

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

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| In the Matter of |) | |
| Application of Duke Energy Corporation and |) | NC WARN'S MOTION |
| Progress Energy, Inc., to Engage in a |) | FOR RECONSIDERATION |
| Business Combination Transaction and to |) | OF MERGER ORDER |
| Address Regulatory Conditions and Codes |) | |
| of Conduct |) | |

PURSUANT TO G.S. 62-80, now comes the N.C. Waste Awareness and Reduction Network ("NC WARN"), by and through the undersigned counsel, and moves that the Commission reconsider its Order Approving Merger Subject to Regulatory Conditions and Code of Conduct, issued June 29, 2012, and issue a "show cause" order to Duke Energy to show why the Order should not be rescinded *in toto* or otherwise amended or modified. In support thereof, NC WARN states the following:

1. In a concurrent filing, NC WARN's Proposed Determination, filed in Docket No. E-7, Sub 1017, NC WARN is recommending that the Commission complete its investigation in that docket and hold a hearing in the merger docket. The present motion for reconsideration adopts that filing by reference. As stated in that filing, the first phase of the investigation developed enough information to provide the basis needed for the Commission to conduct a formal hearing on the approval and closing of the business combination of the two utilities.

2. The Commission has treated the preliminary investigation in Docket E-

7, Sub 1017, as one of fact-finding and has limited participation to the Public Staff and Attorney General who have statutory right of intervention. In its Order denying NC WARN's motion to intervene, issued July 13, 2012, the Commission carefully distinguished between an investigation pursuant to its supervisory powers under Article 3 of Chapter 62 and the other ordinary hearings under Article 4. The non-evidentiary phase of the Article 3 investigation is complete, and has provided basis for continued formal investigations.

3. Any subsequent hearings should take place in the merger docket so that all parties who were allowed to intervene in that docket can participate in the evidentiary hearing. NC WARN agrees with Duke Energy's position that any substantive Commission action can only be accomplished through an evidentiary hearing in which the Commission allows all parties to tender witnesses and cross-examine opposing witnesses and submit evidence into the record. See Duke Energy Corporation's Notice of Objection to the Denial of the Right to Examine Witnesses, filed July 19, 2012 in Docket E-7, Sub 1017.

4. As stated in its concurrent filing in Docket E-7, Sub 1017, NC WARN maintains that the preliminary investigation highlighted several issues that should be resolved before the Commission can make a final decision on the merger. These issues fall into two areas; first, did Duke Energy fail to disclose significant material adverse matters to the Commission subsequent to the September 20-21, 2011 hearings and before the Commission issued its Order conditionally approving the merger on June 29, 2012, and when the merger closed on July 2, 2012? These issues include the actions and inactions leading to the Duke

Energy board's decision to replace Mr. Johnson as CEO because of the expressed "lack of confidence" in his leadership. In his July 20, 2012, testimony in the investigation, Mr. Rogers presented a list of factors why the Duke Energy board made its decision, including Mr. Johnson's autocratic management style, the lack of transparency and flow of information, the safety and reliability of Progress Energy's nuclear fleet, the lack of a realistic assessment of the options at Crystal River, and that generally the financial performance of Progress Energy was not what was expected. Tr. Vol.1, pp. 31-35 (July 10, 2012).

5. The "lack of confidence" factors were reaffirmed by Duke Energy's lead director, Ann Gray, in her statement attached to Duke Energy's Motion in Objection to Order Scheduling Hearing, filed on July 17, 2012, and testimony before the Commission on July 30, 2012, as the root causes for the Duke Energy board's lack of confidence in Mr. Johnson. Tr. pp. ____ (July 20, 2012). Important, none of these factors were disclosed to the Commission prior to Mr. Rogers's testimony on July 20, 2012.

6. As noted in NC WARN's comments July 13, 2012, the cost-saving shortcuts at the Crystal River 3 approved by Mr. Johnson led to the plant's extensive damage. Contrary to Mr. Johnson testimony in September 2011, it is uncertain whether the Nuclear Energy Insurance Ltd. ("NEIL") will recompense Duke Energy for the repairs, even after the current mediation. Ms. Gray, in her testimony, highlighted the Duke Energy's board concern about Mr. Johnson controlling information about Crystal River and NEIL's payments throughout the first half of 2012. Tr. pp. ____ (July 20, 2012). Without assigning motives to his

action, NC WARN believes that Mr. Johnson kept the extent of the repair costs and NEIL's backing away from payment from the Duke Energy board, and more important, from the Commission, because of its material impact on the merger.

7. The second set of issues goes directly to the Commission's determination in its Order approving the merger that it is in the public convenience and necessity. On one hand is the \$650 million in fuel savings Duke Energy has promised ratepayers in North and South Carolina. On the other hand are the significant costs that have come to light since the merger hearings. First is the reported estimate for repairing or replacing the Crystal River 3 nuclear plant, which, as shown in NC WARN's Additional Comments, filed July 13, 2012, will cost in the \$3 billion-plus for either the repairs plus replacement power, or decommissioning, with NEIL's compensation still in serious question. Secondly, newly disclosed cost information by Duke Energy shows it will need to invest a minimum of \$2.2 billion in the legacy Progress Energy nuclear fleet over the next 30 months.¹ Lastly, there has been considerable concern expressed in the public comments in Docket E-7, Sub 1017, and elsewhere, on the severance package of \$44 million received by Mr. Johnson.

8. The cost issues are crucial to the Commission ultimate determination of whether the merger is justified by the public convenience and necessity. G.S. 62-111(a). Do the benefits to the ratepayers outweigh the costs of the merger?

¹ As shown in NC WARN concurrent filing in Docket E-7, Sub 1017. Again, NC WARN believes some of the safety projects in the Progress reactors are long overdue although these expenditures by Duke Energy will be borne by their customers.

The \$650 million in fuel savings promised by Duke Energy may occur regardless of the merger because of lower natural gas prices, while a significant part of it could be caused by the effects of the Joint Dispatch Agreement ("JDA") alone. The \$3 billion in repairs at Crystal River 3 and the \$2.2 billion in investments in the legacy Progress Energy nuclear fleet eliminate the savings to the ratepayers. What are their impacts on the North Carolina ratepayers? At a minimum, these costs should have been disclosed to the Commission as soon as they were realized so that the Commission could reconsider whether the merger, in its opinion, still was in the public convenience and necessity.

9. As this point, the Commission has several options, ranging from completely revoking the merger order, revoking the merger order and allowing the JDA to continue, amending its merger order with additional conditions, penalizing Duke Energy for cause, or doing nothing. NC WARN maintains that a reasonable course at this point is to issue the show cause order and have Duke Energy show why the Commission should not take a positive action. NC WARN further maintains that the show cause hearing should be held in the merger dockets, and that it should be a full evidentiary hearing.

THEREFORE, NC WARN prays that the Commission reconsiders its merger order and issue a show cause order to Duke Energy.

Respectfully submitted this the 26th day of July 2012.

/s/ John D. Runkle

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing NC WARN'S MOTION FOR RECONSIDERATION OF MERGER DOCKET upon each of the parties of record in this proceeding 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 the 26th day of July 2012.

/s/ John D. Runkle

Attorney at Law