

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 986
DOCKET NO. E-2, SUB 998

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
Application of Duke Energy Corporation and)	NC WARN MOTION
Progress Energy, Inc., to Engage in a)	TO MAKE SETTLEMENT
Business Combination Transaction and to)	DOCUMENTS PUBLIC
Address Regulatory Conditions and Codes)	
of Conduct)	

PURSUANT TO N.C. General Statute Chapter 132, the Public Record Act, now comes the North Carolina Waste Awareness and Reduction Network ("NC WARN"), through the undersigned attorney, with a motion in the nature of summary judgment to make public various documents in this docket that have been marked "confidential" by the applicants, Duke Energy and Progress Energy. In support of this motion is the following:

1. As stated in the Position of NC WARN, filed June 18, 2012, NC WARN is concerned that side agreements and settlements between parties tend to reduce benefits from the merger, or to significantly shift the burdens among customer classes. These settlement agreements have modified the scope of the merger without being reviewed fully by the Commission, the other parties, stockholders, or the public, primarily because the settlement documents have been marked as confidential by the utilities. As stated in its Position of June 18, 2012, NC WARN believes there are

additional settlement agreements affecting the merger that are not in the record, although this motion does not address these unfiled agreements.

2. On May 17, 2012, Duke Energy filed fourteen settlement agreements between it and other parties. On May 17, 2012, the Progress Energy and Duke Energy's Confidential Settlement Agreement was filed, more than thirteen months after the initial April 4, 2011 merger application. As late as June 14, 2012, Duke Energy filed an additional confidential amendment to its list of confidential settlement agreements, yet would not even disclose what new settlement agreements were being added to the list.

3. The Public Records Act, codified at Chapter 132 of the North Carolina General Statutes, enables citizens to "obtain copies of their public records" unless the records are specifically exempted by law. G.S. 132-1(b). Public records include "all documents . . . made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." G.S. 132-1(a). This clearly includes the Utilities Commission and the settlement documents filed in the merger docket. .

4. Under the statute, the only exception to public availability is where the information held by Commission is shown by the proponent, i.e., the utilities in this case, to meet all of the requirements for protection pursuant to G.S. 132-1.2(1), the so-called "trade secret" exemption, which states:

Nothing in this Chapter shall be construed to require or authorize a public agency or its subdivision to disclose any information that:

- (1) Meets all of the following conditions:
 - a. Constitutes a "trade secret" as defined in G.S. 66-152(3).
 - b. Is the property of a private "person" as defined in G.S. 66-152(2).
 - c. Is disclosed or furnished to the public agency in connection

with the owner's performance of a public contract or in connection with a bid, application, proposal, industrial development project, or in compliance with laws, regulations, rules, or ordinances of the United States, the State, or political subdivisions of the State.

- d. Is designated or indicated as "confidential" or as a "trade secret" at the time of its initial disclosure to the public agency.

NC WARN concedes that the various settlement documents meet criteria (1)b., c. and

d. but questions whether the information is a trade secret under criteria (1)a. pursuant to

G.S. 66-152(3), which defines a trade secret as

(3) "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:

- a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
- b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

NC WARN concedes that the utilities' efforts to maintain the secrecy of the documents

is reasonable under the circumstances under criteria (3)b. as it is consistent with

Commission practice (although there are no direct Commission statutes or rules delineating a procedure for protecting trade secrets).

5. In this motion, NC WARN questions whether the information is a trade secret at all under G.S. 66-152(3)a. The utilities have the burden of proving the documents are trade secrets, and NC WARN does not see that there is any actual or potential commercial value in the settlement agreements or that anyone could obtain economic value from their disclosure. Case law focuses on the "value to the business and competitors," and in this instance, NC WARN does not believe the utilities can show

economic value in the agreements. *State ex rel. Utilities Comm'n v. MCI Telecommunications Corp.*, 132 N.C. App. 625, 514 S.E.2d 276 (1999); see also the Indiana Utility Regulatory Commission Order in Cause No.43114 IGCC 4 S2, June 6, 2012 (in which Duke Energy Indiana was compelled to publicly disclose hundreds of what it had claimed were trade secrets under a similar Indiana statute).

6. In the cover to the May 17, 2012, list of settlement agreements, Duke Energy states that the agreements “contain provisions and information specific to a particular customer or group of customers that should not be publically disclosed.” It goes further to state that public disclosure would harm the utilities, “and their customers’ or customer groups’ competitive position in the market.” Without getting into confidential matters, the question is how can a large wholesale customer, or even a customer group, be harmed if the new Duke Energy passes on fuel savings or if the customer is promised a discounted rate in the future in exchange for not challenging the merger. The utility may not want the public to know but that is not a trade secret and does not protect a public record from being disclosed.

7. The most compelling argument for full public disclosure in the present instance is that the much more detailed stipulation agreements between the utilities and the Public Staff no doubt contain much more economically valuable information, yet the two settlements those parties entered into are openly disclosed in the record.

8. The Public Records Act does not contain any requirements that the party requesting public records provide any rationale for obtaining them. However, NC WARN, as evidenced in its Position of June 18, 2012, has a clear and demonstrable interest in receiving the documents on behalf of their members and other members of

the public. NC WARN has been asked by members of the media, as well as its members and stockholders, about what is in the settlement agreements and how they have altered the costs and benefits of the merger. Although intervenor's counsel or experts may sign confidentiality agreements to review the records, this does not provide other interested parties the opportunity to review them.

9. Rather than allowing anyone to obtain economic value from the disclosure of the settlement agreements, the "confidential" agreements have the opposite effect and hide from public scrutiny a significant portion of the costs and benefits of the merger.

THEREFORE, in light of the above, NC WARN prays that the settlement agreements described above are disclosed to the public.

Respectfully submitted, this the 21st day of June 2012.

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RALEIGH

DOCKET NO. E-7, SUB 986
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BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
Application of Duke Energy Corporation and)	
Progress Energy, Inc., to Engage in a)	VERIFICATION
Business Combination Transaction and to)	
Address Regulatory Conditions and Codes)	
of Conduct)	

I, James Warren, Executive Director of the N.C. Waste Awareness and Reduction Network, verify that the contents of NC WARN'S MOTION TO MAKE SETTLEMENT AGREEMENTS PUBLIC, filed June 21, 2012, in this docket are true to the best of my knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

James Warren

date _____

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

Sworn to and subscribed before me,
this is the _____ day of _____ 201 2.

Notary Public

my commission expires: July 22, 2012

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the foregoing NC WARN'S MOTION TO MAKE SETTLEMENT DOCUMENTS PUBLIC upon each of the parties of record in this proceeding or their attorneys of record by emailing them an electronic copy or by causing a paper copy of the same to be hand-delivered or deposited in the United States Mail, postage prepaid, properly addressed to each.

This is the 21th day of June 2012.

Attorney at Law