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The Honorable Roy A. Cooper, III
Attorney General
Old Education Building
114 W. Edenton Street
Raleigh, NC 27602

PETITION: Reopen investigation of Duke Energy-Progress Energy merger
or in the alternative, initiate new investigation

Dear Attorney General:

NC WARN urges you to reopen your investigation of the Duke-Progress merger or *in the alternative*, initiate a new investigation pursuant to your authority under G.S. § 75-9. The basis for this petition is the attached interview of Duke Energy CEO Jim Rogers reported in the Charlotte Observer. It contains two extremely troublesome statements – one directly contradicting earlier statements Rogers had made at hearings before the NC Utilities Commission, and the other admitting to *ex parte* communications he had with Commission Chairman Finley. Assuming these statements were accurately reported, both require investigation.

In support of this petition is the following:

1. Your office earlier conducted an investigation of the Duke-Progress merger pursuant to your authority examining representations made to the Utilities Commission by representatives of the two utilities in the merger dockets, NCUC Dockets E-7, Sub 986, and E-2, Sub 998. This paralleled the Commission's investigation of the merger in Docket E-7, Sub 1017, which was initiated after Bill Johnson's immediate firing by the Duke Energy Board once the merger was finalized. The Commission's investigation was terminated on December 3, 2013 when the Commission voted to approve a

settlement agreement among Duke Energy, the Public staff and the Commission staff. At the same meeting, Kevin Anderson of your office announced that you also had reached a settlement, subsequently filed with the Commission, in large part adopting the same settlement agreement.

2. During the investigations, thousands of memoranda, emails, board minutes and other documents were filed with the Commission. Although many of these documents were labeled “confidential” by Duke Energy, your office had access to these documents pursuant to your authority under G.S. § 62-20. This should include the investigation report by the Commission’s outside counsel, Mr. Valukas of the law firm of Jenner & Block, even if the report was only in draft form.

3. The Commission is authorized to approve the merger only if it determines the merger is in the best interest of ratepayers and will provide a net positive benefit for them, i.e., the benefits outweigh costs and potential benefits outweigh potential costs. G.S. 62-111(a) sets out the merger standard as "approval shall be given if justified by the public convenience and necessity.” If costs to the ratepayers were undisclosed by the utilities, with the result that any projected savings never materialize, then the Commission was obligated to deny, or greatly modify, the merger agreements.

4. Throughout the merger process, NC WARN has maintained that the Commission needed to make certain that every part of the process, every hearing and every negotiation was conducted in an open and transparent manner. We are deeply concerned that the Commission failed this duty.

5. In the Observer article, Mr. Rogers states that his position throughout the process was that the merger was an acquisition, and not a merger of equals. This is directly contrary to the testimony he gave in the September 2011 evidentiary hearings as well as the testimony he gave on July 10, 2012, as part of the Commission’s investigation in which he, and his counterpart at Progress Energy, Mr. Johnson, discussed the advantages of combining the companies into one, rather than the merger being a direct acquisition of one company by the other. That this was a merger of equal companies was apparently the understanding of the Commission members. See Order Approving Merger Subject to Regulatory Conditions and Code of Conduct, June 29, 2012, in the merger dockets; and Order Approving Settlement Agreement and Closing Investigation, December 12, 2012, in the investigation docket.

6. Mr. Rogers's statement that he personally negotiated the settlement agreement on the merger investigation with Chairman Finley may be even more serious as it appears to be an admission of a direct violation of the Commission's prohibition of *ex parte* communications under G.S. § 62-70.

7. Although the Commission has authority under § 62-34 to "investigate companies under its control," that does not allow its members to reach deals with the companies they regulate. In this case, the settlement agreement went outside the scope of the investigation and attempted to resolve not only matters being investigated but to resolve matters in the merger dockets. The agreement states that "the Settling Parties desire to resolve all matters and issues involved in the Commission's investigation and the Merger Dockets without further litigation and expense and to move forward in a positive manner." Settlement Agreement, page 3, paragraph 3. Many of the stipulations in that agreement materially and substantially change the substance of the initial merger order. The admitted communications by Mr. Rogers with Chairman Finley went well beyond providing information for an investigation. The result of the communication had a material impact on Duke Energy.

8. With tens of billions of dollars riding on a settlement of all "matters and issues," under no circumstances should the CEO of the regulated utility, then under investigation, have negotiated directly with the Chairman to make such a deal. This behavior is indicative of the problems Duke Energy has faced in Indiana over a mere billion dollars or so in cost overruns during construction of the Edwardsport power plant. The *ex parte* communications there led to several high-level terminations, Federal investigations, and an ongoing, four-count felony indictment against David Lott Hardy, former chairman of the Indiana Utility Regulatory Commission.

9. Lastly, G.S. § 62-70 requires that "any commissioner who knowingly receives any such communication or contact during such proceeding and who fails promptly to report the same to the Attorney General, or who otherwise violates any of the provisions of this subsection shall be liable to impeachment."

THEREFORE, in light of the above, there is ample basis in fact and law for the Attorney General's Office to conduct an investigation of possible misrepresentations by Mr. Rogers under oath, and of possible violations of the restrictions against *ex parte* communications.

FOR NC WARN

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