STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 1017

In the Matter of Investigation Regarding the Approval and Closing of the Business Combination of Duke Energy Corporation and Progress Energy, Inc.	)))))	DUKE ENERGY CORPORATION'S MOTION IN OBJECTION TO ORDER SCHEDULING HEARING

NOW COMES Duke Energy Corporation ("Duke Energy" or "the Company"), pursuant to North Carolina Utilities Commission (the "Commission") Rule R1-7, and respectfully submits this Motion in Objection to Order Scheduling Hearing presently scheduled for July 20, 2012 on this docket.[1] Duke Energy does not object to the questioning by this Commission of its directors concerning their acts, subject to the authority granted directors by statutory and common law under the business judgment rule. Indeed, and attached to this Motion, is a pre-filed statement by Ann Gray, which is intended to provide precisely such information to this Commission.[2] However, the Commission's Order compels out-of-state residents to appear at a hearing to provide testimony and does so on notice that is less than that permitted for depositions under the procedural requirements of North Carolina law. The Company, Ms. Gray and Mr. Browning, are nevertheless willing provide such testimony, but on a schedule that first permits the production of documents requested by the Commission as relevant to its inquiry. In support of this Motion, the Company shows the following:

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[1] This Motion is filed on behalf of the Company and Duke directors Gray and Browning. Because of their different circumstances as legacy Progress directors who joined the Duke board of Directors on July 2, 2012, directors McKee and Hyler are represented by separate counsel.

[2] Attached to this Motion is a pre-filed statement by Ms. Gray that she would intend to adopt as her testimony during her appearance. The four Duke directors have been ordered to appear before this Commission to discuss deliberations of the Duke Board, deliberations that were assisted, in part, by counsel. Nothing in the attached statement or in the testimony of Duke's directors should be construed to be, or is intended to be, a waiver of any privilege in those discussions.

1. On July 6, 2012, the Commission initiated an Investigation pursuant to N.C. Gen. Stat. § 62-37. In laying out the foundation for the Investigation, the Commission outlined the testimony filed by the Company and the testimony given orally by James Rogers and William Johnson that, according to the merger agreement between the two parties, Mr. Rogers would be the Executive Chairman of the board of the combined company, and Mr. Johnson would be the President and Chief Executive Officer of the combined company. The Commission then noted that on July 3, 2012, Duke Energy announced that Mr. Rogers would replace Mr. Johnson as President and CEO of Duke Energy, and that the Commission was not informed that the matter was under consideration by members of the Company's Board prior to the time that the decision was made. As a result, the Commission initiated this investigation and ordered Mr. Rogers to appear so that the Commission could hear from and ask questions of him.

2. On July 10, 2012, Mr. Rogers appeared before this Commission and testified for four hours, answering each and every question by the Commissioners. Notwithstanding Mr. Rogers' testimony and examination, this Commission issued a further order on July 12, 2012, scheduling further hearings to require William D. Johnson, E. Marie McKee and James B. Hyler, Jr., as well as Ann M. Gray and Michael G. Browning, to appear. It should be noted that although Mr. Rogers mentioned Mr. Johnson, Ms. Gray and Mr. Browning in his testimony, Ms. McKee and Mr. Hyler were not identified in any of Mr. Rogers' testimony or documents that have been submitted in this docket.

3. The July 12 Order ordered directors McKee and Hyler to appear at a hearing on July 19, 2012, and directors Gray and Browning on July 20, 2012 – seven and eight days respectively from the date of the Order. The Commission's Order in this regard is procedurally deficient with respect to compelling Ms. Gray and Mr. Browning, neither of

whom are residents of North Carolina, to appear before the Commission. In addition, the notice provided for this hearing is even less than is allotted in connection with depositions under North Carolina law.

4. The Commission's authority to compel the production of documents or testimony is the same as that of a superior court. *See* N.C. Gen. Stat. §§62-60, 62-61 (the Commission "shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers, and punish for contempt, as by law is conferred upon the superior courts"). Section 62-62 further provides the Commission with the authority to issue subpoenas to compel the attendance of witnesses. It is axiomatic that under North Carolina law that the subpoena power does not extend beyond the territorial limits of the State. *See State v. Tindall,* 294 N.C. 689, 242 S.E.2d 806 (1978); *Motor Inn Management, Inc. v. Irvin-Fuller Development Co.*, 46 N.C. App. 707, 266 S.E.2d 368 (1980); *AARP v. American Family Prepaid Legal Corp.*, 2007 NCBC 4. Although the courts of North Carolina possess personal jurisdiction over non-resident directors of corporations operating within North Carolina, the existence of personal jurisdiction is insufficient by itself to extend the subpoena power. *See AARP,* 2007 NCBC 4. Indeed, for purposes of deposition under the North Carolina Rules of Civil Procedure 30(b)(1), Ms. Gray and Mr. Browning cannot be compelled to testify in Raleigh. *See* N.C. R. Civ. P. 30(b)(1) ("A nonresident of the State may be required to attend for such examination only in the county wherein he resides or within 50 miles of the place of service."). Moreover, under North Carolina Rule of Civil Procedure 30(b)(1), notice of a deposition "shall be served on all parties" at least ten days prior to the taking of the deposition. Assuming that the Order is the equivalent to a "Notice of Deposition,"[3] and putting aside the

[3] The Company notes that no subpoena was issued in connection with this Order, which would appear to be contemplated by the statutes enabling the Commission to summon witnesses who are nonparties.

Order was never served upon Ms. Gray or Mr. Browning, the earliest such testimony under a Notice could take place would be Monday, July 23.[4]

5. In order to obtain discovery from non-residents, and as a matter of fundamental fairness and due process, the Commission is subject to North Carolina law and its procedures. As provided by the North Carolina Rules of Civil Procedure, for non-residents to be ordered to appear, the process and procedures required under the laws of the state where the discovery is to be obtained must be followed. *See* N.C. R. Civ. P. 45(f). Connecticut, where Ms. Gray is a resident, requires a commission from the court where a case is pending in order to subpoena the testimony of a Connecticut resident for use in such foreign court. No such commission has been issued here. *See* Conn. Gen. Stat. § 52-148e. Indiana, where Mr. Browning is a resident, provides that its courts may order residents to give testimony or to produce documents for use in a proceeding outside the state upon the application of an interested person or in response to a letter rogatory. *See* Ind. R. Trial P. 28(E). Again, there has been no such application or letter rogatory in this matter.

6. Notwithstanding the procedural issues with the Commission's Order of July 12, 2012, the Company wishes to cooperate with the Commission's investigation. Thus, Ms. Gray and Mr. Browning are willing to appear in person before the Commission on a timetable that permits a more orderly and reasoned development of the issues and facts in this case, which would be after Duke has produced the documents that the Commission has requested be produced by July 31. In this manner, the Commission can be in the best position to ask questions based on all the relevant, non-privileged records it has requested as

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[4] *See Jarrell* v. *Charlotte-Mecklenburg Hosp. Auth.*, 698 S.E.2d 190, 193 (N.C. App. 2010) ("'The attendance of a nonresident witness cannot be enforced, even though summoned....") (quoting *State* v. *Means*, 95 S.E. 912, 913 (N.C. 1918)); *AARP* v. *Am. Family Prepaid Legal Corp., Inc.*, 2007 WL 2570841, at *4, *5 (N.C. Super. Ct. Feb. 23, 2007) ("the existence of personal jurisdiction over a non-party foreign corporation, standing alone, is insufficient to extend the Court's subpoena power to that corporation for purposes of a deposition or the production of documents"; the party seeking the subpoena "remains free to seek a commission or order from this Court requesting that a subpoena *duces tecum* issue from a proper court").

relevant to its investigation; all parties can have full information for the purposes of cross-examination; Ms. Gray and Mr. Browning can avoid being called back to provide further testimony based on questions that might be raised by a production of documents that occurs after their testimony and the Commission would be able to develop the full and fair record necessary to reach a determination in this matter.

7. Accordingly, Duke respectfully requests that the Commission postpone the appearances of Ms. Gray and Mr. Browning until a mutually agreeable date after the Company has produced the required documents, which it is attempting to do even before the specified date of July 31, 2012.

Respectfully submitted this the 17th day of July, 2012.

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STATEMENT OF ANN GRAY

Ann Maynard Gray Statement

On July 2, 2012, by a majority vote of independent directors, the Duke Energy Board asked Bill Johnson to resign as CEO of Duke. Although we made this decision reluctantly, we made it in good faith, based on our business judgment as to the best interests of Duke. We have exercised our fiduciary duties and made our best judgments independently throughout this process, from our decision to approve the merger agreement between Duke and Progress on January 8, 2011, all the way to our decision with respect to Mr. Johnson on July 2, 2012. I do not intend to detail the reasons for our decision in this statement. Jim Rogers has already discussed a number of our concerns in his testimony on July 10, 2012, and I will be prepared to speak to this subject if required by the Commission. But for the reasons that follow, I believe this line of inquiry is unwarranted.

From the time we approved the merger agreement, the Duke Board has believed that the combination of Duke and Progress would provide benefits to our customers, employees, communities and shareholders. At the same time, we also face challenges in combining the companies and addressing a number of business issues. In order to realize the full benefits of the merger, we must draw on the strengths of the two companies and unite as one. I am concerned that the inquiries and investigations that have now been launched may delay Duke's ability to accomplish this. To my knowledge, the Commission's order requiring independent members of the Board to reveal details of confidential Board deliberations is unprecedented.

When I testify, I intend to respond to the Commission's questions to the best of my ability. But then I respectfully request that the Commission accept the decision that the Board has made, even if the Commission disagrees with it, and allow Duke to move forward to realize the benefits that this merger promises for customers and for all our constituencies.

The Board Approved the Merger Agreement and the Management Arrangements in Good Faith

The Duke Board approved the merger agreement between Duke and Progress on January 8, 2011. This followed several months of negotiations between the two companies. We had a number of Board discussions about the potential combination in the months leading up to approval of the transaction. One of the topics that we discussed over that time was the proposed

management arrangements under which Mr. Johnson would become CEO of the combined company and Jim Rogers would become Executive Chairman. We knew of Mr. Johnson by reputation, and we met with Mr. Johnson in two small group dinners on July 29, 2010 and August 2, 2010 and as a full Board on November 19, 2010. Mr. Rogers told us that he believed Mr. Johnson would be a capable CEO and said that he was ready to move to the Executive Chairman role. While at least one of the independent directors expressed concerns at that time, ultimately the Board concluded that we were comfortable with the management arrangements contemplated by the merger agreement.

The Board made the determination in good faith that the transaction, including the management arrangements, was in Duke's best interest. The merger agreement, as executed, included an exhibit detailing the contemplated roles of the CEO and the Executive Chairman. It also included term sheet exhibits that spelled out the terms that would apply to Mr. Johnson's employment as CEO and Mr. Rogers' employment as Executive Chairman. These term sheets largely reflected the terms of their existing employment agreements, including the severance they would receive if their employment were to be terminated following the merger. Mr. Johnson and Mr. Rogers signed their respective term sheets on January 8, 2011, agreeing to be bound by these terms. These terms were then incorporated into employment agreements that I understand were finalized in the fall of 2011, in preparation for what we thought would be a year-end closing.

In connection with the negotiation of the merger agreement, Progress requested that we include provisions that would require a super-majority Board vote to terminate Mr. Johnson's employment as CEO. As a matter of policy, we refused to agree to these provisions. This is an issue about which, as Lead Director, I feel and have always felt strongly. I believe that good corporate governance requires that a majority of the Board always have the ability to replace any executive if it believes that doing so is in the company's best interest.

During our merger negotiations with Cinergy in 2005, when Mr. Rogers was CEO of Cinergy and was to become CEO of Duke following the merger, Cinergy asked for similar super-majority removal provisions. In that transaction, as in our merger with Progress, the ongoing Duke directors constituted a majority of the combined company's Board. In that transaction, as

in our merger with Progress, we refused to agree to super-majority removal provisions. When we signed the merger agreement with Cinergy, we did so with the intent and expectation of having Mr. Rogers become CEO of Duke and lead Duke successfully, which he has done. Similarly, when we signed the merger agreement with Progress, we did so with the intent and expectation of having Mr. Johnson become CEO of Duke and lead Duke successfully. But in each case, we believed that it was important, and consistent with good governance, for the Board to retain the ability to replace the CEO if a majority of the directors made the judgment, in the exercise of their fiduciary duties, that doing so was in Duke's best interest.

The Board Monitored Developments after the Merger Agreement was Signed

At the time we approved the merger agreement, we also recognized that Progress was facing certain business issues and challenges. Duke's management had conducted due diligence on these issues and gave us reports based on information provided by Progress. We understood that the Crystal River nuclear plant had been shut down for repairs since 2009. However, we were told that Progress expected Crystal River to resume operations in April 2011, and that Progress expected significant insurance recoveries in connection with the repairs. We also understood that Progress faced issues with respect to some of their other nuclear operations, but we were told that Progress expected to be able to address these issues and improve the operations.

As the two companies began the process of obtaining the necessary approvals to complete the merger, the Duke Board received status updates at each of our regular Board meetings with respect to merger integration activities and the Progress business. We met with Mr. Johnson on June 20, 2011 and discussed developments at Progress. We received regular ongoing reports, based on information provided by Progress, with respect to a number of developments, including the status of Crystal River and its insurance coverage, the status of Progress's other nuclear operations, and the status of Progress's financial results. These reports caused us concern over time, but we continued to believe in the strategic logic and long-term benefits of the merger. We planned for a year-end closing and for Mr. Johnson to become CEO. As Mr. Rogers stated in his testimony before the Commission, the Board gave Mr. Rogers a retirement gift in early December in recognition of his impending retirement as CEO.

On December 15, 2011, however, the Federal Energy Regulatory Commission (FERC) informed Duke and Progress that the mitigation plan the companies had previously submitted to the FERC to address the FERC's market power concerns was insufficient. This meant that the merger could not close as scheduled and that the companies would need to submit a new mitigation plan. We were surprised by this development and, at our next Board meetings, we had extensive discussions with respect to the ability to develop a mitigation plan that would satisfy the FERC's concerns, the costs of such a mitigation plan, and the impact on the expected benefits of the merger. In addition, we continued to monitor developments in Progress's business, including the status of Crystal River and its insurance coverage, the status of Progress's other nuclear operations, and the status of Progress's financial results.

We also monitored with some concern what appeared to be growing friction between the two companies' leadership teams as they worked to try to develop a new FERC mitigation plan. These frictions resulted in part from differences in assessments of the costs and risks of various elements of the proposed mitigation plan. There were also frictions resulting from the Duke Board's insistence that the companies engage in further discussions with the North Carolina Public Staff, following submission of the revised FERC plan, to try to ensure that the commitments Duke was making were achievable within the context of the revised FERC plan.

Duke and Progress filed the revised FERC mitigation plan on March 26, 2012, and requested approval from the FERC by June 8, 2012. We believed there was a good likelihood that the revised plan would satisfy the FERC's concerns and that we would receive the required merger approvals and be able to close the merger on July 1, 2012. At our Board meetings after that, we continued to discuss the merger, developments in Progress's business, and the impact of the commitments that the combined company would be making in connection with its various regulatory approvals.

The Board Discussed Concerns about Mr. Johnson in the Second Quarter of 2012

After the companies filed the revised mitigation plan, and as the Duke Board focused on the likelihood of a July 1, 2012 closing, some of Duke's independent directors also began to express greater concerns with respect to Mr. Johnson's position as CEO of the combined company.

As I stated earlier, I do not intend to discuss these concerns in this statement. But I will note that the selection of a CEO is one of the most important responsibilities entrusted to any board, and it is a critical responsibility that we take very seriously. A board's ability to oversee and direct the company is dependent on the CEO. A board relies on the CEO to provide the board with full information, to present the options available for any major decision, and to provide a realistic assessment of the risks and benefits of each. A board relies on the CEO to seek the input of the board on strategy and major decisions, to implement the board's decisions, and to run the company in accordance with the board's direction.

At our regular Board meeting on May 3, 2012, we held an extended executive session, without Mr. Rogers, to begin discussion of our concerns as a group. Our outside counsel from Wachtell, Lipton, Rosen & Katz, who had been advising the Board on the merger with Progress from the start, attended this session. Following our discussion, the Board asked me to meet further with counsel and to undertake a more formal analysis of the Board's options. Here I should make clear that, in describing these meetings and the Board's executive sessions with counsel, I do not intend in any way to waive the attorney-client privilege or any other privilege.

On May 17, 2012, I met with our outside counsel and Duke's general counsel, at Wachtell Lipton's offices, to discuss the Board's options. At the end of this meeting, I asked our counsel to be ready to provide further advice to the independent directors at a special executive session that would be scheduled for May 30, 2012. In preparation for that executive session, I had individual conversations with each of the independent directors to get their views and hear their concerns, and we held a telephonic Corporate Governance Committee meeting on May 21, 2012. At the end of May, our outside counsel engaged a communications firm to assist them in providing advice.

On May 30, 2012, Duke's independent directors held a telephonic executive session, with Duke's general counsel and our outside counsel participating in the call. In that session, we continued our discussion of our concerns and the options available to the Board. We focused primarily on three options: (1) approach Progress prior to completion of the merger and raise our concerns; (2) complete the merger and defer consideration of any action with respect to the CEO

position for some period of time thereafter; and (3) complete the merger and consider taking action with respect to the CEO position immediately. We believed these were all difficult options.

At that time, we were still not certain that the FERC would approve the revised mitigation plan and that we would obtain all the necessary regulatory approvals to complete the merger, and we deferred further discussion of our options with respect to the CEO position until our regularly scheduled Board meetings on June 25-26, 2012. In the meantime, the independent directors asked me to continue to work with counsel on contingency planning, which I did. I also spoke again individually with each of the independent directors prior to our late June meetings.

As Mr. Rogers has testified, I spoke with him on June 23, 2012, and Michael Browning and I met with him on June 24, 2012. Mr. Rogers was aware by then that the independent directors had been expressing concerns and considering options with respect to the CEO position. As I hope is clear from the history I have described, however, the discussions the independent directors were having on this subject were initiated by the independent directors, not by Mr. Rogers. We intentionally excluded Mr. Rogers from these discussions, just as we excluded Mr. Rogers and Mr. Johnson from our executive session on July 2, 2012, because we wanted any decision that we might ultimately make to be a decision of the independent directors.

In my conversation with Mr. Rogers on June 23, 2012, and Mr. Browning's and my meeting with him on June 24, 2012, we discussed the extent of our concerns. At our June 24, 2012 meeting, we told Mr. Rogers that no final decision had been made, but we asked him whether, were the Board to decide to ask for Mr. Johnson's resignation after completion of the merger, Mr. Rogers would be willing to step back in as CEO. Mr. Rogers said he would be willing to do so if that were the Board's decision.

The Board Decided to Consider Taking Action with Respect to the CEO Following the Closing of the Merger

In the executive session on June 26, 2012, which our counsel attended but Mr. Rogers did not, we again discussed the Board's options, including the option of raising our concerns about Mr. Johnson in advance of the scheduled closing, and the option of closing and deferring consideration of any action with respect to Mr. Johnson until some future date. After extensive discussion and advice, however, we concluded that the "least bad" option was to close the merger and

consider action with respect to Mr. Johnson immediately thereafter. We did not make any final decision concerning Mr. Johnson's employment at this session. I continued to work with counsel and prepared to consider the matter in executive session with the combined company's Board following completion of the merger.

The merger became effective at 4:02 pm on July 2, 2012, at which time Mr. Johnson became CEO and Mr. Rogers became Executive Chairman. The combined company's Board convened by conference call at 4:30 pm and, at approximately 5:00 pm, following completion of routine business, I asked to go into executive session. Mr. Johnson and Mr. Rogers left the meeting and we continued with only the independent directors and our outside counsel. I presented the matter and, after an extended discussion, by a 10-5 vote, the Duke Board resolved to ask for Mr. Johnson's resignation and to appoint Mr. Rogers as CEO.

After the executive session ended, outside counsel and I met in person with Mr. Johnson to inform him of the Board's decision and our desire to negotiate a mutual separation agreement. Mr. Johnson responded that the Board was within its rights to take the action it had taken. Later that night, Mr. Johnson's counsel and our counsel negotiated a mutual separation agreement. The agreement was finalized and signed before issuance of a press release, announcing the closing of the merger and the change in CEO, at 7:00 a.m. the next morning.

* * *

I continue to believe that the new Duke, its customers, its employees, its communities and its shareholders will all benefit from this combination. In order to realize those benefits, I believe that moving forward is in the interest of all parties.