

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 )  
Progress Energy, Inc., to Engage in a )  
Business Combination Transaction and to ) POSITION OF NC WARN  
Address Regulatory Conditions and Codes )  
of Conduct )

PURSUANT TO the Commission’s Order Establishing Procedural Schedule, June 11, 2012, now comes the North Carolina Waste Awareness and Reduction Network (“NC WARN”), through the undersigned attorney, with its position regarding the current status of the merger application *sub judice*. As shown below, NC WARN is unable to waive cross-examination of Duke Energy witnesses and respectfully requests a hearing on the merits with the opportunity for public testimony. In support of its position is the following:

1. The Commission is authorized to approve the merger only if it is in the best interest of rate payers and will provide a net positive benefit for them, summed up in the statement "benefits outweigh costs and potential benefits outweigh potential costs." G.S. 62-111(a) puts this slightly more broadly as requiring "public convenience and necessity." The merger as it stands now does not provide a net positive benefit to many, if not most, of the residential customers, especially low-income families and those on fixed incomes. As such, the merger application should be DENIED.

2. NC WARN's current position adopts by reference the following:
  - a. NC WARN Position on Merger Stipulations, September 8, 2011, in which NC WARN proposed conditions to the first stipulation agreement focused on the need for energy efficiency programs for low-income and fixed-income residential customers as a means to mitigate the costs to those customers from the merger;
  - b. NC WARN's Brief, November 23, 2011, in which NC WARN proposed findings on the lack of completeness of the application, the inordinate impacts on low-income families and how to mitigate those impacts, and the need to adopt best practices for energy efficiency; and
  - c. the supporting testimony of Mr. Colton on the impacts on low-income families, the cross-examination of the witnesses of the other parties, and the testimony of public witnesses.

3. Many of the facts relevant to the proposed merger and the benefits and costs of a merger have changed significantly since the public and evidentiary hearings, held September 20-22, 2011. As described in further detail below:

- a. the final FERC Order<sup>1</sup> opens up considerable doubts about the potential costs and benefits of the merger to the ratepayers;
- b. The side agreements and settlements between the utilities and various

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<sup>1</sup> Order Accepting Revised Compliance Filing, as Modified, and Power Sales Agreements (Issued June 8, 2012) in FERC Docket EC11-60-004, and related power sale agreement dockets, is currently not entered in the record in the present NCUC docket although the Commission may take notice of it. As of today's date, the Order is not finalized as the utilities have 15 days to accept FERC's revisions to the Revised Mitigation Proposal (although Duke Energy has stated it intends to do so in a timely manner). Other parties may have the opportunity to appeal the FERC Order.

parties draw into question, or even directly undermine, the professed benefits to the ratepayers or shift the costs among customer classes;

- c. The reported effort by South Carolina officials to require Duke Energy and Progress Energy to purchase the Santee Cooper share of the V.C. Summer Nuclear Generating Station as part of the merger has introduced a new factor that would add significant cost to the rate payers;<sup>2</sup> and
- d. The significantly increasing costs of new nuclear and coal plants, as well as the extensive repairs required at the Crystal River Nuclear Power Plant, have significantly increased the debt burden of the utilities.

These matters require testimony, and cross-examination of utility and Public Staff witnesses, and additional public testimony, to assist the Commission in analyzing whether the benefits of a merger would outweigh the costs for all classes of ratepayers.

4. At the time of the hearing before the Utilities Commission, FERC had not issued a final order on the merger. The first stipulated settlement agreement between the utilities and the Public Staff, dated September 2, 2011, at paragraph 9, stated in part

DEC and PEC agree that the parties will have an opportunity to analyze such order(s) and present positions as to whether or not such order(s) alter the benefits and risks associated with the Merger and whether further conditions and other actions are needed.

The second stipulation agreement between the utilities and the Public Staff, the Supplemental Agreement and Stipulation of Settlement, May 8, 2012, reflected probable changes to the first agreement from the expected FERC Order and importantly, the

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<sup>2</sup> NC WARN is sending requests today to the Attorney General and the Public staff to investigate the substance and propriety of this allegation.

changed circumstances since the first agreement that required additional negotiated conditions.

5. After reviewing the final FERC Order, NC WARN's position is that the provisions in the Order significantly alter the benefits and costs associated with the merger and that as such, requires an evidentiary hearing as well as a new public hearing. Among other matters, the final FERC Order requires the extension of transmission lines connecting to the PJM regional transmission organization with the stated purpose of allowing competitive sales of electricity to eastern North Carolina.

6. The FERC Order does not address the question about whether the approved transmission projects will then allow the new Duke Energy unrestricted access to sales outside its present service area into the PJM and Northeastern markets. This position is in line with FERC policy but does nothing to benefit the North Carolina ratepayers. If this is the case, Duke Energy will in all likelihood require new generation facilities to meet this potential demand, as it arguably did for its proposed sales to Orangeburg and other markets in South Carolina. Any cost savings through competition in eastern North Carolina would be more than offset by the costs of new generation facilities required for increased Duke Energy sales.

7. NC WARN is also concerned that side agreements and settlements between parties tends to reduce benefits from the merger, or to significantly shift the burdens among customer classes. On May 17, 2012, Duke Energy filed fourteen settlement agreements among it and other parties; these settlement agreement have modified the scope of the merger without being investigated fully by the Commission, the other parties or the public. Without going into confidential matters, several of the agreements

required Duke Energy to pass on fuel savings, if any, to wholesale customers, while others provided lower rates for large industrial customers. This latter is evidenced in the proposed Economic Recovery Rate in Docket E-7, Sub 1013, in which a selected pool of industrial customers would receive a 6% discounted rate in part from the merger settlement (and in part from a settlement in the Duke rate case, Docket E-7, Sub 989).

8. Another settlement agreement, the Progress Energy and Duke Energy's Confidential Settlement Agreement, was filed on May 17, 2012, more than thirteen months after the original merger application was filed on April 4, 2011. As late as June 14, 2012, Duke Energy filed an additional confidential amendment to its list of confidential settlement agreements. Without review and disclosure of these settlement agreements, the Commission is not able to assess the merits of the merger.

9. The "confidential" settlement agreements hide from public scrutiny a significant portion of the costs and benefits of the merger. While the detailed settlement agreements between the utilities and the Public Staff have been openly filed in the record, the other agreements have not, but should be. Confidentiality of side agreements undermines public confidence in the process. At the hearing on the merits, NC WARN will move that the settlement agreements should not be kept confidential and that their contents should be public .

10. The other side agreement that has been widely reported is that South Carolina government officials, including members of the South Carolina Public Service Commission, are pressuring Duke Energy and Progress Energy to purchase the State-owned Santee Cooper's shares of the V.C. Summer Nuclear Generating Station. Santee Cooper owns one-third of the existing nuclear unit, but 45% of the proposed

units 2 and 3. The most recent cost estimate for the new units is \$9.8 billion without financing, although this figure is roughly half of estimates for other nuclear units. If a purchase of nuclear units under construction in South Carolina has been part of the merger negotiations, that should be part of the record and the costs and benefits should be fully considered by the Commission.

11. The Supplemental Agreement and Stipulation of Settlement, May 8, 2012, in Part III, recognizes changed circumstances that required a modification of the original utility and Public Staff settlement. These included an extension in the expected fuel savings because of lower natural gas prices over the past year and other matters.

12. Similarly, another significant change of circumstance since the evidentiary hearings is the costly new construction of power plants by Progress Energy. The minimum \$4.5 billion price tag for the Summer Station is compounded by a recently released cost estimate showing an increase of \$2 billion for the proposed Levy County Nuclear Power Station (up from its estimate of \$22.5 billion including financing).

13. The other major construction cost not evident at the September 2011 hearing is the repair of the Crystal River Nuclear Power Plant, shut down since 2009 because of major damage caused by a misguided maintenance operation. Contrary to Mr. Johnson's testimony at the hearing ("we've also said that we believe the majority or maybe all of that is covered by insurance"), Nuclear Electric Insurance Limited (NEIL), the insurance company involved in the Crystal River, is unlikely to indemnify Progress Energy for the repairs. Tr. Vol. 2, pp. 140-141. NEIL has in fact halted payments for replacement power. Progress Energy is many months late in submitting an engineering plan for repair of Crystal River, although indications are that they will attempt an

unprecedented replacement of containment walls and roof – with a nuclear power unit inside. Costs for the repairs are estimated to be upwards of \$3 billion, although some experts believe the nuclear unit is beyond repair.

14. As a change in circumstances, it is NC WARN's understanding that several months ago, Duke Energy's board of directors sanctioned a study of the costs and feasibility of repairing Crystal River, and has withheld the study from Progress Energy. The results of the study will be made to the Duke Energy's board of directors in the imminent future and is likely to change financial considerations between the two utilities.

15. All of these matters should be considered as changed circumstances that should be addressed by the Commission as part of its merger investigation. Although some of these costs of the new construction may be "ring-fenced," i.e., North Carolina customers will not be required to bear the burden, the cost of the V.C. Summer purchase is not. The change in the costs of construction since the September 2011 hearing, including the V.C. Summer purchase, adds up to approximately \$10 billion. Regardless of who will be asked to bear these costs in the future, a new Duke Energy would have considerably more debt and financial outlay than was originally stated in the merger application. Any benefits from the merger have evaporated over the nine months since the evidentiary hearing from rapidly escalating construction costs.

16. The additional debt from construction of the Levy County Station, Crystal River Plant and the V.C. Summer Station, piled on top of Duke Energy's ambitious construction plans, is likely to damage the new Duke Energy's financial position and lower its bond ratings. The increase in the borrowing costs may have a negative impact on North Carolina ratepayers.

17. In conclusion, due to the sheer size, complexity and sweeping, long-term ramifications of this arrangement, the Commission must ensure a full and careful examination of all these issues, not compress its review to accommodate the utilities' much-publicized pressure that their deal needs to be closed by any certain date. Moreover, the July 8, 2012, date appears to be a false deadline; Duke Energy and Progress Energy have indicated publicly that they can extend that deadline as needed. Both companies have invested so much in this merger, it seems clear that a few additional weeks of careful review would provide an important boost to public confidence that, should it be approved, this merger has at least been completed without any taint of unanswered questions about matters of importance to North Carolina ratepayers.

THEREFORE, in light of the above, NC WARN prays that it be allowed to present testimony and evidence, and cross-examine utility and Public Staff witnesses, at a hearing on the merits, and further that any hearing provide the opportunity for public testimony.

Respectfully submitted, this the 18<sup>th</sup> of June 2012.

\_\_\_\_\_/s/jdr  
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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the foregoing POSITION OF NC WARN 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 18<sup>th</sup> day of June 2012.

\_\_\_\_\_/s/jdr\_\_\_\_\_  
Attorney at Law