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October 7, 2009

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Clerk's Office
N.C. Utilities Commission

Ms. Renne Vance, Chief Clerk
North Carolina Utilities Commission
430 North Salisbury Street
Dobbs Building
Raleigh, NC 27603-5918

VIA HAND DELIVERY

Re: Application of Duke Energy Carolinas, LLC for Approval of Save-a-Watt Approach, Energy Efficiency Rider and Portfolio Of Energy Efficiency Programs
Docket No. E-7, Sub 831

Dear Ms. Vance:

Enclosed please find an original and thirty (30) copies of the Joint Brief of the North Carolina Waste Awareness and Reduction Network, North Carolina Justice Center, AARP, North Carolina Council of Churches and Legal Aid of North Carolina.

If you have any questions regarding this matter, please feel free to let me know.

Sincerely,

Jack Holtzman
Staff Attorney

(BL)
Full Dist.
√DISK to Kim Campbell

Xc: (w/encl.) Parties of Record

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH
Docket No. E-7, Sub 831

In the Matter of

Application of Duke Energy Carolinas, LLC) For Approval of Save-a-Watt Approach) Energy Efficiency Rider and Portfolio of) Energy Efficiency Programs)	JOINT POST-HEARING BRIEF OF NC WARN AND PUBLIC INTEREST INTERVENORS

On June 12, 2009, 2009, Duke Energy Carolinas, LLC ("Duke Energy"), together with Southern Alliance for Clean Energy, Environmental Defense Fund, Natural Resources Defense Council, the Southern Environmental Law Center ("Environmental Intervenors") and the Public Staff, submitted a proposed Settlement Agreement to the North Carolina Utilities Commission ("Commission").

The Commission held an evidentiary hearing in Raleigh on August 19, 2009, to review the adequacy and appropriateness of the proposed Settlement. By Order dated October 1, 2009, the Commission allowed the parties until October 7, 2009 in which to file briefs and proposed orders. The North Carolina Waste Awareness and Reduction Network ("NC WARN"), together with the North Carolina Justice Center, AARP, North Carolina Council of Churches and Legal Aid of North Carolina ("Public Interest Intervenors") now submit this joint Brief.

The Commission, in its previous Order, held that Duke's proposed low income EE programs "strike an appropriate balance between assisting low-income customers and maintaining cost-effectiveness." That "balance," based on previous levels of recommended usage reduction, must now be reviewed and modified by the Commission, as Duke Energy has since committed in its proposed Settlement to substantially increase energy savings for EE program participants by 250%, while its commitment to low income and low and fixed income senior customers remains unchanged and relatively meaningless. To more than double the total usage reduction proposed through Save-A-Watt without also substantially enhancing the EE programs specifically directed towards Duke's low income and low and fixed income senior customers, is unreasonable.

NC WARN and the Public Interest Intervenors respectfully request that the Commission disapprove Duke Energy's proposed Settlement Agreement for three basic reasons: First, Duke Energy's proposed Settlement Agreement, if approved, would not provide rates and services that are just, reasonable or nondiscriminatory as related to low income ratepayers, in violation of both G.S. § 62-131(a) and (b) and G.S. § 62-140(a). Second, the cost recovery mechanism in Save-a-Watt ignores the non-energy benefits to Duke Energy from providing energy efficiency ("EE") programs; Third, even with the

financial incentives afforded Duke Energy, the commitments for energy savings in Save-a-Watt remain merely discretionary goals.

As a result, Duke Energy's proposed Settlement Agreement is not in the public interest as required under G. S. § 62-2, and should therefore be disapproved or significantly modified by the Commission.

ISSUES PRESENTED

I. THE EVIDENCE FAILS TO SHOW THAT DUKE'S PROPOSED SETTLEMENT AGREEMENT, IF APPROVED, WILL RESULT IN RATES TO LOW INCOME CUSTOMERS THAT ARE "JUST AND REASONABLE," AND INSTEAD ESTABLISHES THAT RATES AND SERVICES TO LOW INCOME CUSTOMERS WILL BE DISCRIMINATORY.

A. The Just, Reasonable and Nondiscrimination Standard Requires That Duke Energy Not Exclude the Vast Majority Of Its Low Income Customers from Its Save-a-Watt EE Programs.

In the Public Utilities Act (the "Act"), the General Assembly established just, reasonable and non-discriminatory rates and charges as essential elements of the services provided by regulated utilities:

[I]t is hereby declared to be the policy of the State of North Carolina:

(4) To provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages...;

(b) To these ends, therefore, authority shall be vested in the North Carolina Utilities Commission to regulate public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements, and in the manner and in accordance with the policies set forth in this Chapter.

G.S. § 62-2(a)(4) and (b) (2007) (in pertinent part).

The purpose of the Public Utilities Act is to empower the Commission to effectuate the public policies established by the Act. State ex rel. Utilities Comm. v. Edmisten, 294 N.C. 598, 606, 242 S.E.2d 862, 870 (1978).

As described in more detail below, approval of Duke Energy's Settlement Agreement, as currently proposed, will violate both G.S. §§ 62-131 and 62-140, by systemically and intentionally excluding the vast majority of Duke Energy's low income and low and fixed income senior customers from its proposed EE programs, and will

prohibit those same low income customers from obtaining any meaningful EE usage reduction. This exclusion, in effect, will cause Duke Energy's low income and low and fixed income senior customers to assume increased energy bills, by denying them the same program benefits that Duke Energy's EE program participants will be able to receive. Duke Energy's own witness, Judah Rose, acknowledged this result in discussing the impact of Duke Energy's Energy Efficiency Plan on non-participants, stating:

> However, energy efficiency might unintentionally increase average electric rates for and bills of non-participants as utility fixed costs are carried by fewer sales. Further, the greater the energy efficiency, the greater the chance that this might happen. Put another way, rates could increase for those customers that simply choose not to participate.

(Rose Direct, at 8). Rose also acknowledges that:

> However, as energy efficiency lowers the electricity demand of program participants, the utility's fixed costs (e.g., capital recovery of legacy investment) are borne by lower amounts of electricity sales, and hence, average rates and bills of non-participants could unintentionally increase under some specific circumstances.

(Rose Direct, at 16). In concluding that Duke Energy's EE program will benefit all customers, Rose acknowledges that this is "assuming that all customers participate equally in the program..." (Rose Direct, at 18).

Under G.S. § 62-2(a)(4) and (b) (2007) the Commission must ensure that a public utility such as Duke Energy not institute any rate plan or service programs that would result in the systemic and unilateral exclusion of the vast majority of a segment of its customers from the benefits of any program, or that results in those excluded customers being prejudiced or disadvantaged by higher rates or bills than those charged to non-excluded customers. Without substantial modifications to the proposed Settlement Agreement as recommended in this Brief, such exclusion of and prejudice to Duke Energy's low income and low and fixed income senior customers will occur.

B. The Evidence Fails to Show That Duke Energy's proposed Settlement Agreement Will Provide Just and Reasonable Rates and Service to its Low Income Customers

The Public Utilities Act requires that:

(a) Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable.
(b) Every public utility shall furnish adequate, efficient and reasonable service.

G.S. § 62-131(a) and (b) (2007)

The primary purpose of the Act is to assure that the public receive adequate service at a reasonable charge, and not to guarantee utilities' stockholders constant growth in value of and in dividend yield from their investment State ex rel. Utilities Comm. v. General Tel. Co. of Southeast, 285 N.C. 671, 687, 208 S.E.2d 681 (1974).

Duke Energy has made various generalized statements in this docket about the inclusiveness of its programs. Duke Energy witness James E. Rogers states that "our energy efficiency products and services will be convenient, affordable and reliable and available to all customers." Rogers Direct, at 12)(emphasis added) In Duke Energy's "Energy Efficiency Plan," filed May 7, 2007 ("EE Plan" or "Application"), it asserts that the goal and effect of its Save-a-Watt application is to "provide customers with universal access to energy efficiency and new technology"... "for the benefit of its customers." Application at 1-2. (emphasis added). Further in Duke Energy's Application, it states that the "save-a-watt approach will benefit Duke Energy Carolinas' customers, the public and the Company, by...Offering the potential to substantially lower bills for customers who participate in energy efficiency programs;" ...and "Providing more choices and options that help customers manage their bills in a rising energy price environment." Id. at 4-5 (emphasis added).

Duke Energy witness Charles J. Cicchetti asserted that for those participating Duke Energy customers, energy usage reductions will result in their receiving the benefit of lower monthly energy bills. Tr. Vol. 2, p. 91 (July/August 2008). However, as note in the Direct Testimony of Public Interest Intervenors' witness Roger Colton, at 32-39, the availability and eligibility criteria regarding Duke Energy's proposed EE programs will exclude the vast majority of Duke Energy's low income and low and fixed income senior customers from even receiving this alleged benefit. Because of the many remaining restrictive eligibility requirements, including renters as well as home-owners (the single positive change proposed in Duke Energy's Settlement Agreement), () the difference in treatment by Duke Energy will still result in non-participant rates, charges and services that are unjust and unreasonable.

Duke Energy has stated that its Weatherization and Equipment Replacement Assistance program for low income customers will be "available for up to 5,000 existing, individually metered, single family, owner-occupied all electric residences, condominiums and mobile homes." Application at 6. The inclusion of otherwise eligible renters does not appear to change that fixed number of potential low income participants.

In addition, Duke Energy's program requirements explicitly exclude homeowners and renters making less than 150% of the Federal Poverty Level. Id. The EE program thus will continue to exclude the vast majority of Duke Energy's low income and low and fixed income senior customers. Colton Direct, at 36-37. In addition, the Energy Efficiency Products program will provide "energy efficiency starter kits and compact fluorescent bulbs, not to exceed $30.00 in value" even to customers not residing in owner-occupied housing. Colton Direct, at 38.

However, Duke Energy's plan to distribute such starter kits or CFLs to low income customers cannot occur under existing federal program restrictions, as the local WAP agencies Duke Energy plans to use to distribute the starter kits and CFLs are not allowed under existing federal regulations to expend any labor or funds in relation to persons with incomes above 125% of the FPL, Colton Direct, at 37-39. Therefore, the local WAP programs in North Carolina will not be able to partner with Duke Energy as it has assumed, because Duke Energy's EE program (including the starter kit program) will only serve customers with incomes above 150% of FPL. There is also no evidence in the record to show that Duke Energy intends to fund any such distribution process itself, rather than attempt to use local WAP agencies. Colton Direct, at 40.

Duke Energy's reference to its own starter kit program also shows the extremely limited energy use savings to low income and low and fixed income senior customers that would result from such starter kits. As noted by Mr. Colton at the August 19, 2009 hearing, even using the modified, higher, numbers asserted by Duke (which would produce energy use savings equal to, at most, only 51.3 kWh or 88.9 kWh), "the delivery of CFLs cannot and will not be an effective or efficient or reasonable baseload energy efficiency program directed toward low income families." Tr. Vol. 2, pp. 79-80.

Nonetheless, these are the usage reduction services that Duke Energy proposes to distribute to low-income customers. It is important to note that Duke Energy witness Morgan reports that these are the "total savings for all measures." (Morgan Rebuttal, at Table 1). In contrast, a refrigerator replacement program, if made available to Duke's residential customers below 150% of the Federal Poverty Level, would produce savings for each of those low income families, on average, of 1,260 kWh per unit. (Colton Direct, at 57).

Morgan states (Morgan Rebuttal at 6, 10) that Duke Energy's proposed low income program in North Carolina is "modeled" after the low income EE program in Indiana. However, unlike the low income EE program in Indiana, which includes the large segment of low income customers below 150% of the Federal Poverty Level,[1] Duke Energy has chosen to exclude that same segment of its low income customers from EE programs it proposes as part of its Settlement Agreement in North Carolina.

Duke has since included a refrigerator replacement component within its proposed low income EE programs in North Carolina. However, Duke chose to exclude from its North Carolina program two key elements existing in its Indiana refrigerator replacement program: (1) providing refrigerator replacements whether or not someone also heats with electricity (in other words, the weatherization program could be applied to a gas-heated home, but could replace the refrigerator using all or part of Duke Energy's funds); and (2) providing refrigerators as part of the Weatherization Assistance Program (WAP) to households at or below 150% of the Federal Poverty Level/FPL.

[1] See description of income eligibility guidelines for Indiana's Weatherization Assistance Program at http://www.incap.org/energyinfo.html (accessed Oct. 6, 2009).

In fact, despite the glowing reports of how well the Ohio and Indiana Duke Energy programs are working, Duke Energy's current proposed Save-a-Watt program does not include any commitment to pursue those programs in North Carolina. Witness Morgan stated in his rebuttal testimony:

> If this level of services proves to be cost-effective, the Company could seek to increase the program availability.

(Morgan Rebuttal, at 12)(emphasis added). The evidence therefore shows that no such "universal access to energy efficiency programs" will in fact result from the implementation of Duke Energy's proposed Settlement Agreement, or is even intended by Duke Energy. Instead, Duke Energy's Settlement Agreement, as with its initial Application, intentionally and systemically excludes the vast majority of its low income and low and fixed income senior residential customers from participation in the EE programs. For those customers, there will be no "options" or ability to "elect to participate" in Duke Energy's EE programs. [2]

As a result of Duke Energy's own availability and eligibility restrictions (eg. only providing EE services to all electric homes, requiring customer ownership of any appliances or heat pumps to be replaced, and requiring household income between 150% -200% of the Federal Poverty Level), its proposed Settlement Agreement (even with removing the restriction on possible inclusion of otherwise eligible low income renters) still appears to only provide EE services for "up to 5,000" low income customers. Duke Energy's Settlement Agreement will therefore exclude approximately 98% of its low income customers from access to any EE program.

According to the U.S. Census Bureau 2006 American Survey data,[3] the total number of persons in North Carolina was 8,591,303, with the number of persons living at or below 150% of the Federal Poverty Level at 2,126,018, or 24.7% of the total population. The total number of Duke Energy's residential customers in North Carolina is 1,510,000. To determine the total number of Duke Energy's low income residential customers, one would apply the following calculation: 1,510,000 residential customers x .247, to equal 372,970 Duke Energy residential customers at or below 150% of the FPL. Subtracting the proposed 5,000 low income customers to be included in the Settlement Agreement's EE program from the total of 372,970, equals 367,970, the approximate number of Duke Energy's low income, residential customers who cannot participate in any of Duke Energy's EE programs.

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[2] Duke witness Rose, whose expertise seems to be based mainly on load forecasting and capacity pricing, rather than experience in serving low income energy customers, or the creation or implementation of energy efficiency programs for low income and low and fixed income senior customers, attempted to rebut Colton's original direct testimony concerning this systemic exclusion from Duke's proposed energy efficiency programs. However, Rose, other than making various unsubstantiated assumptions not based on data in the evidentiary record (or anywhere), did not actually address Colton's specific program by program critique of Duke's Application. See Colton Direct, at 31-43.

[3] NC WARN and Public Interest Intervenors request, pursuant to N.C. Gen. Stat. § 62-65(b) and R1-24(b), that the Commission take judicial notice of this U.S. Census Bureau data, as it is public information, and published and available from an official federal agency.

Thus, under Duke Energy's EE program restrictions as currently exist within the proposed Settlement Agreement, approximately 367,970 or 98% of Duke Energy's low income and low and fixed income senior residential customers will be excluded. If Duke Energy provided EE weatherization services to those customers at a rate of 5,000 per year, Duke Energy would only be able to provide such EE service to all of those low income residential customers in approximately the next 75 years (assuming no already included residence would need to be re-weatherized in that 75 year period).

This systemic exclusion by Duke Energy of almost all low income and low and fixed income senior residential customers is also intentional. Regarding the costs of its energy efficiency programs, Duke Energy "has the incentive to get those costs lower, because the more energy it can save, the greater it can earn under the rate rider provisions that it's proposing..." Cicchetti, Tr. Vol. 2, pp. 40-41 (July/August 2008). Because Duke Energy's proposed Settlement Agreement is still based on an "avoided cost" model, it allows the Company greater financial benefits for those programs where the spread between the avoided costs and the program costs are the greatest (i.e., where the cost-effectiveness is the highest). Given this incentive structure created by Save-a-Watt (unchanged by any possible concessions brought about by the proposed Settlement Agreement), Duke Energy is incentivized to "cream-skim," i.e., to take only those programs that are the most cost-effective, and exclude other cost effective programs (such as low-income programs). See Colton Direct, at 20-21, 26, 28-29.

In sum, Duke Energy, in order to maximize its revenue under the Save-a-Watt plan, has a financial incentive not to allow most of its low income and low and fixed income senior customers to participate in its EE programs, even if doing so would still be "cost effective."[4]

Morgan confirms that Colton's testimony (Colton Direct, at 20-21, 26, 28-31) was correct that under the Save-a-Watt incentive structure, Duke Energy would choose to exclude low-income customers and EE programs directed toward low-income customers, toward baseload customers, in favor of efficiency programs provided to customers generating higher returns. Morgan objected to Colton's testimony by stating that "Mr. Colton is advocating for a major increase in spending for low-income customer programs that are not cost effective or not as cost effective as the Company's other current program designs." (Morgan Rebuttal, at 13)(emphasis added). Again, it is not that the programs are not cost-effective at all.

[4] Duke witness Rose (Rose Rebuttal, at 4) bases his rebuttal testimony in part on an assumption that only 15% of Duke's low income customers fall into this non-served/excluded category because energy efficiency programs for them would be more expensive for Duke to implement. However, Rose's testimony is based on his incorrect assertion that low income customers make up only 10% of Duke's residential customers. Id. As noted at page 7 of this Brief, at least 24% of Duke's residential customers are "low income" according to available U.S. Census Bureau data. Thus, even under Rose's unsubstantiated analysis, the percentage of Duke's "low income" residential customers (and thus the percentage of those who will be excluded from Duke's EE programs) is must greater than he assumes.

The modifications to the Settlement Agreement proposed at the end of this Brief, as well as by Mr. Colton (Colton Suppl. Direct, at 10-11), to "rebalance" the proposed Settlement Agreement, by addressing existing availability and eligibility restrictions in the low income EE program, have been implemented by Duke Energy and other utility companies in other states (allowing greater numbers of low income utility customers to obtain energy usage reductions through EE).

The programs that Colton recommended at 54-59 of his Direct Testimony, as well as those proposed at the end of this Brief, have already been found by Duke Energy and other public utilities to be "cost-effective." However, they are not "as cost-effective" (Morgan Rebuttal, at 13) as non-low income EE programs, and thus not as revenue producing, as Duke Energy would like. To the extent that the low-income programs noted in Colton's testimony and this Brief are cost-effective, the regulatory justification for those programs is as a cost-effective usage reduction investment.

Duke Energy, in refusing to include such programs providing low income and low and fixed income senior customers with an opportunity to meaningfully participate in its EE programs, while at the same time implementing programs that systemically exclude those same customers from the existing EE programs, is therefore not providing them reasonable services, nor just and reasonable rates, in violation of G.S. § 62-131(a) and (b).

C. The Evidence Shows That Duke Energy's Settlement Agreement As Currently Proposed, Unreasonably Discriminates Against Duke Energy's Low Income Customers In Its Provision of Rates and Services.

The Public Utilities Act prohibits discrimination among a public utility's customers and states:

> No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service.

G.S. § 62-140(a) (2007). The legislative purpose of the "no discrimination" law is to prohibit a public utility from unreasonably discriminating among its customers. State ex rel. Utilities Comm. v. Southern Bell, 88 NC App. 153, 363 S.E.2d 73 (1987).

The instant situation is not merely one regarding different charges and services to participating and non-participating residential customers, where each customer has the ability to exercise a choice whether or not to participate in the EE plan. In such an energy usage reduction program allowing participation, customers can weigh the costs and benefits involved and make a choice regarding participation. In that situation, any

resulting prejudice or disadvantage as to charges or service could be viewed, as least in part, as resulting from the customer's voluntary choice.

Here, as the low income EE program currently exists within Duke Energy's proposed Settlement Agreement, Duke Energy has intentionally and systemically excluded the vast majority of its low income and low and fixed income senior customers (those who do not live in all electric homes, or those with household incomes below 150% of FPL) from participation in the Save-a-Watt EE program. At the same time, Duke Energy has unreasonably refused to implement cost effective programs that would allow the majority of its low income and low and fixed income senior customers the option of participating in a program to reduce their energy usage and resulting energy bills. The non-participation of low income Duke Energy customers in Save-a-Watt's EE programs is instead forced upon them by Duke Energy's unilaterally imposed program availability and eligibility restrictions, based solely on those customers' existing income level and household status.

One of the goals of the electric utility rate structure established under the Public Utilities Act is the elimination of intra-class prejudice or disadvantage, such as intra-class cross-subsidies. State ex rel. Utilities Comm. v. Edmisten, 314 NC 122, 169, 333 S.E. 2d 453, vacated on other grounds, 477 US 902, on remand 318 NC 279, 347 S.E.2d 459 (1985). Where substantial differences in services or conditions exist, the unreasonable application of the same rates may be discriminatory and improper under G.S. § 62-140(a). State ex rel. Utilities Comm. v. Edmisten, 291 NC 424, 230 S.E. 2d 647 (1976).

Even if under Duke Energy's proposed Settlement Agreement the same increased rate would be charged to middle and upper class customers/EE plan participants and low income customers/EE plan non-participants, application of the same rate is unreasonable, discriminatory and improper under G.S. § 62-140(a). That is because there are substantial differences in the conditions and services Duke Energy is offering to each group. This unequal ability to participate in EE usage reduction programs and thus benefit from lower rates, results from Duke's unilaterally imposed program eligibility and availability restrictions..

Such a discriminatory cost-shifting or cross-subsidization between participating customers and non-participating customers would in fact still occur in the EE Rider and programs Duke Energy proposes to implement in the Settlement Agreement. In other words, participating customers would (according to Duke Energy) benefit from lower energy bills, while non-participating customers would be bearing the costs associated with the program without any similar or sufficient offsetting benefits. (See eg. Colton Direct, at 78-82).

Mr. Cicchetti testified, Tr. Vol. 2, pp. 41-42 (July/August 2008), that Duke Energy's EE programs could "produce great benefit for participating customers" but acknowledged that "non-participating customers might see an increase... ." Duke Energy expert witness Stephen M. Farmer also stated in his pre-filed testimony that as a result of Duke Energy's Application "customer rates are expected to increase by about 2.2% by

the fourth year when compared to rates in effect for the twelve months ending December 2007. Customers who elect to participate in the energy efficiency programs offered by the Company can reduce their bill significantly." Farmer, Direct Testimony Summary at 5 (emphasis added). This EE related rate reduction for participating Duke customers, and resulting rate increase for low income customers unable to participate in the EE program, remains unchanged by the proposed Settlement Agreement.

The Settlement Agreement's 250% increase in usage reduction for EE program participants, while leaving low income non- program participants with the same resulting rate increase as before, creates an even greater discriminatory effect. Non-participants, the approximately 98% of Duke Energy's low income residential customers excluded by Duke Energy's EE program availability and requirements, will be both prejudiced and disadvantaged by being forced to pay higher bills. (See also Direct Testimony of Duke Energy witness Judah Rose, at page 3 of this Brief). Those low income and low and fixed income senior customers, through no fault of their own, or any voluntary choice on their part, would not be allowed by Duke Energy's programs to "elect to participate" and receive the direct benefits of those programs, as Duke Energy asserts its other residential customers will be able to do.

Rather than address this increased disparity between its residential customers, Duke's proposed Settlement Document does not propose any specific portfolio of low income EE programs. Instead, it merely states that Duke Energy will "convene the Advisory Group. . .to guide efforts to expand cost-effective programs for low-income customers." This discussion, however, occurs only after the Commission approves the Company's efficiency plan for the year. By design, therefore, this work will not influence what the Company offers in the near-term. The Company does not commit to expanding its low-income programs.

Moreover, there is no time frame placed on the work of the Advisory Group regarding low-income programs. For example, the Advisory Group only meets twice a year. While the Advisory Group may "establish working groups on specific topics," no specific commitment to establish a low-income working group is made, let alone a work group with a specific workplan and a specific timeframe within which to complete that workplan. The Advisory Group delay acerbates the exclusion of many Duke Energy ratepayers from benefiting from Save-a-Watt.

The incentive structure proposed in Duke Energy's low income EE program not only allows such an exclusion, but as noted above, affirmatively rewards this exclusion through the higher spread between avoided costs and program costs. The mere reference of an Advisory Group that might possibly address the need for greater low income EE programs, but without providing any specific details or timeframes, fails to ameliorate this and other related problems with Duke's low income EE program. Thus, Duke Energy's proposed Settlement Agreement inherently and unreasonably discriminates against its low income and low and fixed income senior customers, in violation of G.S. § 62-140(a).

II. DUKE'S COST RECOVERY METHOD WITHIN THE PROPOSED SETTLEMENT AGREEMENT IS UNJUST AND UNREASONABLE BECAUSE IT IGNORES NON-ENERGY BENEFITS TO DUKE FROM PROVIDING EE PROGRAMS.

Duke Energy's proposed Settlement Agreement is unjust and unreasonable because it does not reflect all avoided costs in its financial analysis. The Commission should therefore direct that utility-related Non-Energy Benefits (NEBs) generated by low-income efficiency investments be quantified by Duke on an annual basis.

What Public Interest Intervenors and NC WARN propose does not involve any calculation of "social" cost savings. The avoided costs that Public Interest Intervenors and NC WARN have identified are not "social costs" that are outside the realm of the utility ratemaking process. Rather, this analysis is limited to the specific cost components that would otherwise be reflected in Duke Energy's revenue requirement collected from ratepayers.

Recent authoritative assessments have been made of the utility-related non-energy benefits arising from the implementation of energy efficiency improvements in low-income housing units. An assessment of non-energy benefits by Oak Ridge National Laboratory[5] found utility benefit as follows classified as "ratepayer benefits" in 2001 dollars:

- Lower bad debt write-off: $89
- Reduced carrying costs on arrearages: $57
- Fewer notices and customer calls: $6
- Fewer shutoffs and reconnections for delinquencies: $8
- Insurance savings: $1
- Transmission and distribution loss reduction: $48

The total cost reductions accruing to Duke Energy would thus be $209 per treated customer in 2001 dollars. Bringing these avoided costs forward to 2009 dollars places the value at $255 (using the U.S. Department of Labor's Inflation Calculator). The dollar value of the non-energy avoided costs would need to be adjusted on an annual basis for inflation.

On the revenue side, Duke Energy's proposed Rider would allow the Company to recover the revenue that the Company loses as a result of the usage reduction resulting from low-income efficiency programs, by charging these lost revenues to all other customers. With respect to the low-income weatherization program, to allow the Company to collect this entire lost margin is inappropriate, since on the expense side, the Company has proposed no corresponding mechanism to reflect the decreased costs resulting from the efficiency investments. As a result, these dollars of non-energy

[5] Martin Schweitzer and Bruce Tonn (April 2002). Non-energy Benefits From the Weatherization Assistance Program: A Summary of Findings from the Recent Literature, Oak Ridge National Laboratory: Oak Ridge (TN).

avoided costs, in the absence of their identification and capture, would simply flow through as increased earnings to Duke Energy's shareholders.

If Duke Energy shareholders are to be held harmless against a decrease in revenue, they should not also be allowed to benefit from the decrease in expenses. These decreases in expenses should not be pocketed by Duke Energy shareholders as increased profits. The primary purpose of the Act is to assure that the public receive adequate service at a reasonable charge, and not to guarantee utilities' stockholders constant growth in value of and in dividend yield from their investment State ex rel. Utilities Comm. v. General Tel. Co. of Southeast, 285 N.C. 671, 687, 208 S.E.2d 681 (1974).

This process of capturing the non-energy avoided costs will have no negative consequences under the terms of the Duke Energy Save-A-Watt program. If the Commission allows the Company to capture some percentage of its energy avoided costs, it is entirely reasonable that the non-energy avoided costs should be treated the same way. Simply because one set of avoided costs is energy-related, while the other set of avoided costs is non-energy-related does not change the fact that both represent real sets of avoided costs.

The avoided costs identified here are not social benefits. They are concrete, quantifiable, expense reductions that, in the absence of the recommended ratemaking treatment, would flow through to investors as additional, unwarranted, increases in equity returns. The offsets calculated as described above should be provided as a supplement to the Weatherization Assistance Program (WAP) to fund additional weatherization activities in low-income housing units.

III. THE STIPULATION AGREEMENT DOES NOT REQUIRE DUKE TO ACTUALLY ACHIEVE ITS GOALS FOR ENERGY SAVINGS.

A. The Settlement Agreement Provides Duke Energy With Considerable Incentives For Conducting Save-a-Watt.

Utilities are permitted to recover costs for new DSM and EE measures pursuant to the provisions of Session Law 2007-397 (Senate Bill 3) and the resulting Commission rules. The explicit goals of Senate Bill 3, Section 1:

> To promote the development of renewable energy and energy efficiency through the implementation of a Renewable Energy and Energy Efficiency Portfolio Standard (REPS) that will do all of the following:
>
> a. Diversify the resources used to reliably meet the energy needs of consumers in the State.
>
> b. Provide greater energy security through the use of indigenous energy resources available within the State.

c. Encourage private investment in renewable energy and energy efficiency.

d. Provide improved air quality and other benefits to energy consumers and citizens of the State.

G.S. 62-2(a)(10). Any approval of a cost recovery rider needs to look at whether it is promoting our State's goals of achieving the least cost mix and maximizing the benefits to the consumers. As demonstrated above, even though the EE goals in the Settlement Agreement will lower demand and provide benefits to some consumers, the Save-a-Watt proposal unjustly does little to benefit low income ratepayers.

Secondly, Save-a-Watt needs to meet the specific requirements in subsection G.S. 62-133.9(d), that

> The Commission shall, upon petition of an electric public utility, approve an annual rider to the electric public utility's rates to recover all reasonable and prudent costs incurred for adoption and implementation of new demand-side management and new energy efficiency measures. Recoverable costs include, but are not limited to, all capital costs, including cost of capital and depreciation expenses, administrative costs, implementation costs, incentive payments to program participants, and operating costs. In determining the amount of any rider, the Commission:
>
> (1) Shall allow electric public utilities to capitalize all or a portion of those costs to the extent that those costs are intended to produce future benefits.
>
> (2) May approve other incentives to electric public utilities for adopting and implementing new demand-side management and energy efficiency measures. Allowable incentives may include:
>
> a. Appropriate rewards based on the sharing of savings achieved by the demand-side management and energy efficiency measures.
>
> b. Appropriate rewards based on capitalization of a percentage of avoided costs achieved by demand-side management and energy efficiency measures.
>
> c. Any other incentives that the Commission determines to be appropriate.

In its Rule R8-69, the Commission establishes a procedure for the annual review of the costs sought to be recovered through utility EE and DSM programs. The rule does not change the need for the "reasonable and prudent cost analysis," nor does it shift the burden away from the utility. The Commission is therefore required to determine if the incentives are appropriate and lead to cost-effect programs that benefit all of the consumers, and are not simply designed to maximize utility profit.

The Commission recognized in its February 26, 2009 Order in this docket that Duke Energy had not met its burden of proving that the Save-a-Watt cost recovery mechanism met the Senate Bill 3 standards as reasonable and prudent costs. The record before the Commission simply did not contain an adequate justification for the cost mechanism in the Save-a-Watt proposal and could not find that the resulting rates could be just and reasonable. Before it could make any final determination, the Commission required Duke Energy to file extensive supplemental information. Duke Energy did so but in the meanwhile negotiated a settlement with the Public Staff and the national environmental organizations.

Although somewhat less than in Duke Energy's original proposal, the Settlement Agreement contains considerable rewards and incentives to Duke Energy for carrying out EE programs under Save-a-Watt. It allows Duke Energy to be compensated for a percentage of its estimated energy and capacity-related avoided costs, net loss revenues for a limited period and a "tiered" performance incentive structure based on avoided costs.

These incentives mean that Duke Energy has the opportunity to receive a greater return on its investments in its EE programs than it would have without Senate Bill 3. Although not as excessive as in the Save-a-Watt funding mechanism originally requested, the incentives and rewards in the Settlement Agreement allow for quick capitalization and fairly immediate profits.

B. The EE Goals In The Settlement Agreement Are Not Mandatory.

On its face, the Settlement Agreement is only for the first four years, although it does contain long term performance goals. Settlement Agreement, Exhibit B, Sections B and E. Duke Energy agreed to a ramped target of 2% savings over the first four years and then an additional 1% a year after that. The result of that commitment is best shown by the Environmental Intervenors' witness, John Wilson, in his Exhibit 2 to his direct testimony.

At best, the new commitment for savings in the stipulation brought a commitment made earlier by Duke Energy up a couple of years. The difference between the settlement agreement and the earlier Save-a-Watt commitment is that the new commitment allows Duke Energy to start later but moves up the 1% annual savings up two years. In his testimony in the record, Duke Energy CEO, Jim Rogers, touted Duke Energy's agreement with the national efficiency associations to start an EE program in 2015 that will increase 1 percent a year for ten years. See also Hager Supplemental Exhibit No. 2. At the first set of hearings on Save-a-Watt, Duke Energy witness Schultz, and others, made it clear that this commitment was contingent "upon approval of its save-a-watt initiative." Tr. Vol. 3, p. 21 (July/August, 2008). In the most recent hearing on the stipulation, Duke Energy witness Theodore Schultz also agreed that Duke Energy should be able to meet its goals, but continued to hedge when pushed on whether Duke Energy would actually meet those goals. He testified that

> We are designing our programs to go after all cost-effective energy efficiency and striving towards the commitments that are here in this four-year plan and our national commitment assuming we still have the save-a-watt mechanism in place at 1 percent a year.

Tr. Vol. 1, pp. 47-48 (August 19, 2009). In essence, Duke Energy's commitment to EE is only as long as Save-a-Watt is in place.

The recommendations by earlier witnesses of an immediate 1% annual savings were not given credibility by Duke Energy witnesses. In the earlier hearings, NC WARN's witness, Dr. John Blackburn, testified that a 1% a year decrease in demand was economic and achievable through proven EE measures, although he believed that the 1% could start almost immediately, with a 10% decrease in demand in ten years.[6] He based this on studies in North Carolina, Duke Energy's own Forefront study and what was being achieved in other states. NC WARN Rogers Cross Exhibit. 1. The witness for the Public Interest Intervenors, Roger Colton, testified that many of the programs Duke Energy should consider to achieve this were actually in use by Duke Energy in other states. Colton Direct at 57; Tr. Vol. 2, pp. 66-68 (August 19, 2009). The principal differences between those recommendations and the goals in the Settlement Agreement is that Duke Energy ramps up its Save-A-Watt programs over four years and then goes into the 1% a year savings.

If the Commission approves the settlement agreement in full or in a modified form, then the Public Interest Intervenors and NC WARN believe that the Commission in its Order should make the "goals" in the agreement binding on Duke Energy. Otherwise, the commitment has relatively little substance and may not influence the way Duke Energy, as a corporation, does business in North Carolina.

If at some future point, Duke Energy wishes to modify its Save-a-Watt goals, it should be able to do so. Increasing the levels of EE savings could be simply a part of the annual REPS reporting requirement. On the other hand, if Duke Energy wished to decrease its level of EE savings, it should be required at a minimum to show cause why the goal is no longer economical, as well as showing that a lower goal was in the public interest. The Commission should then ask Duke Energy serious questions about its corporate commitment to EE as the "fifth fuel," as characterized by Mr. Rogers.

This is in line with the "off-ramp" provisions of Senate Bill 3; pursuant to G.S. 62-133.8(i)(2), the Commission has the authority to modify or delay the Senate Bill 3 provisions if it finds that it is in the public interest to do so and if it finds that the utility demonstrates it "made a reasonable effort to meet the requirements."

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[6] See report of Dr. Blackburn, "North Carolina's Energy Future: Data Shows We Can Close Power Plants Instead of Building New Ones," March 31, 2009, filed in Dockets E-7, Sub 790 and E-100, Sub 118.

For the reasons given above, the Public Interest Intervenors and NC WARN argue that it definitely is in the public interest for the Commission to continue strong oversight of EE programs that are given additional incentives, such as Duke Energy has requested in Save-a-Watt.

CONCLUSIONS AND RECOMMENDATIONS.

For the reasons given above, the Public Interest Intervenors and NC WARN urge the Commission to find that the Settlement Agreement is not in the public interest and should be denied or significantly modified.

In addition to the issues raised above that need resolution, the Public Interest Intervenors and NC WARN offer the following recommendations to the Commission for inclusion in the final order in this docket:

1. In addition to offering weatherization services to customers below 150% of the Federal Poverty Level, Duke Energy should commit to implementing a baseload electric usage reduction program modeled on the "exemplary" low-income programs presented in the catalogue of such programs developed by the American Council for an Energy Efficient Economy (ACEEE), previously discussed in this proceeding.

2. In addition, Duke Energy should commit to importing its own successful low-income programs from Indiana and Ohio to North Carolina beginning in the first year. Duke should also incorporate two into its North Carolina program two key elements of its existing Indiana refrigerator replacement program: a) inclusion of households below 150% of the FPL; and b) inclusion of households with Duke customers, whether or not the household lives in a 100% electric usage home.

3. The scope and funding for the program components identified above should be made subject to the deliberations of the Advisory Group identified in the Settlement Document. A plan to deliver efficiency services, including baseload electric efficiency services, to low-income and low and fixed-income senior customers should be delivered to the Commission for approval within 60-days after a final order in this proceeding. The Advisory Group should be directed to respond to the question: what level of programs should be offered to low-income and low and fixed-income senior customers? The Settlement Document should be modified, however, and the Order should be clear that the question of *whether* such programs should be offered to low-income and low and fixed-income senior customers has been decided.

4. The plan to be developed by the Advisory Committee should include:

   - a specific dollar commitment to low-income programs, including either a specific commitment to the number of low-income units to be served, or a specific proportion of total residential budget to be devoted to low-income customers;
   - a commitment to pursue electric baseload programs, including refrigerator replacements;
   - a commitment to deliver energy efficiency services to households with income below 150% of the Federal Poverty Level;
   - a commitment to a program directed specifically toward rental properties, including investments directed toward property owners participating in the Section 8 housing program; and
   - a specific workplan through which housing units treated not only through the Department of Energy's Weatherization Assistance Program (WAP), but housing units constructed or rehabbed through public programs such as HOME and the Low-Income Housing Tax Credit (LIHTC), will be reached.

5. The cost recovery mechanism in Save-a-Watt should reflect the non-energy benefits to Duke Energy from providing EE services to ratepayers.

6. The goals in the Settlement Agreement should be made mandatory, with the proviso that if Duke Energy wants to lower is energy savings, it should show cause to the Commission.

7. Duke Energy should amend its 2009 Annual Plan filed in Docket No. E-100 Sub 124 and in subsequent IRPs, to reflect its Save-a-Watt goals. Decisions about the construction or cancellation of generating plants should reflect the mandatory Save-a-Watt goals.

For the foregoing reasons, NC WARN and the Public Interest Intervenors respectfully request that the Commission not adopt and approve Duke Energy's proposed Save-a-Watt program as set forth in the Settlement Agreement.

This the 7th day of October, 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies that he has served a copy of the foregoing JOINT POST-HEARING BRIEF OF NC WARN AND PUBLIC INTEREST INTERVENORS upon the parties of record in this proceeding or their attorneys by electronic means or depositing a copy of the same in the United States Mail.

This the 7th day of October, 2009.

Jack Holtzman
Staff Attorney