

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Duke Energy Corporation	)	
	)	Docket No. EC11-60-000
Progress Energy, Inc.	)	
	)	
Duke Energy Corporation and Progress Energy, Inc.	)	Docket No. ER11-3307-000
	)	
Duke Energy Corporation and Progress Energy, Inc.	)	Docket No. ER11-3306-000
	)	
	)	(Not consolidated)

**MOTION TO INTERVENE AND COMMENTS OF  
THE ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission")<sup>1</sup> and the Commission's April 6, 2011 "Errata Notice Extending Comment Date,"<sup>2</sup> the Electric Power Supply Association ("EPSA")<sup>3</sup> respectfully moves to intervene in the above-captioned proceeding and submit comments on the April 4, 2011 application filed by Duke Energy Corporation ("Duke Energy") and Progress Energy, Inc. ("Progress Energy") (collectively, with their public utility subsidiaries, the "Applicants"), pursuant to Section 203 of the Federal Power Act ("FPA"),<sup>4</sup> for the approval of a transaction in which Progress Energy will become a wholly-owned subsidiary of Duke Energy and the former shareholders of Progress Energy will become shareholders of Duke Energy

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<sup>1</sup> 18 C.F.R. §§ 385.212 and 385.214 (2011).

<sup>2</sup> *Duke Energy Corp., et al.*, Errata Notice Extending Comment Date, Docket No. EC11-60-000 (issued Apr. 6, 2011).

<sup>3</sup> The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

<sup>4</sup> 16 U.S.C. § 824b (2006).

(the “Transaction”).<sup>5</sup> The Applicants also submitted, pursuant to Section 205 of the FPA,<sup>6</sup> two related filings: a Joint Open Access Transmission Tariff (the “Joint OATT”)<sup>7</sup> and a Joint Dispatch Agreement.<sup>8</sup>

The Applicants have stated that the Transaction will benefit wholesale customers.<sup>9</sup> However, the evidence indicates that Applicants are pursuing only a strategy of generation self-build options rather than supporting an environment across all their service territories that is conducive to the development or maintenance of competitive generation by wholesale suppliers. The proposed combination of the Applicants and the institution of their proposed Joint Dispatch Agreement not only will not ameliorate this difficult environment for competitive suppliers, but it would also substantially increase the existing barriers to entry by new competitive generators and the barriers for existing competitive generators to sell their output on reasonable commercial terms going forward.

Of note, the Application indicates, with minor exceptions, that Progress Energy makes competitive market purchases from **only four** suppliers.<sup>10</sup> It is EPSA’s understanding that negotiating purchase and sale agreements on reasonable terms with Progress Energy prior to the proposed Transaction has been a difficult and

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<sup>5</sup> *Duke Energy Corp., et al.*, Application for Authorization of Disposition of Jurisdictional Assets and Merger, Docket No. EC11-60-000 (filed Apr. 4, 2011) (“Application”).

<sup>6</sup> 16 U.S.C. § 824d (2006).

<sup>7</sup> *Duke Energy Corp., et al.*, Filing Containing Pro Forma Joint Open Access Transmission Tariff, Docket No. ER11-3307-000 (filed Apr. 4, 2011).

<sup>8</sup> *Duke Energy Corp., et al.*, Filing Containing Pro Forma Joint Dispatch Agreement Between Duke Energy Carolinas, LLC and Carolina Power & Light Company, Docket No. ER11-3306-000 (filed Apr. 4, 2011).

<sup>9</sup> Application at 3.

<sup>10</sup> Application, Exhibit No. J-1, Direct Testimony and Exhibits of William B. Hieronymus at Ex. J-4 (“Hieronymus Affidavit”).

lengthy process. EPSA believes the size and scope of the post-merger entity, combined with the proposed Joint Dispatch Agreement and aggressive self-build plans, will increase the burden on existing competitive suppliers seeking to find a sales market in the interconnected service territories of the Applicants and likely will deter new entry as well. EPSA therefore respectfully requests that the Commission condition any approval of the proposed Transaction on the requirement that Applicants join a regional transmission organization (“RTO”). This requirement is consistent with Commission precedent finding that RTO membership alleviates horizontal and/or vertical competitive concerns raised by a proposed merger,<sup>11</sup> and it would prevent Applicants from abusing their increased market power from the Transaction and promote a level playing field for new and existing competitive suppliers.

Alternatively, in the event the Commission declines to require RTO membership, EPSA urges the Commission to direct the Applicants to develop, through consultation with all affected stakeholders (including competitive generators, relevant state regulators, load-serving entities, and other customers), a proposal to establish an organized, competitive wholesale energy market within the merged entity’s service territory that would be administered and overseen by an independent entity or market monitor, and to submit this proposal for Commission approval under FPA Section 205. Once this organized market is up and running, the Applicants should be further required to make quarterly compliance filings with the Commission with information on wholesale purchases from competitive suppliers made by Applicants and other

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<sup>11</sup> See, e.g., *AEP and Company and Central and South West Corporation*, 105 FERC ¶ 61,251 (2003) (“*AEP*”); *Ameren Corp.*, 108 FERC ¶ 61,094 (2004); *Northern States Power Company, et al.*, 90 FERC ¶ 61,020 (2000); *Ohio Edison Co.*, 81 FERC ¶ 61,110 (1997).

information relevant for assessing the efficiency and competitiveness of this market. In this way, the Commission can monitor on an ongoing basis whether there is foreclosure of competition to rival suppliers and any other such anticompetitive conduct associated with the Applicants' wholesale purchasing activities and the manner in which the Applicants implement their proposed Joint Dispatch Agreement. To be clear, however, this alternative is a "second best" solution that is indisputably inferior to requiring RTO membership.

## **I. MOTION TO INTERVENE**

### **A. Communications**

All service and correspondence with respect to these proceedings should be sent to:

Nancy E. Bagot  
Vice President of Regulatory Affairs  
Electric Power Supply Association  
1401 New York Avenue, NW  
11<sup>th</sup> Floor  
Washington, DC 20005  
(202) 682-8200  
nancyb@epsa.org

### **B. Description of Movant**

EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which, collectively, account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.

### **C. Basis for Intervention**

EPSA members own and operate, or in the future may construct, own or operate, power generation facilities or sources of supply which are or may be used to serve customers in the interconnected service territories of the Applicants. Therefore, EPSA has a significant interest in this proceeding as certain members may or will be directly affected by the Commission's order with regard to the Transaction, the Joint Dispatch Agreement and the Joint OATT.

Other participants in these proceedings may take positions on the issues that support their specific interests, and those positions may differ from the positions EPSA may take. For this reason, no other party adequately can represent the interests of EPSA, and EPSA respectfully requests leave to intervene and to be made a party to this proceeding.

## **II. COMMENTS**

### **A. The Proposed Transaction Exacerbates the Potential for the Exercise of Horizontal Market Power.**

EPSA is concerned that Applicants each already possess horizontal market power in their respective markets, as reflected by, among other things, the fact that the Applicants are not authorized to make sales at market-based rates in their home balancing authority areas (“BAAs”),<sup>12</sup> which will be exacerbated by the proposed Transaction, unless the merger is appropriately conditioned by the Commission on RTO membership. These concerns are supported by information in the Application,

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<sup>12</sup> See *Duke Power, a Division of Duke Energy Corp.*, 111 FERC ¶ 61,506 (2006) (order revoking Duke Energy's market-based rate authority in Duke Energy's home BAA); *Florida Power Corp.*, 113 FERC ¶ 61,131 (2005) (order accepting the proposal of Progress Energy's affiliate, Carolina Power & Light Company, to relinquish market-based rate authority in its home BAA and noting that Florida Power Corporation, another Progress Energy affiliate, did not have market-based rate authority in its home BAA).

which reflects the Applicants' markets all are very highly concentrated under the Economic Capacity ("EC") measure and experience screen failures in certain periods under the Available Economic Capacity ("AEC") measure, which the Applicants indicate is the more meaningful gauge of the competitive effects of the merger.<sup>13</sup> Significantly, these screen failures occur in both the Duke Energy Carolinas and in the Progress Energy Carolinas – East markets.<sup>14</sup> They occur before the effects of Applicants' self-described "significant generation construction programs"<sup>15</sup> are even taken into account. Despite the fact that Applicants' own analyses show that they fail the AEC screens in certain time periods, Applicants' witness Dr. Hieronymus claims that the "combination" of the Applicants will not result in adverse competitive effects. He seeks to dismiss the screen failures as not particularly meaningful because he attributes them to the Applicants' elimination of rate pancaking or because the adverse competitive effects exist even in the pre-merger environment.<sup>16</sup>

The reality is that there has been a dearth of independent power producers ("IPPs") that have invested in generating capacity in the Applicants' home BAAs, and many of those that have done so have had difficulty competing on a level playing field for their wholesale power sales. Absent regulatory intervention, the chances of the competitive landscape for IPPs improving in the face of a combination that will

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<sup>13</sup> Applicants claim that the AEC measure is more appropriate for use in assessing the impact of the proposed combination in their markets than the EC measure because there is no retail competition in the states in which they conduct business and no prospect of its introduction on the horizon. However, the Applicants' markets all are very highly concentrated when EC is considered and in all three of Applicants' balancing authority areas ("BAA") in the Carolinas, the Applicants fail the EC screens in all time periods. Application at 22-23, 25-26, Ex. J-1 at 10.

<sup>14</sup> *Id.* at 23, 25-26.

<sup>15</sup> *Id.* at 28.

<sup>16</sup> See Application, Prepared Direct Testimony and Exhibits of William H. Hieronymus on Behalf of Applicants at 9, 49.

eliminate one wholesale power purchaser entirely and vastly increase the size of the remaining single entity, is slim.

An article published in the Charlotte Observer is instructive in this regard. It states:

Several years ago, Peter Scott, then chief financial officer at Progress, told Wall Street investors that a Duke-Progress merger would be a natural fit, but clearing regulatory hurdles could require the sell-off of generating or transmission assets to ease monopoly concerns.

Last week, however, Duke CEO Jim Rogers said that the utilities' internal analysis shows the merger won't raise major anti-competitive concerns for regulators. That's largely because the Southeast is a regulated utility market lacking a cluster of independent power operators to raise objections.<sup>17</sup>

The dearth of IPPs to raise objections does **not** mean that the proposed Transaction will not result in major anti-competitive effects. Quite to the contrary, the dearth of IPPs in the merging entities' BAAs is evidence of the Applicants' pre-existing horizontal market power, which will only be increased if the proposed Transaction is permitted to go forward without being conditioned on RTO membership. For example, as EPSA has indicated, there are a mere four suppliers, with minor exceptions, from which Progress Energy currently makes competitive market purchases. Thus, the record evidence lacks the substantial evidence needed by the Commission to conclude that the Transaction would not have adverse competitive effects.

As the Commission stated in Order No. 642:<sup>18</sup>

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<sup>17</sup> John Murawski, *Progress, Duke Start Sales Pitch*, CHARLOTTE OBSERVER, Mar. 9, 2011, <http://www.charlotteobserver.com/2011/03/09/2122785/progress-duke-start-sales-pitch.html>.

<sup>18</sup> *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats and Regs., Regulations Preambles July 1996 – December 2000 ¶ 31,111 (2000) (“Order No. 642”), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

The facts of each case (e.g., market conditions, such as demand and supply elasticity, ease of entry and market rules, as well as technical conditions, such as the types of generation involved) determine whether the merger would harm competition. When there is a screen failure, applicants must provide evidence of relevant market conditions that indicate a lack of a competitive problem or they should propose mitigation.<sup>19</sup>

Despite the screen failures in the EC and AEC analyses the Applicants conducted, the Applicants have not provided the required evidence demonstrating that the relevant market conditions indicate the lack of adverse competitive effects. The Commission should therefore direct the Applicants to update the horizontal market power analysis in the Application to evaluate the effects on competition in light of (1) their ongoing aggressive self-build plans, (2) the implementation of the proposed Joint Dispatch Agreement, and (3) the near absence of IPPs in these markets, which have faced difficulty reaching commercially reasonable wholesale power sales agreements with the Applicants.

**B. The Commission Should Condition Any Approval of the Transaction on RTO Membership.**

As previously indicated, Applicants are pursuing an aggressive strategy to construct new generation facilities.<sup>20</sup> Specifically, one or more of the Applicants have decided to pursue self-build options for rate-based capacity rather than supporting an

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<sup>19</sup> Order No. 642 at 31,882.

<sup>20</sup> See *Order Issuing Certificate of Public Convenience and Necessity*, In the Matter of Application of Progress Energy Carolinas, Inc., for a Certificate of Public Convenience and Necessity to Construct Approximately 600 MW of Combined-Cycle Generating Capacity at its Richmond County Complex Near Hamlet, North Carolina, Before the North Carolina Utilities Commission, Docket No. E-2, Sub 916 (Issued June 26, 2008); *Order Issuing Certificates of Public Convenience and Necessity*, In the Matter of Duke Energy Carolinas, LLC, for Approval for an Electric Generation Certificate of Public Convenience and Necessity to Construct 620 MW Buck Combined Cycle Project and In the Matter of Application of Duke Energy Carolinas, LLC for Approval for an Electric Generation Certificate of Public Convenience and Necessity to Construct 620 MW Dan River Combined Cycle Project, Before the North Carolina Utilities Commission (“NCUC”), Docket Nos. E-7, Sub 791 and Sub 832 (Issued February 28, 2008).

environment in their service territories that is conducive to the development or maintenance of competitive wholesale markets. EPSA has long been an advocate for open and robust competitive procurement processes, which is the minimum condition that should be imposed on this proposed transaction.<sup>21</sup>

The proposed combination of the Applicants and the implementation of their proposed Joint Dispatch Agreement will *not* ameliorate this difficult environment for competitive wholesale suppliers. Instead, it will increase the existing barriers to new entry by IPPs and the barriers for resident competitive generators to sell their output on reasonable commercial terms going forward.

In order to ensure that the proposed combination does not impose further burdens on competitive wholesale suppliers and lead to further deterioration of wholesale competition, EPSA therefore urges the Commission to condition any approval of the Transaction on the requirement that Applicants join an RTO. EPSA believes such a measure is appropriate as the Commission has previously conditioned

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<sup>21</sup> See, e.g., Dickstein Shapiro, *The Case for Competitive Procurement in States with Vertically Integrated Utilities*, Electric Power Supply Association, July 2007; Dickstein Shapiro, *State Competitive Procurement: A Partial Survey of Best Practices*, Electric Power Supply Association, November 2007; Dickstein Shapiro, *State Competitive Procurement: Model Success Stories and Lessons Learned*, Electric Power Supply Association, April 2008; Boston Pacific Company, *Getting the Best Deal for Electric Utility Consumers*, Electric Power Supply Association, 2004; GF Energy, LLC, *Electric Utility Resource Planning: The Role of Competitive Procurement and Debt Equivalency*, Electric Power Supply Association, July 2005. Among other things, EPSA supports the efforts of and submitted comments on the Initial Report of the FERC/NARUC Competitive Procurement Collaborative. (See Comments of the Electric Power Supply Association on the Initial Report of the FERC/NARUC Competitive Procurement Collaborative, September 9, 2008) Additionally, EPSA specifically advocated for a competitive procurement process in the Duke Energy Carolinas, LLC proceeding referenced in fn. 20 in Docket Nos. E-7, Sub 791 and Sub 832. In its February 2008 Order, the NCUC determined that it would institute a rulemaking proceeding in a new docket to consider standards for requests for proposals (“RFPs”) in the future.

merger approval on RTO membership to ensure that the merger is consistent with the public interest and to mitigate market power concerns.<sup>22</sup>

Alternatively, in the event the Commission declines to order the requested relief, EPSA requests that the Commission condition approval of the merger on the requirement that the Applicants, working with all affected stakeholders, develop a proposal to establish an organized, competitive wholesale energy market in the merged entity's service territories that would be administered and overseen by an independent entity or market monitor, and to file this proposal with the Commission under FPA Section 205. In addition, once this market has begun operations, the Applicants should be required to make quarterly compliance filings with detailed information regarding wholesale purchases from competitive suppliers made by Applicants and other information relevant for assessing competition in this market and advising the Commission of any operational or other problems in implementing these markets, and proposing appropriate solutions.

### **III. CONCLUSION**

**Wherefore**, for the reasons stated herein, EPSA respectfully requests that the Commission: (1) condition any approval of the Transaction on the requirement that Applicants join an RTO; (2) alternatively, if the Commission declines to require RTO membership, condition approval of the Transaction on the requirement that Applicants

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<sup>22</sup> *AEP*, 105 FERC ¶ 61,251 at P 1 ("[I]n supplement to its orders approving the merger of American Electric Power Company with Central and South West Corporation (CSW),[] the Commission finds that, to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission, American Electric Power Company-East (AEP or AEP-East) [] must fulfill its voluntary commitment to join a Regional Transmission Organization (RTO), namely, PJM Interconnection, LLC (PJM).").

develop a proposal, in consultation with all affected stakeholders, to establish an organized, competitive wholesale energy market in the merged entity's service territories; (3) direct the Applicants to supplement the Application to address any adverse competitive effects from the Transaction, taking into account their self-build plans, the proposed Joint Dispatch Agreement, and the lack of competition from IPPs; and (4) grant such other relief as may be required to protect EPSA's interests.

Respectfully submitted,



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Nancy E. Bagot  
Vice President of Regulatory Affairs  
Sharon Theodore  
Director of Regulatory Affairs  
Electric Power Supply Association  
1401 New York Avenue, NW  
11<sup>th</sup> Floor  
Washington, DC 20005  
(202) 682-8200

June 3, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the foregoing pleading this 3rd day of June 2011, upon each person designated on the official service list compiled by the Secretary in this proceeding.



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Nancy E. Bagot, VP of Reg Affairs