



March 12, 2021

**Via email: [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)**

Office of Chief Counsel  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**RE: Request for Reconsideration of March 9, 2021 Decision Permitting  
Duke Energy Corporation to Exclude Stockholder Proposal of the National  
Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8**

Ladies and Gentlemen,

We at the National Center for Public Policy Research respectfully request review and reconsideration by the staff of the Division of Corporation Finance (“the Staff”) and the U.S. Securities and Exchange Commission (the “Commission”) of the Staff’s March 9, 2021 concurrence with the no-action request of Duke Energy Corporation (“the Company”) dated December 30, 2020 (the “No-Action Request”) regarding our Proposal that the Company “prepare a report based on a review of the BRT Statement of the Purpose of a Corporation, signed by our Chief Executive Officer, and provide the board’s perspective regarding how our Company’s governance and management systems can be altered to fully implement the Statement of Purpose, or, in the alternative, what our Company should do if the Statement cannot be reconciled with current practices and commitments.”<sup>1</sup>

We respectfully request that the Division of Corporate Finance, under Part 202.1(d) of Title 17 of the Code of Federal Regulations, present the Staff decision to the full Commission for review.

Under Part 202.1(d) of Title 17 of the Code of Federal Regulations, the Division of Corporate Finance may request Commission review of a Division no-action response relating to Rule 14a-8 of the Exchange Act if it so determines that the request involves “matters of substantial importance and where the issues are novel or complex.”

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<sup>1</sup> Free Enterprise Project, NATIONAL CENTER, REPORT ON COMPANY’S INVOLVEMENT WITH BUSINESS ROUNDTABLE “STATEMENT ON THE PURPOSE OF A CORPORATION” (attached).

Throughout 2020 and now in 2021<sup>2</sup> we have attempted to get the Commission or its Staff to address a number of issues. These include:

- (1) why our arguments are incorrect that its new interpolation of Rule 14a-8, and its concomitant policy of not providing any explanation of its decisions at all in most instances, are not themselves arbitrary and capricious; and
- (2) whether or not that policy of silence is arbitrary and capricious in the face of direct requests from us to help us understand how to conform our proposals to its guidelines in a way that will make them non-omittable while still pursuing our policy goals, goals that have different subject-matter foci but the same form and intent as previous proposals from other organizations that have been found non-omittable.

We renew those objections here. We additionally renew the argument made earlier in this proceeding. This argument, in short, is that our Proposal in this proceeding does not functionally differ from previous proposals (*see, e.g., McKesson Corp.* (avail. May 26, 2020)) that have been found non-omissible with regard to exactly this subject matter. The only non-trivial difference at all is that we ask the Company to include in the requested report considerations that raise additional aspects of analysis – *i.e.*, that add a new dimension to the considerations that broaden the policy implications of the inquiry. Meanwhile, the Company’s response to our Proposal is no more responsive to our Proposal than McKesson’s was to the proposal in that proceeding. Of course, making distinctions on the basis of the Staff’s personal evaluation of the merits or policy implications of a proposal is forbidden by Staff rules and by higher federal dictate.<sup>3</sup> This renders the Staff’s decision either substantively inappropriate or procedurally arbitrary, or both.

In addition to these objections, we raise to the Commission’s particular attention the fact that the Staff in this proceeding concurred in the Company’s omission request despite the fact that the Company failed even to address our actual Proposal as submitted to the Company in this proceeding. Rather, it addressed a materially different proposal that we had submitted in an earlier proceeding, and which we’d revised in order to eliminate any possible legitimate grounds for omission. Moreover, the Company’s argument for omission focused squarely and solely on the portions of the previous proposal that had been edited out of the proposal that was submitted to the Company.

This will not do. Under Rule 14a-8(g), the Company bears the burden of persuading the Staff that it may omit our Proposal. The Company simply cannot have done so in this case, because it said nothing germane about the proposal that was actually submitted to it. We note that the Staff’s *J.P. Morgan, Chase & Co.* (avail. March 9, 2021) decision issued on the same day as this

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<sup>2</sup> See *Walgreens, Boots Alliance, Inc.* (reconsid. avail. Dec. 10, 2020); *Salesforce.com, Inc.* (reconsid. avail. April 22, 2020); *Alphabet, Inc.* (reconsid. avail. April 22, 2020); *Apple, Inc.* (reconsid. avail. Jan. 17, 2020).

<sup>3</sup> See *Staff Legal Bulletin No. 14A*, at B.6-7; Scott Shepard, *SEC Decisions Raise Specter of Bias, McCarthyism*, NATIONAL POLICY ANALYSIS NO. 681 (Feb. 21, 2020) (detailed analysis of recent staff procedural changes and legal obligations), available at <https://nationalcenter.org/ncppr/2020/02/21/sec-decisions-raise-specter-of-bias-mccarthyism/> (last accessed March 11, 2021).

instant decision, but that cannot avail the Staff. Aside from the demerits of that decision, each Company must make its own case. The Company here made no relevant case at all. The Staff violated the SEC's rules by concurring with the Company despite that deficiency. And if it looked outside of the record in this proceeding for the grounds on which to decide in the Company's favor, but fails to take "administrative notice" of all arguments made outside of the bounds of individual proceedings in *all* proceedings, not merely ours – a behavior that would require monumental effort, and that we find profoundly unlikely – then the Staff in this case has compounded its abandonment of SEC rules by once again showing our Proposals, in particular, unique and impermissibly biased disfavor.

We find the increasing evidence of bias based on merit considerations particularly troubling given the rising public expectation, based on analysis of recent SEC behavior and of the past pronouncements and behavior of incoming leaders, that the SEC will be allowing the omission of fewer ESG proposals in future.<sup>4</sup> If this turns out to mean, as our recent experiences with the SEC staff suggest that it may well mean, that the SEC intends not to permit more ESG proposals generally, but only those that fit a specific, approved partisan template, then the SEC will have abandoned its fundamental obligation to treat all Americans neutrally and with objective fairness. We hope and trust that this will not be the case, and we hope the Commission will demonstrate its commitment to the rule of law in this reconsideration.

### Conclusion

The Staff, in affirming the Company's No-Action Request in this case, provided additional evidence that our concerns about the biased, arbitrary and capricious nature of its decisions, and about its decisional process generally, are warranted. We therefore ask the Commission to reverse the decision of the Staff, and to deny the Company's No-Action Request. In the alternative, we ask that the current Staff decision be withdrawn, and the matter returned to the Staff with the options of either denying the No-Action Request or fully explaining the grounds on which it finds our Proposal excludable, having found the functionally indistinguishable *McKesson* proposal non-excludable; and also explaining its objective rule for the use of administrative notice of arguments not advanced by companies making no-action requests.

Thank you to the Staff and the Commission for your time and consideration.

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<sup>4</sup> See, e.g., Dieter Holger, *More ESG Shareholder Proposals Could Reach Ballots Under New SEC Leadership*, WALL ST. J. (March 9, 2021), available at <https://www.wsj.com/articles/more-esg-shareholder-proposals-could-reach-ballots-under-new-sec-leadership-11615285800> (last accessed March 11, 2021); *Will the SEC Support More ESG Shareholder Proposals?*, NASDAQ (March 10, 2021), available at <https://www.nasdaq.com/articles/will-the-sec-support-more-esg-shareholder-proposals-2021-03-10> (last accessed March 11, 2021).

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Division of Corporation Finance  
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A copy of this correspondence has been timely provided to the Company. If I can provide additional materials to address any queries the Staff or the Commission may have with respect to this letter, please do not hesitate to call me at 202-507-6398 or email me at [sshepard@nationalcenter.org](mailto:sshepard@nationalcenter.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Shepard", with a long horizontal flourish extending to the right.

Scott Shepard

Enclosure (Attachment)

cc: Nancy M. Wright, Duke Energy ([Nancy.wright@duke-energy.com](mailto:Nancy.wright@duke-energy.com))  
Justin Danhof, National Center for Public Policy Research

## **Report on Company's Involvement with Business Roundtable "Statement on the Purpose of a Corporation"**

**Whereas**, our Company's Chief Executive Officer (CEO) Lynn Good signed a Business Roundtable (BRT) "Statement on the Purpose of a Corporation," (Statement) in August 2019, committing our Company to serve all stakeholders – including employees, customers, supply chains, communities where we operate – and shareholders.<sup>5</sup>

Existing governance documents evolved in the still legally mandated system of shareholder primacy, but the Statement articulates a new purpose, moving away from shareholder primacy and including commitment to all stakeholders. The Statement may or may not be beneficial to associate with our brand, but as company policy, it may conflict with existing corporate law unless, and possibly even if, it is integrated into Company governance documents, including bylaws, articles of incorporation, and/or committee charters.

A stakeholder model would shift corporate focus from value creation to concerns generally referred to as Environmental, Social and Governance (ESG) issues. CEO Good works hard to indicate Company commitment to such causes, priding herself on her commitments to renewable energy, carbon-capture technology, and workplace diversity.<sup>6</sup> And she and other Company executives tout the power of ESG commitments to power profit growth for the company.<sup>7</sup>

For consistency and the avoidance of legal risk, our Company should not endorse positions with which it has not or cannot conform itself. We currently engage in actions that seem to contradict the Statement. Just two examples:

- Our Company is regularly accused of "greenwashing," as by failing to move directly to zero-carbon energy production, which environmental activists consider an insufficient commitment to environmental protection.<sup>8</sup>

And

- Our Company has instituted massive layoffs in the wake of mergers and consolidation by the Company, which activists consider an inappropriate placement of profit over duty to stakeholders.<sup>9</sup>

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<sup>5</sup> <https://opportunity.businessroundtable.org/ourcommitment/>

<sup>6</sup> <https://moneyinc.com/duke-energy-ceo-lynn-good/>

<sup>7</sup> <https://www.bizjournals.com/charlotte/news/2020/10/09/duke-energy-tells-investors-environmental-social.html>

<sup>8</sup> <https://www.dailytarheel.com/article/2019/09/duke-energy-emission-plan-0924>; <https://www.pv-magazine.com/2019/11/19/more-claims-of-greenwashing-at-major-us-electric-utilities/>; <https://www.dailykos.com/stories/2020/5/29/1948437/-Renewable-Friday-Duke-Energy-Greenwashing>

<sup>9</sup> <https://www.wsocvtv.com/news/local/duke-energys-latest-wave-of-job-cuts-its-largest-ever-926485473/>

And while the Statement implies accountability to stakeholders, without clear mechanisms in place to implement the Purpose, this broadened standard could reduce real accountability to shareholders and all stakeholders generally and in effect, result in genuine accountability to none. This would violate both the letter and the spirit of the Statement.

**Resolved:** Shareholders request our Board prepare a report based on a review of the BRT Statement of the Purpose of a Corporation, signed by our Chief Executive Officer, and provide the board's perspective regarding how our Company's governance and management systems can be altered to fully implement the Statement of Purpose, or, in the alternative, what our Company should do if the Statement cannot be reconciled with current practices and commitments. The report may include the Board's perspective on benefits and drawbacks of the options considered, as well as the Board's recommendations.

### **Supporting Statement**

Given the Company's inconsistent actions related to the Statement of Purpose, the Board might after full investigation consider the option of rescinding the CEO's signature and Company's name from that document.