepared by the Company with respect to any period or (3) any financial information with respect to a month or fiscal period that has not yet ended or has ended less than forty-five (45) days prior to the date of such request.

(b) Notwithstanding anything to the contrary contained in this Agreement (including this Section 5.14): (i) nothing in this Agreement (including this Section 5.14) shall require any such cooperation to the extent that it would (1) require the Company to pay any commitment or other fees, reimburse any expenses or otherwise incur any liabilities or give any indemnities prior to the Closing, (2) unreasonably interfere with the ongoing business or operations of the Company or any of the Subsidiaries of the Company, (3) require the Company or any of the Subsidiaries of the Company to enter into or approve any agreement or other documentation effective prior to the Closing or agree to any change or modification of any existing agreement or other documentation that would be effective prior to the Closing, (4) require the Company to provide *pro forma* financial statements or *pro forma* adjustments reflecting the Financing or any description of all or any component of the Financing (it being understood that the Company shall use reasonable best efforts to assist in preparation of *pro forma* financial adjustments to the extent otherwise relating to the Company and required by the Financing), (5) require the Company or the Subsidiaries of the Company to provide *pro forma* financial statements or *pro forma* adjustments reflecting transactions contemplated or required hereunder (it being understood that the Company shall use reasonable best efforts to assist in

preparation of *pro forma* financial adjustments to the extent otherwise relating to the Company and required by the Financing), or (6) require the Company, any of the Subsidiaries of the Company or any of their respective boards of directors (or equivalent bodies) to approve or authorize the Financing, and (ii) no action, liability or obligation (including any obligation to pay any commitment or other fees or reimburse any expenses) of the Company, the Subsidiaries of the Company, or any of their respective Representatives under any certificate, agreement, arrangement, document or instrument relating to the Financing shall be effective until the Closing.

(c) Parent shall (i) promptly reimburse the Company for all reasonable and out-of-pocket costs or expenses (including reasonable and documented costs and expenses of counsel and accountants) incurred by the Company the Subsidiaries of the Company and any of its or their Representatives in connection with any cooperation provided for in this Section 5.14, and (ii) indemnify and hold harmless the Company, the Subsidiaries of the Company and any of its and their Representatives against any claim, loss, damage, injury, liability, judgment, award, penalty, fine, Tax, cost (including cost of investigation), expense (including fees and expenses of counsel and accountants) or settlement payment incurred as a result of, or in connection with, any cooperation provided for in this Section 5.14 or the Financing and any information used in connection therewith, unless the Company acted in bad faith or with gross negligence and other than in the case of fraud.

(d) Without limiting the generality of the foregoing, promptly following Parent's request, the Company shall deliver to each of the lenders under the Existing Indebtedness (the "Existing Loan Lenders") a notice (an "Existing Loan Notice") prepared by Parent, in form and substance reasonably acceptable to the Company, notifying each of the Existing Loan Lenders of this Agreement and the contemplated Merger. At Parent's election, the Existing Loan Notice with respect to one or more of the Existing Loan Documents may include a request for a consent, in form and substance reasonably acceptable to the Company (an "Existing Loan Consent"), to (1) the consummation of the Merger and the other transactions contemplated by this Agreement, and (2) certain modifications of (or waivers under or other changes to) the Existing Loan Documents; provided, that no such modifications, waivers or changes shall be effective prior to the Effective Time.

**Section 5.15 Fiscal Year.** From the date of the receipt of the of the Company Shareholder Approval until the Effective Time, promptly following Parent's request, the Company shall cooperate with Parent to take all actions reasonably requested by Parent to prepare to change the fiscal year of the Company and its Subsidiaries to end on December 31, effective immediately following the Effective Time. Parent shall, promptly upon request by the Company, reimburse the Company for all documented and reasonable out-of-pocket costs incurred by the Company or any of its Subsidiaries in connection with such cooperation under this Section 5.15.

## ARTICLE VI

### CONDITIONS PRECEDENT

**Section 6.1 Conditions to Each Party's Obligation to Effect the Merger.** The respective obligations of each party hereto to effect the Closing shall be subject to the satisfaction (or waiver, if permissible under applicable Law) on or prior to the Closing Date of the following conditions:

(a) Company Shareholder Approval. The Company Shareholder Approval shall have been obtained.

(b) Regulatory Approvals. All waiting periods (and any extensions thereof) applicable to the Merger under the HSR Act shall have been terminated or shall have expired and the Required Statutory Approvals shall have been obtained at or prior to the Effective Time (the termination or expiration of such waiting periods and extensions thereof, together with the obtaining of the Required Statutory Approvals, the "Regulatory Approvals").

(c) No Injunctions. No Law enacted, promulgated, issued, entered, amended or enforced by any Governmental Authority shall be in effect enjoining, restraining, preventing or prohibiting consummation of the Merger or making the consummation of the Merger illegal.

**Section 6.2 Conditions to Obligations of Parent and Merger Sub.** The obligations of Parent and Merger Sub to effect the Closing are further subject to the satisfaction (or waiver, if permissible under applicable Law) on or prior to the Closing Date of the following conditions:

(a) Representations and Warranties. (i) Each of the representations and warranties of the Company set forth in this Agreement (other than the representations and warranties of the Company set forth in Section 3.2(a), Section 3.2(b), Section 3.3(a), Section 3.6(b) and Section 3.19) shall be true and correct (without giving effect to any limitation as to "materiality" or "Company Material Adverse Effect" set forth therein), except where the failure to be true and correct has not had or would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect; (ii) each of the representations and warranties of the Company set forth in Section 3.2(a), Section 3.2(b), Section 3.3(a) and Section 3.19 shall be true and correct in all material respects; and (iii) the representations and warranties set forth in Section 3.6(b) shall be true and correct in all respects; in the case of each of clause (i), (ii) and (iii), as of the Effective Time as though made at and as of the Effective Time (except to the extent that such representation and warranty is expressly made as of a specified date, in which case such representation and warranty shall be true and correct as of such specific date).

(b) Performance of Covenants and Agreements of the Company. The Company shall have performed in all material respects all covenants and agreements required to be performed by it under this Agreement at or prior to the Closing Date.

(c) Officer's Certificate. Parent shall have received a certificate signed on behalf of the Company by an executive officer of the Company certifying the satisfaction by the Company of the conditions set forth in Section 6.2(a) and Section 6.2(b).

(d) Absence of Company Material Adverse Effect. Since the date of this Agreement, no circumstance, change, event, development, occurrence or effect that, individually or in the aggregate, has had or would reasonably be expected to have a Company Material Adverse Effect, shall have occurred and be continuing.

(e) Absence of Burdensome Effect. The Regulatory Approvals shall not impose or require any undertakings, terms, conditions, liabilities, obligations, commitments or sanctions, or any structural or remedial actions (including any Remedial Actions), that constitute a Burdensome Condition.

**Section 6.3 Conditions to Obligations of the Company**. The obligation of the Company to effect the Closing is further subject to the satisfaction (or waiver, if permissible under applicable Law) on or prior to the Closing Date of the following conditions:

(a) Representations and Warranties. The representations and warranties of Parent and Merger Sub set forth in this Agreement shall be true and correct (without giving effect to any limitation as to “materiality” or “Parent Material Adverse Effect” set forth therein) as of the Effective Time with the same effect as though made on and as of the Effective Time (except to the extent that such representation and warranty expressly speaks as of an earlier date, in which case such representation and warranty shall be true and correct as of such earlier date), except where the failure to be true and correct has not had and would not reasonably be expected to have a Parent Material Adverse Effect.

(b) Performance of Covenants and Agreements of Parent and Merger Sub. Parent and Merger Sub shall have performed in all material respects all covenants and agreements required to be performed by them under this Agreement at or prior to the Closing Date.

(c) Officer’s Certificate. The Company shall have received a certificate signed on behalf of Parent by an executive officer of Parent certifying the satisfaction by Parent and Merger Sub of the conditions set forth in Section 6.3(a) and Section 6.3(b).

**Section 6.4 Frustration of Closing Conditions**. None of the Company, Parent or Merger Sub may rely on the failure of any condition set forth in Section 6.1, Section 6.2 or Section 6.3, as the case may be, to be satisfied if such failure was caused by such party’s failure to use its reasonable best efforts to consummate the Merger and the other Transactions or due to the failure of such party to perform any of its other obligations under this Agreement.

## **ARTICLE VII** **TERMINATION**

**Section 7.1 Termination**. This Agreement may be terminated and the Transactions abandoned at any time prior to the Effective Time:

(a) by the mutual written consent of the Company and Parent; or

(b) by either of the Company or Parent:

(i) if the Merger shall not have been consummated on or before October 31, 2016 (the "End Date"); provided that if, prior to the End Date, all of the conditions to the Closing set forth in Article VI have been satisfied or waived, as applicable, or shall then be capable of being satisfied (except for any condition set forth in Section 6.1(b), Section 6.1(c) or Section 6.2(e)), either the Company or Parent may, prior to 5:00 p.m. Charlotte, North Carolina time on the End Date, extend the End Date to a date that is not later than six (6) months after the End Date (and if so extended, such later date shall then, for all purposes under this Agreement, be the "End Date"); provided, further, that neither the Company nor Parent may terminate this Agreement or extend the End Date pursuant to this Section 7.1(b)(i) if it (or, in the case of Parent, Merger Sub) is in breach of any of its covenants or agreements and such breach has primarily caused or resulted in either (1) the failure to satisfy the conditions to its obligations to consummate the Closing set forth in Article VI prior to the End Date or (2) the failure of the Closing to have occurred prior to the End Date;

(ii) if any Law having the effect set forth in Section 6.1(c) shall not have been reversed, stayed, enjoined, set aside, annulled or suspended and shall be in full force and effect and, in the case of any ruling, decree, judgment, injunction or order of any Governmental Authority (each, a "Restraint"), shall have become final and non-appealable; provided, however, that the right to terminate this Agreement under this Section 7.1(b)(ii) shall not be available to a party if the issuance of such final, non-appealable Restraint was primarily due to the failure of such party to perform any of its obligations under this Agreement, including under Section 5.4;

(iii) the Company Shareholder Approval is not obtained at the Company Shareholders Meeting duly convened (unless such Company Shareholders Meeting has been adjourned, in which case at the final adjournment thereof); or

(c) by Parent:

(i) if the Company shall have breached or failed to perform any of its representations, warranties, covenants or agreements set forth in this Agreement, which breach or failure to perform (A) would give rise to the failure of a condition set forth in Section 6.2(a) or Section 6.2(b), respectively, and (B) cannot be cured by the Company by the End Date or, if capable of being cured, shall not have been cured within thirty (30) calendar days following receipt of written notice from the Parent stating the Parent's intention to terminate this Agreement pursuant to this Section 7.1(c)(i) and the basis for such termination; provided that Parent shall not have the right to terminate this Agreement pursuant to this Section 7.1(c)(i) if it or Merger Sub is then in material breach of any of its representations, warranties, covenants or other agreements hereunder; or

(ii) if the Company Board (or a duly authorized committee thereof) shall have effected a Company Adverse Recommendation Change; provided, however, that Parent shall not have the right to terminate this Agreement under this Section 7.1(c)(ii) if the Company Shareholder Approval shall have been obtained; or

(d) by the Company:

(i) if Parent or Merger Sub shall have breached or failed to perform any of its representations, warranties, covenants or agreements set forth in this Agreement, which breach or failure to perform (A) would give rise to the failure of a condition set forth in Section 6.3(a) or Section 6.3(b), respectively, and (B) cannot be cured by Parent or Merger Sub by the End Date or, if capable of being cured, shall not have been cured within thirty (30) calendar days following receipt of written notice from the Company stating the Company's intention to terminate this Agreement pursuant to this Section 7.1(d)(i) and the basis for such termination; provided that, Company shall not have the right to terminate this Agreement pursuant to this Section 7.1(d)(i) if it is then in material breach of any of its representations, warranties, covenants or other agreements hereunder; or

(ii) prior to the receipt of the Company Shareholder Approval, if the Company Board shall have effected a Company Adverse Recommendation Change with respect to a Superior Proposal in accordance with Section 5.3 and shall have approved, and concurrently with the termination hereunder, the Company shall have entered into, a Company Acquisition Agreement providing for the implementation of such Superior Proposal; provided that such termination pursuant to this Section 7.1(d)(ii) shall not be effective and the Company shall not enter into any such Company Acquisition Agreement, unless the Company has paid the Company Termination Fee to Parent or causes the Company Termination Fee to be paid to Parent substantially concurrently with such termination in accordance with Section 7.3; (provided that Parent shall have provided wiring instructions for such payment or, if not, then such payment shall be paid promptly following delivery of such instructions).

**Section 7.2 Effect of Termination.** In the event of the termination of this Agreement as provided in Section 7.1, written notice thereof shall be given to the other party or parties, specifying the provision hereof pursuant to which such termination is made, and this Agreement shall forthwith become null and void and have no further force or effect (other than Section 5.6(b), Section 7.2 and Section 7.3, and Article VIII, all of which shall survive termination of this Agreement), and there shall be no liability on the part of Parent, Merger Sub or the Company or their respective directors, officers, other Representatives or Affiliates, whether arising before or after such termination, based on, arising out of or relating to this Agreement or the negotiation, execution, performance or subject matter hereof (whether in contract or in tort or otherwise, or whether at law (including at common law or by statute) or in equity); provided, however, that, subject to Section 7.3 (including the limitations on liability contained therein), no party shall be relieved or released from any liabilities or damages arising out of any willful and material breach of this Agreement prior to such termination that gave rise to the failure of a condition set forth in Article VI. The Confidentiality Agreement shall survive in accordance with its terms following termination of this Agreement. Without limiting the meaning of a willful and material breach, the parties acknowledge and agree that any failure by a party hereto to consummate the Merger and the other transactions contemplated hereby after the applicable conditions to the Closing set forth in Article VI have been satisfied or waived (except for those conditions that by their nature are to be satisfied at the Closing, which conditions would be capable of being satisfied at the time of such failure to consummate the Merger) shall constitute a willful and material breach of this Agreement.

**Section 7.3 Company Termination Fee; Parent Termination Fee.**

(a) In the event that this Agreement is terminated by the Company pursuant to Section 7.1(d)(ii), the Company shall pay or cause to be paid as directed by Parent the Company Termination Fee substantially concurrently with the termination of this Agreement.

(b) In the event that this Agreement is terminated by Parent pursuant to Section 7.1(c)(ii), the Company shall pay or cause to be paid as directed by Parent the Company Termination Fee within two (2) Business Days of such termination.

(c) In the event that (i) this Agreement is terminated (A) by Parent or the Company pursuant to Section 7.1(b)(i) or Section 7.1(b)(iii) or (B) by Parent pursuant to Section 7.1(c)(i) (solely with respect to a breach or failure to perform a covenant), (ii) a Takeover Proposal shall have been publicly disclosed or made to the Company after the date hereof (x) in the case of termination pursuant to Section 7.1(b)(i) or Section 7.1(c)(i), prior to the date of such termination, or (y) in the case of termination pursuant to Section 7.1(b)(iii), prior to the date of the Company Shareholder Meeting, and (iii) within twelve (12) months of the date this Agreement is terminated, the Company enters into a Company Acquisition Agreement which is subsequently consummated or consummates a Takeover Proposal (provided that for purposes of clause (iii) of this Section 7.3(c), the references to "15%" in the definition of Takeover Proposal shall be deemed to be references to "50%"), then the Company shall pay or cause to be paid as directed by Parent the Company Termination Fee on the date of consummation of such transaction.

(d) For purposes of this Agreement, "Company Termination Fee" shall mean an amount equal to \$125,000,000 in cash.

(e) Parent shall pay to the Company a fee of \$250,000,000 in cash (the "Parent Termination Fee") if each of the following clauses (i), (ii) and (iii) of this Section 7.3(e) is true:

(i) this Agreement is terminated by Parent or the Company:

(A) pursuant to Section 7.1(b)(i) and, at the time of such termination, any of the conditions set forth in Section 6.1(b) or Section 6.1(c) (in the case of Section 6.1(c), if and only if the applicable Restraint giving rise to termination arises in connection with the Regulatory Approvals), shall have not been satisfied; or

(B) pursuant to Section 7.1(b)(ii), (if, and only if, the applicable Restraint giving rise to such termination arises in connection with the Regulatory Approvals); or

(ii) this Agreement is terminated by the Company pursuant to Section 7.1(d)(i) because of a failure by Parent or Merger Sub to comply with its obligations under Section 5.4; and

(iii) at the time of such termination, the conditions to the Closing set forth in Section 6.1(a) and Section 6.2 (other than Section 6.2(c) and Section 6.2(e)) shall have been satisfied or waived (except for any such conditions that have not been satisfied as a result of a breach by Parent or Merger Sub of its respective obligations under this Agreement).

Parent shall pay the Parent Termination Fee to the Company (to an account designated in writing by the Company) no later than three (3) Business Days after the date of the applicable termination.

(f) Notwithstanding the foregoing, in no event shall the Company be required to pay the Company Termination Fee on more than one occasion. Notwithstanding anything to the contrary in this Agreement, the parties agree that if this Agreement is terminated under circumstances in which the Company is obligated to pay the Company Termination Fee under this Section 7.3 and the Company Termination Fee is paid, the payment of the Company Termination Fee shall be the sole and exclusive remedy available to Parent and Merger Sub with respect to this Agreement and the Transactions, and, upon payment of the Company Termination Fee pursuant to this Section 7.3, the Company (and the Company's Affiliates and its and their respective directors, officers, employees, shareholders and other Representatives) shall have no further liability with respect to this Agreement or the Transactions to Parent, Merger Sub or any of their respective Affiliates or Representatives; provided, that regardless of whether the Company pays or is obligated to pay the Company Termination Fee, nothing in this Section 7.3(f) shall release the Company from liability for a willful and material breach of this Agreement. In no event shall Parent be required to pay the Parent Termination Fee on more than one occasion. Notwithstanding anything to the contrary in this Agreement, the parties agree that if this Agreement is terminated under circumstances in which Parent is obligated to pay the Parent Termination Fee under this Section 7.3 and the Parent Termination Fee is paid, the payment of the Parent Termination Fee shall be the sole and exclusive remedy available to the Company with respect to this Agreement and the Transactions, and, upon payment of the Parent Termination Fee pursuant to this Section 7.3, Parent, Merger Sub and the Persons providing the Financing (the "Financing Parties") (and Parent's, Merger Sub's and the Financing Parties' Affiliates and their respective directors, officers, employees, shareholders and other Representatives) shall have no further liability with respect to this Agreement or the Transactions to the Company or any of their respective Affiliates or Representatives; provided, that regardless of whether Parent pays or is obligated to pay the Parent Termination Fee, nothing in this Section 7.3(f) shall release Parent from liability for a willful and material breach of this Agreement.

(g) Any amount that becomes payable pursuant to Section 7.3 shall be paid by wire transfer of immediately available funds to an account designated by Parent or the Company, as applicable, and shall be reduced by any amounts required to be deducted or withheld therefrom under applicable Law in respect of Taxes.

#### **ARTICLE VIII** **MISCELLANEOUS**

**Section 8.1 No Survival of Representations and Warranties.** None of the representations and warranties in this Agreement or in any instrument delivered pursuant to this Agreement shall survive the Effective Time and all rights, claims and causes of action (whether

in contract or in tort or otherwise, or whether at Law (including at common law or by statute) or in equity) with respect thereto shall terminate at, the Effective Time. This Section 8.1 shall not limit any covenant or agreement of the parties that by its terms contemplates performance in whole or in part after the Effective Time. The Confidentiality Agreement shall (a) survive termination of this Agreement in accordance with its terms and (b) terminate as of the Effective Time.

**Section 8.2 Fees and Expenses.** Except as otherwise provided in Section 5.8 and Section 7.3, whether or not the Transactions are consummated, all fees and expenses incurred in connection with the Transactions and this Agreement shall be paid by the party incurring or required to incur such fees or expenses.

**Section 8.3 Amendment or Supplement.** At any time prior to the Effective Time, this Agreement may be amended or supplemented in any and all respects, whether before or after receipt of the Company Shareholder Approval, by written agreement of the parties hereto and delivered by duly authorized officers of the respective parties; provided, however, that (a) following receipt of the Company Shareholder Approval, there shall be no amendment or change to the provisions hereof which by Law would require further approval by the shareholders of the Company without such approval and (b) after the Effective Time, this Agreement may not be amended or supplemented in any respect.

**Section 8.4 Waiver.** At any time prior to the Effective Time, any party may, subject to applicable Law, (a) waive any inaccuracies in the representations and warranties of any other party hereto, (b) extend the time for the performance of any of the obligations or acts of any other party hereto or (c) waive compliance by the other party with any of the agreements contained herein or, except as otherwise provided herein, waive any of such party's conditions. Notwithstanding the foregoing, no failure or delay by the Company, Parent or Merger Sub in exercising any right hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right hereunder. Any agreement on the part of a party hereto to any such extension or waiver shall be valid only if set forth in an instrument in writing signed on behalf of such party.

**Section 8.5 Assignment.** Neither this Agreement nor any of the rights, interests or obligations hereunder shall be assigned, in whole or in part, by operation of Law or otherwise, by any of the parties without the prior written consent of the other parties. Subject to the preceding sentence, this Agreement shall be binding upon, inure to the benefit of, and be enforceable by, the parties hereto and their respective successors and permitted assigns. Any purported assignment not permitted under this Section shall be null and void.

**Section 8.6 Counterparts.** This Agreement may be executed in counterparts (each of which shall be deemed to be an original but all of which taken together shall constitute one and the same agreement) and shall become effective when one or more counterparts have been signed by each of the parties and delivered (by electronic communication, facsimile or otherwise) to the other parties.

**Section 8.7 Entire Agreement; Third-Party Beneficiaries.** This Agreement, including the Company Disclosure Schedule, and the exhibits hereto, together with the other

instruments referred to herein, including the Confidentiality Agreement (a) constitute the entire agreement, and supersede all other prior agreements and understandings, both written and oral, among the parties, or any of them, with respect to the subject matter hereof and thereof and (b) except for (i) the rights of the Company's shareholders and holders of Company RSUs and Company Performance Share Awards to receive the Merger Consideration and payments pursuant to Article II, respectively, after the Effective Time, (ii) the right of the Company, on behalf of its shareholders, to pursue damages in the event of Parent or Merger Sub's willful and material breach of this Agreement, in which event the damages recoverable by the Company for itself and on behalf of its shareholders (without duplication) shall be determined by reference to the total amount that would have been recoverable by the holders of the Company Common Stock (including, "lost premium" and time value of money) if all such holders brought an action against Parent and Merger Sub and were recognized as intended third party beneficiaries hereunder, which right is hereby acknowledged and agreed by Parent and Merger Sub, and (iii) the provisions of Section 5.8, is not intended to and shall not confer upon any Person other than the parties hereto any rights or remedies hereunder. Each of Parent, Merger Sub, and the Company hereby acknowledges and agrees that, except for the representations and warranties contained in this Agreement (as modified by the Company Disclosure Schedule, in the case of the representations and warranties of the Company), none of them, or any of their respective Affiliates or Representatives, or any other Person acting on behalf of any of them, makes, and none of them or any of their respective Representatives relies on or has been induced by any other representations, warranties, information (including estimates, projections, forecasts and other forward-looking information, business plans and cost-related plan information) or inducements, and each of the parties to this Agreement, on behalf of itself, its Affiliates, and its and their respective Representatives, hereby disclaims any other representations, warranties or inducements, express or implied, as to the accuracy or completeness of any information, made by, or made available by, itself, any of its Affiliates or any of its or their respective Representatives, with respect to, or in connection with, the negotiation, execution or delivery of this Agreement or the Transactions contemplated hereby, notwithstanding the delivery or disclosure to the other or the other's Representatives of any documentation or other information with respect to any one or more of the foregoing.

#### **Section 8.8 Governing Law; Jurisdiction.**

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware, without giving effect to any choice or conflict of laws provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of the Laws of any jurisdiction other than the State of Delaware, except that matters related to the fiduciary obligations of the Company Board shall be governed by the laws of the State of North Carolina.

(b) Each of the parties (i) irrevocably submits itself to the personal jurisdiction of each state or federal court sitting in the State of Delaware, as well as to the jurisdiction of all courts to which an appeal may be taken from such courts, in any suit, action or proceeding arising out of or relating to this Agreement or any of the transactions contemplated herein, (ii) agrees that every such suit, action or proceeding shall be brought, heard and determined exclusively in the Court of Chancery of the State of Delaware (provided that, in the event subject matter jurisdiction is unavailable in or declined by the Court of Chancery, then all

such claims shall be brought, heard and determined exclusively in any other state or federal court sitting in the State of Delaware), (iii) agrees that it shall not attempt to deny or defeat such personal jurisdiction by motion or other request for leave from such court, (iv) agrees not to bring any suit, action or proceeding arising out of or relating to this Agreement or any of the transactions contemplated herein in any other court, and (v) waives any defense of inconvenient forum to the maintenance of any suit, action or proceeding so brought.

(c) Each party irrevocably consents to the service of process outside the territorial jurisdiction of the courts referred to in this Section 8.8 in any such action or proceeding by mailing copies thereof by registered or certified United States mail, postage prepaid, return receipt requested, to its address as specified in or pursuant to this Article VIII. However, the foregoing shall not limit the right of a party to effect service of process on the other party by any other legally available method.

**Section 8.9 Specific Enforcement.**

(a) The parties agree that immediate, extensive and irreparable damage would occur for which monetary damages would not be an adequate remedy in the event that any of the provisions of this Agreement are not performed in accordance with their specific terms or are otherwise breached. Accordingly, the parties agree that, if for any reason Parent, Merger Sub or the Company shall have failed to perform its obligations under this Agreement or otherwise breached this Agreement, then the party seeking to enforce this Agreement against such nonperforming party under this Agreement shall be entitled to specific performance and the issuance of immediate injunctive and other equitable relief without the necessity of proving the inadequacy of money damages as a remedy, and the parties further agree to waive any requirement for the securing or posting of any bond in connection with the obtaining of any such injunctive or other equitable relief, this being in addition to and not in limitation of any other remedy to which they are entitled at Law or in equity. If any party hereto brings any Claim to enforce specifically the performance of the terms and provisions of this Agreement when expressly available to such party pursuant to the terms of this Agreement, then, notwithstanding anything to the contrary herein, the End Date shall automatically be extended by the period of time between the commencement of such Claim and ten (10) Business Days following the date on which such Claim is fully and finally resolved.

**Section 8.10 WAIVER OF JURY TRIAL.** Each party hereto hereby waives, to the fullest extent permitted by applicable Law, any right it may have to a trial by jury in respect of any suit, action or other proceeding arising out of this Agreement or the Transactions. Each Party (a) certifies that no representative, agent or attorney of any other party has represented, expressly or otherwise, that such party would not, in the event of any action, suit or proceeding, seek to enforce the foregoing waiver and (b) acknowledges that it and the other Parties have been induced to enter into this Agreement by, among other things, the mutual waiver and certifications in this Section 8.10.

**Section 8.11 Notices.** All notices, requests and other communications to any party hereunder shall be in writing and shall be deemed given if delivered personally, facsimiled (which is confirmed) or sent by overnight courier (providing proof of delivery) to the parties at the following addresses:

If to Parent or Merger Sub, to:

Duke Energy Corporation  
550 South Tryon Street, DEC-45A  
Charlotte, North Carolina 28202  
Attention: Greer Mendelow, Deputy General Counsel  
Facsimile: (980) 373-9962

with a copy (which shall not constitute notice) to:

Sidley Austin LLP  
One South Dearborn  
Chicago, Illinois 60603  
Attention: Thomas A. Cole  
Imad I. Qasim  
Facsimile: (312) 853-7036

If to the Company, to:

Piedmont Natural Gas Company, Inc.  
4720 Piedmont Row Drive  
Charlotte, North Carolina 28210  
Attention: Thomas E. Skains, Jane R. Lewis-Raymond  
Facsimile: (704) 731-4099

with a copy (which shall not constitute notice) to:

Kirkland & Ellis LLP  
655 Fifteenth Street, N.W., Suite 1200  
Washington, D.C. 20005  
Attention: George P. Stamas  
Facsimile: (202) 879-5200

or such other address or facsimile number as such party may hereafter specify by like notice to the other parties hereto. All such notices, requests and other communications shall be deemed received on the date of receipt by the recipient thereof if received prior to 5 p.m. in the place of receipt and such day is a Business Day in the place of receipt. Otherwise, any such notice, request or communication shall be deemed not to have been received until the next succeeding Business Day in the place of receipt.

**Section 8.12 Severability.** If any term or other provision of this Agreement is determined by a court of competent jurisdiction to be invalid, illegal or incapable of being enforced by any rule of law or public policy, all other terms, provisions and conditions of this Agreement shall nevertheless remain in full force and effect. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible to the fullest extent permitted by applicable law in an acceptable manner to the end that the Transactions are fulfilled to the extent possible.

**Section 8.13 Definitions.** As used in this Agreement, the following terms shall have the meanings ascribed to them below:

“Acceptable Confidentiality Agreement” shall mean a confidentiality agreement (which need not prohibit the making of a Takeover Proposal) that contains provisions that are not materially less favorable in the aggregate to the Company than those contained in the Confidentiality Agreement.

“Advisory Board” shall have the meaning set forth in Section 1.7.

“Affiliate” shall mean, as to any Person, any other Person that, directly or indirectly, controls, or is controlled by, or is under common control with, such Person. For this purpose, “control” (including, with its correlative meanings, “controlled by” and “under common control with”) shall mean the possession, directly or indirectly, of the power to direct or cause the direction of management or policies of a Person, whether through the ownership of securities or partnership or other ownership interests, by contract or otherwise.

“Agreement” shall have the meaning set forth in the Preamble.

“Annual Incentive Plans” shall mean the Company’s Short-Term Incentive Plan and the Company’s Mission, Values and Performance Plan.

“Antitrust Laws” shall have the meaning set forth in Section 5.4(a).

“Applicable Retired Company Employee” shall mean an individual who was employed by the Company or any of its Subsidiaries (i) at any time during the performance period under the Company Stock Plan, Annual Incentive Plans, and any other applicable bonus plan during which the Effective Time occurs, or (ii) at any time during the performance period under the Company Stock Plan, Annual Incentive Plans, and any other applicable bonus plan that was completed prior to the Effective Time, but with respect to which Company Performance Share Awards have not been settled or bonuses have not been paid, as applicable, as of the Effective Time, but who in each case is no longer employed by the Company or any of its Subsidiaries as of the Effective Time due to such individual’s retirement in accordance with Company policy.

“Articles of Merger” shall have the meaning set forth in Section 1.3.

“Balance Sheet Date” shall have the meaning set forth in Section 3.5(d).

“Bankruptcy and Equity Exception” shall have the meaning set forth in Section 3.3(a).

“Book-Entry Shares” shall have the meaning set forth in Section 2.1(c).

“Burdensome Condition” shall have the meaning set forth in Section 5.4(g).

“Business Day” shall mean a day except a Saturday, a Sunday or other day on which the SEC or banks in the cities of Charlotte, North Carolina or New York, New York are authorized or required by Law to be closed.

“Certificate” shall have the meaning set forth in Section 2.1(c).

“Claim” shall have the meaning set forth in Section 5.8(a).

“Clayton Act” shall mean the Clayton Act of 1914.

“Closing” shall have the meaning set forth in Section 1.2.

“Closing Date” shall have the meaning set forth in Section 1.2.

“Code” shall have the meaning set forth in Section 2.2(g).

“Company” shall have the meaning set forth in the Preamble.

“Company Adverse Recommendation Change” shall have the meaning set forth in Section 5.3(c).

“Company Acquisition Agreement” shall have the meaning set forth in Section 5.3(c).

“Company Board” shall have the meaning set forth in the recitals.

“Company Board Recommendation” shall have the meaning set forth in Section 3.3(a).

“Company Charter Documents” shall have the meaning set forth in Section 1.5.

“Company Common Stock” shall have the meaning set forth in Section 2.1.

“Company Disclosure Schedule” shall have the meaning set forth in the Article III Preamble.

“Company Employee” shall have the meaning set forth in Section 5.11(a).

“Company ESPP” shall mean the Company Employee Stock Purchase Plan, amended and restated as of April 1, 2009, as amended from time to time.

“Company Financial Advisor” shall have the meaning set forth in Section 3.18.

“Company Intervening Event” shall have the meaning set forth in Section 5.3(h).

“Company Joint Venture” shall mean any Joint Venture of the Company.

“Company Material Adverse Effect” shall mean any circumstance, change, event, development, occurrence or effect that (a) has, individually or in the aggregate, a material adverse effect on the business, properties, assets, results of operations or financial condition of the Company and its Subsidiaries taken as a whole; provided that no circumstance, change, event, development, occurrence or effect, directly or indirectly, arising out of, resulting from or relating to the following, individually or in the aggregate, shall constitute or be taken into account in determining whether a Company Material Adverse Effect has occurred: (i) any condition, change, event, occurrence or effect in any of the industries or markets in which the

Company or its Subsidiaries operates, including natural gas distribution or transmission industries (including, in each case, any changes in the operations thereof or with respect to system-wide changes or developments in natural gas transmission or distribution systems); (ii) any enactment of, change in, or change in interpretation of, any Law or GAAP or governmental policy; (iii) general economic, regulatory or political conditions (or changes therein) or conditions (or changes therein) in the financial, credit or securities markets (including changes in interest or currency exchange rates) in any country or region in which the Company or any of its Subsidiaries conducts business; (iv) any change in the price of natural gas or any other raw material, mineral or commodity used or sold by the Company or any of its Subsidiaries or in the cost of hedges relating to such prices, any change in the price of interstate natural gas transportation services or any change in customer usage patterns or customer selection of third-party suppliers for natural gas; (v) any acts of God, natural disasters, terrorism, armed hostilities, sabotage, war or any escalation or worsening of acts of terrorism, armed hostilities or war; (vi) the announcement, pendency of or performance of the Transactions, including by reason of the identity of Parent or any communication by Parent regarding the plans or intentions of Parent with respect to the conduct of the business of the Company or any of its Subsidiaries and including the impact of any of the foregoing on any relationships, contractual or otherwise, with customers, suppliers, distributors, collaboration partners, joint venture partners, employees or regulators; (vii) any action taken by the Company or any of its Subsidiaries that is required or expressly permitted by the terms of this Agreement or with the consent or at the direction of Parent or Merger Sub; (viii) any change in the market price, or change in trading volume, of the capital stock of the Company (it being understood that the facts or occurrences giving rise or contributing to such change shall be taken into account in determining whether there has been a Company Material Adverse Effect); (ix) any failure by the Company or its Subsidiaries to meet internal, analysts' or other earnings estimates or financial projections or forecasts for any period, or any changes in credit ratings and any changes in any analysts recommendations or ratings with respect to the Company or any of its Subsidiaries (it being understood that the underlying facts or occurrences giving rise to such failure shall be taken into account in determining whether there has been a Company Material Adverse Effect if not otherwise falling within any of the exceptions set forth in clauses (a)(i) through (a)(viii) or (a)(x) through (a)(xi) of this proviso); (x) any fact, circumstance, effect, change, event or development that results from any shutdown or suspension of operations at any third-party facilities from which the Company or any of its Subsidiaries obtains natural gas (excluding the Company Joint Ventures); (xi) any pending, initiated or threatened Transaction Litigation, in each case to the extent, in each of clauses (i) through (v), that such change, event, occurrence or effect does not affect the Company and its Subsidiaries, taken as a whole, in a materially disproportionate manner relative to other similarly situated participants in the business and industries in which the Company and its Subsidiaries operate; or (b) would, individually or in the aggregate, reasonably be expected to prevent or materially impede, interfere with or delay the consummation by the Company of the Transactions.

“Company Material Contract” shall have the meaning set forth in Section 3.15(a).

“Company Pension Plan” shall have the meaning set forth in Section 3.10.

“Company Performance Share Awards” means all performance share awards payable in shares of Company Common Stock subject to performance-based vesting or delivery requirements, whether granted under a Company Stock Plan or otherwise.

“Company Permits” shall have the meaning set forth in Section 3.8.

“Company Plans” shall mean (a) each “employee benefit plan” (as such term is defined in Section 3(3) of ERISA) that the Company or any of its Subsidiaries sponsors, participates in, is a party or contributes to, or with respect to which the Company or any of its Subsidiaries could reasonably be expected to have any material liability and (b) each other employee benefit plan, program or arrangement, including without limitation, any stock option, stock purchase, stock appreciation right or other stock or stock-based incentive plan, cash bonus or incentive compensation arrangement, retirement or deferred compensation plan, profit sharing plan, unemployment or severance compensation plan, that the Company or any of its Subsidiaries sponsors, participates in, is a party or contributes to, or with respect to which the Company or any of its Subsidiaries could reasonably be expected to have any material liability.

“Company Preferred Stock” shall have the meaning set forth in Section 3.2.

“Company Retired Employees” shall have the meaning set forth in Section 5.11(b).

“Company Risk Management Guidelines” shall have the meaning set forth in Section 5.1(a)(xviii).

“Company RSUs” means any share unit payable in shares of Company Common Stock or whose value is determined with reference to the value of shares of Company Common Stock, whether granted under a Company Stock Plan or otherwise.

“Company SEC Documents” shall have the meaning set forth in Section 3.5(a).

“Company Stock Plan” shall mean the Company’s Incentive Compensation Plan.

“Company Shareholder Approval” shall have the meaning set forth in Section 3.19.

“Company Shareholders Meeting” shall have the meaning set forth in Section 5.2(b).

“Company Termination Fee” shall have the meaning set forth in Section 7.3(d).

“Company’s Retiree Health Plan” shall have the meaning set forth in Section 5.11(b).

“Confidentiality Agreement” shall have the meaning set forth in Section 5.6(a).

“Continuation Period” shall have the meaning set forth in Section 5.11(a).

“Contract” means any loan or credit agreement, debenture, note, bond, mortgage, indenture, deed of trust, lease, license, contract or other agreement.

“Effective Time” shall have the meaning set forth in Section 1.3.

“Eligible Retirees” shall have the meaning set forth in Section 5.11(b).

“Encumbrances” shall mean any mortgage, deed of trust, lease, license, restriction, hypothecation, option to purchase or lease or otherwise acquire any interest, right of first refusal or offer, conditional sales or other title retention agreement, adverse claim of ownership or use, easement, encroachment, right of way or other title defect, or encumbrance of any kind or nature.

“End Date” shall have the meaning set forth in Section 7.1(b)(i).

“Environmental Laws” means all Laws relating to workplace safety or health, safety in respect of the transportation, storage and delivery of hazardous liquids and natural gas, and pollution or protection of the environment and natural resources, including without limitation, Laws (including common law) relating to the exposure to, or Releases or threatened Releases of, natural gas, asbestos and any hazardous or toxic materials, substances or wastes, as the foregoing are enacted or in effect on or prior to Closing.

“Equity Award Conversion Ratio” means the quotient of (i) the Merger Consideration divided by (ii) the average of the volume weighted averages of the trading prices of Parent Shares on the NYSE, on each of the five (5) consecutive trading days ending on (and including) the trading day that is two (2) trading days prior to the Closing Date.

“Equity Securities” shall have the meaning set forth in Section 3.2.

“ERISA” means the Employee Retirement Income Security Act of 1974.

“ERISA Affiliate” means each corporation or trade or business that would be treated as a single employer with the Company pursuant to Section 4001(b)(1) of ERISA.

“Exchange Act” shall have the meaning set forth in Section 3.4.

“Existing Indebtedness” means the Indebtedness evidenced by the Existing Loan Documents.

“Existing Loan Consent” shall have the meaning set forth in Section 5.14(d).

“Existing Loan Documents” means the Contracts (and all amendments thereto) to which the Company or any of its Subsidiaries is a party or by which it is bound or to which any of their respective assets are subject (other than any of the foregoing solely between the Company and any of its wholly owned Subsidiaries or solely between any of the Company’s wholly owned Subsidiaries) that evidences Indebtedness for borrowed money in excess of \$5,000,000 of the Company or any of its Subsidiaries, whether unsecured or secured.

“Existing Loan Lenders” shall have the meaning set forth in Section 5.14(d).

“Existing Loan Notice” shall have the meaning set forth in Section 5.14(d).

“Federal Trade Commission Act” shall mean the Federal Trade Commission Act of 1914.

“Financing” shall have the meaning set forth in Section 5.14(a).

“Financing Parties” shall have the meaning set forth in Section 7.3(f).

“GAAP” shall mean generally accepted accounting principles in the United States.

“Governmental Authority” shall mean any federal, state or local, domestic, foreign or multinational government, court, regulatory or administrative agency, commission, authority or other governmental instrumentality.

“Hazardous Materials” means any materials or substances or wastes which are limited, controlled or otherwise regulated under, or as to which liability or standards of conduct may be imposed under any Environmental Law.

“HSR Act” shall mean the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

“Indebtedness” shall mean, with respect to any Person, without duplication, (a) all obligations of such Person for borrowed money (other than intercompany indebtedness), (b) all obligations of such Person evidenced by bonds, debentures, notes or similar instruments, (c) all obligations of such Person evidenced by letters of credit, bankers’ acceptances or similar facilities to the extent drawn upon by the counterparty thereto, (d) all capitalized lease obligations of such Person and (e) all guarantees or other assumptions of liability for any of the foregoing.

“Indemnitee(s)” shall have the meaning set forth in Section 5.8(a).

“Intellectual Property” shall mean all intellectual property and industrial property rights of any kind or nature to the extent recognized in any and all jurisdictions throughout the world, including all (a) patents all related continuations, continuations-in-part, divisionals, reissues, reexaminations, substitutions, and extensions thereof, and pending applications for any of the foregoing, (b) registered and unregistered trademarks, trade names, service marks, logos, corporate names, internet domain names, and any applications for registration of any of the foregoing, together with all goodwill associated with each of the foregoing, (c) registered and unregistered copyrights and works of authorship, including copyrights in computer software, mask-works and databases, and any applications for registration of any of the foregoing, and (d) trade secrets and other proprietary rights in know-how, customer lists, databases, technical information, invention disclosures, research and development, computer software, data, formulas, algorithms, methods, systems, processes and technology.

“IRS” means the U.S. Internal Revenue Service.

“Joint Venture” of a Person shall mean any Person that is not a Subsidiary of such first Person, in which such first Person owns directly or indirectly an equity interest.

“Knowledge” shall mean, (a) in the case of the Company, the actual knowledge, as of the date of this Agreement, of the individuals listed on Section 8.13 of the Company Disclosure Schedule and (b) in the case of Parent and Merger Sub, the actual knowledge, as of the date of this Agreement, of Patricia C. Smith and Julia S. Janson.

“Laws” shall have the meaning set forth in Section 3.8.

“Liens” shall mean any pledges, liens, charges, Encumbrances, options to purchase or lease or otherwise acquire any interest, and security interests of any kind or nature whatsoever.

“LTIP Target Amount” shall have the meaning set forth in Section 5.11(a).

“Merger” shall have the meaning set forth in the recitals.

“Merger Consideration” shall have the meaning set forth in Section 2.1(c).

“Merger Sub” shall have the meaning set forth in the Preamble.

“NCBCA” shall have the meaning set forth in the recitals.

“NCUC” shall have the meaning set forth in Section 3.5(e).

“New Plans” shall have the meaning set forth in Section 5.11(b).

“Notice of Recommendation Change” shall have the meaning set forth in Section 5.3(d).

“NYSE” shall mean the New York Stock Exchange.

“Old Plans” shall have the meaning set forth in Section 5.11(b).

“Parent” shall have the meaning set forth in the Preamble.

“Parent Board” shall mean the board of directors of Parent.

“Parent Material Adverse Effect” shall mean any change, event, occurrence or effect that, individually or in the aggregate, has had or would reasonably be expected to have a material and adverse effect on the ability of Parent or Merger Sub to consummate, or that would reasonably be expected to prevent or materially impede, interfere with or delay the consummation by Parent or Merger Sub of the Transactions.

“Parent RSU Award” shall have the meaning set forth in Section 2.3(c).

“Parent RSU Award Recipient” shall have the meaning set forth in Section 2.3(c).

“Parent RSU Award Vesting Date” shall have the meaning set forth in Section 2.3(c).

“Parent Shares” means shares of Parent common stock, par value \$0.001 per share.

“Parent Termination Fee” shall have the meaning set forth in Section 7.3(e).

“Paying Agent” shall have the meaning set forth in Section 2.2(a).

“Payroll Deduction Period” shall have the meaning set forth in Section 2.4.

“Permitted Encumbrances” shall mean (a) zoning, building codes and other state and federal land use Laws regulating the use or occupancy of such real property or the activities conducted thereon which are imposed by any Governmental Authority having jurisdiction over such real property and (b) easements, rights-of-way, encroachments, restrictions, covenants, conditions and other similar Encumbrances that (i) are disclosed in the public records, (ii) would be set forth in a title policy, title report or survey with respect to the applicable real property or (iii) individually or in the aggregate, (A) are not substantial in character, amount or extent in relation to the applicable real property and (B) do not materially and adversely impact the Company’s current or contemplated use, utility or value of the applicable real property or otherwise materially and adversely impair the Company’s present or contemplated business operations at such location.

“Permitted Liens” shall mean (a) statutory Liens for Taxes, assessments or other charges by Governmental Authorities not yet due and payable or the amount or validity of which is being contested in good faith and by appropriate proceedings, (b) mechanics’, materialmen’s, carriers’, workmen’s, warehouseman’s, repairmen’s, landlords’ and similar Liens granted or which arise in the ordinary course of business, (c) Liens reflected in the Company SEC Documents, (d) Permitted Encumbrances, (e) Liens permitted under or pursuant to any Contracts relating to Indebtedness and (f) such other Liens that would not have a Company Material Adverse Effect.

“Person” means an individual, corporation, limited liability company, partnership, association, trust, unincorporated organization, other entity or group (as defined in the Exchange Act), including a Governmental Authority.

“Proxy Statement” shall have the meaning set forth in Section 3.4.

“Regulatory Filings” shall have the meaning set forth in Section 3.5(e).

“Release” means any release, spill, emission, discharge, leaking, pumping, injection, deposit, disposal, dispersal, leaching or migration into the indoor or outdoor environment (including, without limitation, ambient air, surface water, groundwater and surface or subsurface strata) or into or out of any property, including the migration of released Hazardous Materials through or in the soil, surface water or groundwater.

“Regulatory Approvals” shall have the meaning set forth in Section 6.1(b).

“Remedial Action” shall have the meaning set forth in Section 5.4(d).

“Representatives” means, with respect to any Person, the professional (including financial) advisors, attorneys, accountants, consultants or other representatives (acting in such capacity) retained by such Person or any of its controlled Affiliates, together with directors, officers, employees, agents and representatives of such Person and its Subsidiaries.

“Required Statutory Approvals” shall have the meaning set forth in Section 3.4.

“Restraint” shall have the meaning set forth in Section 7.1(b)(ii).

“Sarbanes-Oxley Act” shall have the meaning set forth in Section 3.5(a).

“SEC” means the U.S. Securities and Exchange Commission.

“Securities Act” shall have the meaning set forth in Section 3.1(b).

“Sherman Act” means the Sherman Antitrust Act of 1890.

“Significant Subsidiary” shall have the meaning set forth in Section 3.1(b).

“Subsidiary” when used with respect to any party, shall mean any corporation, limited liability company, partnership, association, trust or other entity of which securities or other ownership interests representing more than 50% of the equity and more than 50% of the ordinary voting power (or, in the case of a limited partnership, more than 50% of the general partnership interests) are, as of such date, owned by such party or one or more Subsidiaries of such party or by such party and one or more Subsidiaries of such party. For the avoidance of doubt, the Company Joint Ventures are not Subsidiaries of the Company.

“Superior Proposal” shall have the meaning set forth in Section 5.3(g).

“Surviving Corporation” shall have the meaning set forth in Section 1.1.

“Systems” shall have the meaning set forth in Section 3.11.

“Takeover Statute” shall have the meaning set forth in Section 3.13.

“Takeover Proposal” shall have the meaning set forth in Section 5.3(f).

“Tax Returns” shall have the meaning set forth in Section 3.9(j).

“Taxes” shall have the meaning set forth in Section 3.9(j).

“Transaction Litigation” shall have the meaning set forth in Section 5.9.

“Transactions” refers collectively to this Agreement and the transactions contemplated hereby, including the Merger.

“WARN” shall have the meaning set forth in Section 3.16.

**Section 8.14 Interpretation.**

(a) Time Periods. When calculating the period of time before which, within which or following which any act is to be done or step taken pursuant to this Agreement, (i) the date that is the reference date in calculating such period shall be excluded and (ii) if the last day of such period is a not a Business Day, the period in question shall end on the next succeeding Business Day.

(b) Dollars. Unless otherwise specifically indicated, any reference herein to \$ means U.S. dollars.

(c) Gender and Number. Any reference herein to gender shall include all genders, and words imparting the singular number only shall include the plural and vice versa.

(d) Articles, Sections and Headings. When a reference is made herein to an Article or a Section, such reference shall be to an Article or a Section of this Agreement unless otherwise indicated. The table of contents and headings contained herein are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

(e) Include. Whenever the words "include", "includes" or "including" are used herein, they shall be deemed to be followed by the words "without limitation."

(f) Hereof, Defined Terms. The words "hereof," "hereto," "hereby," "herein" and "hereunder" and words of similar import when used herein shall refer to this Agreement as a whole and not to any particular provision of this Agreement. All terms defined in this Agreement shall have the defined meanings when used in any document made or delivered pursuant hereto unless otherwise defined therein.

(g) Contracts; Laws. Any Contract or Law defined or referred to herein means such Contract or Law as from time to time amended, modified or supplemented, unless otherwise specifically indicated.

(h) Persons. References to a Person are also to its successors and permitted assigns.

(i) Exhibits and Disclosure Schedules. The Exhibits to this Agreement and the Company Disclosure Schedules are hereby incorporated and made a part hereof. The Company may include in the Company Disclosure Schedule items that are not material in order to avoid any misunderstanding, and such inclusion, or any references to dollar amounts herein or in the Company Disclosure Schedule, shall not be deemed to be an acknowledgement or representation that such items are material, to establish any standard of materiality or to define further the meaning of such terms for purposes of this Agreement or otherwise. Any capitalized term used in any Exhibit or any Company Disclosure Schedule but not otherwise defined therein shall have the meaning given to such term herein.

(j) Construction. Each of the parties hereto have participated jointly in the negotiation and drafting of this Agreement and, in the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as jointly drafted by the parties hereto and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provision of this Agreement.

*[Signature page follows]*

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered as of the date first above written.

PIEDMONT NATURAL GAS COMPANY, INC.

By: /s/ Thomas E. Skains

Name: Thomas E. Skains

Title: Chairman of the Board, President and  
Chief Executive Officer

FOREST SUBSIDIARY, INC.

By: /s/ Julia S. Janson

Name: Julia S. Janson

Title: President

DUKE ENERGY CORPORATION

By: /s/ Lynn J. Good

Name: Lynn J. Good

Title: President, CEO and Vice Chair

*[Signature Page to Agreement and Plan of Merger]*