# THE EDWARDSPORT IGCC PLANT:

## A monument to cost overruns, concealment, mismanagement and malfeasance



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# THE EDWARDSPORT IGCC PLANT:

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### INTRODUCTION

It was supposed to be Duke Energy Inc.'s shining jewel — the biggest, the best, the latest in efficient and clean coal-powered electricity, the answer to Indiana's power needs.

Instead, the 618-megawatt Edwardsport Integrated Gasification Combined Cycle Generating Facility (IGCC) is a $3.554 billion monument to cost overruns, concealment, mismanagement and malfeasance. For all Duke's hype about the Knox County plant being green, it will spew four million tons of carbon dioxide annually into the atmosphere for at least 30 years, exacerbating the worldwide, menacing issue of climate change.

And if Duke has its way, 790,000 Indiana electric customers will pay dearly for this debacle.

Despite cost overruns, despite mismanagement, despite a scandal that toppled a high-ranking state official and several Duke executives, there has been no stopping the Edwardsport project. Its seeds were sown in the mid-2000s, when high natural-gas prices made the prospect of clean coal-powered electricity particularly alluring. It took root through Duke's grandiose desires to own one of the first large-scale coal-gasification plants in the world. And it was nurtured by federal, state and local tax incentives and Gov. Mitch Daniels' fondness for "home-grown energy,"[1] which signaled his desire for a smooth road for Duke and its novel technology.

Daniels' appointee to lead the Indiana Utility Regulatory Commission (IURC), David Lott Hardy, heard the signal loud and clear. Through behavior that ranged from turning a blind eye, to determined manipulation, to overt malfeasance, Hardy and several of his subordinates at the commission abandoned their regulatory duty in favor of eagerly promoting the Edwardsport project and themselves. Their corrupt behavior gave Duke an unfair advantage over the interests of their electric customers — the ratepayers — who are expected to foot the bill but ignore the little men behind the curtain.

Four citizens' advocacy and environmental organizations, known collectively as the "joint intervenors," decidedly have not acquiesced. The groups — the Citizens Action Coalition, Save the Valley, the Sierra Club and Valley Watch — coalesced to pull back the curtain, to challenge Duke and its claims on customers' pocketbooks, to shine a light on the unseemly behavior of state regulators and Duke executives, and to question the extent to which that behavior has irrevocably tainted a process that Indiana citizens should be able to trust.

Construction of the Edwardsport IGCC plant is nearly completed; the plant used the coal-gasification process to produce power for the first time Oct. 30[2] as part of a testing program announced Oct. 17.[3] A proposed settlement, announced April 30, calls for Duke to charge its electric customers $2.595 billion plus financing charges over and above the hundreds of millions of dollars they already have paid during construction. Under the settlement, bills for residential customers, whose rates already increased 5 percent to cover Edwardsport construction costs, would climb another 9.6 percent.[4]

The proposed settlement was reached by a utility anxious to cover its exorbitant expenditures and get beyond this nightmare; a group of industrial customers whose laser focus on the bottom line renders other issues moot; and the Indiana utility consumer counselor, A. David Stippler, a governor-appointed state employee who is supposed to represent customers' interests but who inexplicably has agreed to excuse Duke and several regulators' abhorrent behavior.

The citizens' groups adamantly oppose the proposed settlement. They contend that it:

- Requires customers to pay for a project that should not have been approved and would not have been, had the truth about its true risks and costs been told from the beginning;
- Sweeps under the rug the gross mismanagement and concealment that led to cost overruns, as well

as the ethical misconduct that compromised the commission's regulatory oversight of the project; and

- Does nothing to mitigate the massive amounts of carbon dioxide—the primary culprit in worldwide climate change—that a completed Edwardsport will spew into the atmosphere for at least 30 years.

The commission is expected to rule on the proposed settlement by year's end.

## DUKE'S LOFTY ASPIRATIONS LEAD TO GROSS MISMANAGEMENT

Duke had visions of building an IGCC plant since the early 2000s. In October 2004, it signed a letter of intent to study the feasibility of doing so.[5] The Duke project was to be the first IGCC plant built by "the alliance" of two worldwide companies, Bechtel Corp. and General Electric Co.

PSI Energy Inc., a Duke subsidiary whose name still conjured memories of the failed Marble Hill nuclear plant project, which was left half-finished after $2.5 billion had already been spent, asked the IURC on Sept. 7, 2006, to grant the Edwardsport project a certificate of public convenience and necessity. (Less than a month later, PSI legally changed its name to Duke Energy Indiana.[6]) The plan was for Duke to own 80 percent of the plant and its partner, Vectren Energy Delivery of Indiana Inc., to own 20 percent.

James E. Rogers, Duke president and chief executive officer who had previously held the same job at PSI after the Marble Hill fiasco, filed testimony with the commission that IGCC technology would allow Duke to "most economically, efficiently and robustly meet our anticipated baseload capacity needs over the long term." The IGCC technology was "especially attractive," he said, "because it has so much potential for both near– and long-term cost-effectiveness while being an environmentally responsible choice."

The citizens' groups saw it much differently. At the IURC's first hearings on the matter on May 15, 2007, one of the groups' witnesses testified that alternative energy sources would be less expensive and less risky than the IGCC plant. Duke, for example, could install wind turbines with more than twice as much capacity as Edwardsport but without "significant operational or reliability constraints."[7] The recommendation was ignored but has since been vindicated; as of the first quarter of 2011, 1,889 megawatts of wind energy had been installed in Indiana—though not by Duke—but only 26 percent of the wind-powered electricity, which is considerably cheaper than the projected cost of electricity from Edwardsport, is bought by Indiana utilities.[8] Another witness for the citizens' groups said that efficiency measures could meet all new power needs through at least 2020.[9] And a third maintained that Duke had failed to consider the cost of mitigating carbon dioxide emissions if the government imposed new regulations.[10]

Vectren Energy soon came to the same conclusions; it announced on Aug. 1, 2007, that it would not participate after all. Its needs, Vectren said, "could more appropriately be satisfied through other alternatives, including natural gas peaking generation, purchased power, renewable resources and customer conservation."[11]

Still, the five-member commission sided with Duke, voting unanimously on Nov. 20, 2007, to grant the certificate of public convenience and necessity for Edwardsport.[12] Duke went on to persuade the Indiana General Assembly to adopt a tax credit for IGCC plants that use Indiana coal, estimated at the time of approval to be worth $124 million; secure $133.5 million in federal tax credits; and win tax concessions from the Knox County Council valued at $204 million.[13] It also received a $1 million federal grant to study the permanent storage of carbon dioxide.[14]

Even with all that support, even with their brave public face, Duke executives may have been quietly anxious that the technology was too new, too expensive, too unsure a thing. And so they embarked on a campaign to bring some certainty to the project: they befriended David Lott Hardy and several staff members at the IURC, which held the fate of Duke and the Edwardsport IGCC plant in their hands.

## GROSS MISMANAGEMENT LEADS TO COST OVERRUNS

Duke executives were right to worry. Having failed to learn from the Marble Hill debacle, they were doomed to repeat history. Indeed, the Edwardsport IGCC plant has been egregiously mismanaged from its inception.

From the time that the plant was merely a twinkle in their eyes through more than four years of construction, Duke executives were either incapable of making valid cost estimates or of containing costs—or both. When Duke requested the certificate of public convenience and necessity in September 2006, it said the plant would cost $1.3 billion to $1.6 billion.[15] After conducting a front-end engineering and design study, Duke told the commission in April 2007 that the plant would cost $1.985 billion;[16] this was the cost at which the commission originally approved the project. Thirteen months later, Duke raised the price to $2.35 billion, a result of

"unprecedented global competition for construction-related commodities and engineered equipment and materials, as well as increased labor costs."[17]

In November 2009, Duke issued a news release warning that "design modifications and growth in the scope" of the project would add at least $150 million to the project's $2.35 billion cost."[18] James Turner, then Duke's No. 2 executive, had misgivings about the seemingly low estimate. "How about this for a new first paragraph on the press release?" he asked in the subject line of an e-mail dated Nov. 23, 2009. He wanted the paragraph to say that "design and scope growth" would cause the project "to exceed its current estimated cost by as much as 8% to 17%."

Eight percent would equal $188 million; 17 percent, $399.5 million. Turner did not prevail in the argument over the news release. But when the company made its filing with the commission in April 2010, his warning seemed prescient: the estimate had skyrocketed even higher than Turner had predicted—to $2.88 billion,[19] an increase of more than *half a billion dollars.*

In September 2010, Duke, several industrial customers and the Indiana Office of the Utility Consumer Counselor proposed a rate settlement in which customers would be charged $2.975 billion.[20] Over the next two months, the public learned about Duke and the IURC's corrupt behavior, causing the customer groups to back away from the settlement and forcing Duke to re-open negotiations.[21] In October 2011, Duke's Board of Directors approved an updated cost estimate of $3.3 billion.[22] On April 30, 2012, Duke and the same groups proposed a new settlement that would have customers paying $2.595 billion.[23] And on Oct. 31, Duke filed a new estimate with the commission: $3.554 billion.[24]

Duke executives' inability to contain costs may be matched only by their arrogance. They rejected a "lump sum turnkey" proposal offered by Bechtel in January 2007 because it was higher than they expected;[25] they were convinced they could build the project for less.[26] A witness suggested that the decision was made by the very people whose egos would be fed and jobs secured were they to assume a project-management role.[27] Even Bechtel, which would have assumed the risk under a lump-sum arrangement, scoffed at Duke's decision: "Rather than relying on Bechtel's proposed structure, execution plan and pricing, Duke substituted its own in its submission to the IURC," Bechtel President Bill Dudley Jr. wrote in a Feb. 17, 2010, letter to Duke.[28]

The lump sum turnkey price cannot be publicly disclosed; many documents filed with the commission



have been ruled confidential. However, American Electric Power, which wanted to build a plant on the Virginia-West Virginia line that was nearly identical to Edwardsport, *did* take advantage of the Bechtel-GE alliance's offer of a price guarantee[29] of $2.23 billion.[30] As for Duke's ability to contain costs? It took only 13 months for the Edwardsport price tag to exceed the AEP lump sum; these days, the price tag surpasses the AEP lump sum by *more than $1.3 billion.*

Not all Duke executives were oblivious to the problems. E-mails obtained by the citizens' groups and the news media through open-records requests and discovery motions show that, as the new guy on the block, Senior Vice President Richard Haviland, brought in in January 2008 to oversee construction, was perhaps more observant than the Duke employees who assured the commission that they had costs and construction in hand. He expressed frustration in a May 7, 2009, e-mail to Turner, his boss, in which he said, "we just see things differently and have different motivations—and you have the only vote… I can only vote with my feet." Turner responded: "I hope you don't vote with your feet. That would be very unfortunate." It's unclear if Turner addressed Haviland's concerns; most of the rest of the e-mail was redacted by Duke and remains so by order of the commission. But this *is* clear: Haviland's concerns were not addressed *adequately*.

"I am very uncomfortable with where we are and think the only way out is to get some Bechtel cost engineers… (and) give them the responsibility to pull it all together," he wrote in a June 8, 2009, e-mail. Two months later, he warned Turner that "we have a low probability of staying in budget" because new forecasts from Bechtel called for much more steel, concrete, pipe and cable than previously anticipated. Duke, he said, needed to get a handle on things lest "we can leave ourselves open on the prudency end…" He was referring to the requirement that a project be found prudent by the commission before customers' electric rates increase to pay for it.



"I think Duke was unprepared for this from a management and people standpoint—and we are challenged today with the skill and experience level," he wrote. "You cannot get an outcome by fiat and hope is not a strategy."

Haviland told Turner on Oct. 17, 2009, that "I do get frustrated that since Duke has not built anything for so long the mgmt team is not sensitive to the effort required or risks or value added." That same day, when he suggested talking points for Rogers to use at an upcoming board meeting, Haviland said that Edwardsport "is just a bigger project than Bechtel thought it was designing."[31]

For that matter, Duke's executives failed to acknowledge that Edwardsport, as a multi-billion-dollar, first-of-its-kind megaproject, carried extraordinary risk and was subject to significant increases in capital costs, delays in the in-service date and operating problems. Instead, they repeatedly and confidently assured the commission that they had the project under control and that the plant would perform initially and consistently at 84 percent of its capacity—an unusually high rate, especially for a first-of-its-kind. (Only two other coal-gasification power plants exist in the United States and both are less than half the size of Edwardsport. One, at the Wabash River site near Terre Haute, was built by Duke predecessor PSI, owned by Wabash Valley Power Association and operated by Duke.[32] It ran so poorly in its initial years of operation that a 2009 IURC filing said it "increases Wabash Valley's exposure to unit outage."[33])

Despite warnings from the citizens' groups, Duke refused throughout 2007 and early 2008 to consider any scenario in which the plant might cost more than estimated. Even after recognizing in fall 2009 that the project's cost was again rising, the company failed to promptly conduct new economic studies to determine if it was feasible to continue. Instead, Duke continued to rapidly spend money from October 2009 through March 2010, turning "to-go costs" into "sunk costs" in an effort to make the project a self-fulfilling prophecy.[34]

When Duke finally conducted economic analyses to present at a July 2010 commission hearing, it was clear that its witnesses had used flawed assumptions to bias the results and make it appear that continuing construction at Edwardsport was the most cost-effective option. David Schlissel, an MIT- and Stanford-educated engineer and lawyer, testified that Duke did not consider any alternate economic scenarios under which the plant's cost would rise. Duke used an unrealistically high price for natural gas to judge that continuing construction of the coal-gasification plant was the better choice. Duke also asserted—with no basis in fact and no plans on the books—that expensive *nuclear* units would be needed if the IGCC project were stopped. And it still was not owning up to the eventual costs of carbon capture and sequestration.[35]

What's more, Duke failed to acknowledge that, between 2007 and 2010, its forecast for electric demand for 2018 dropped from 7,500 megawatts to 6,800 megawatts, a drop of 700 megawatts that obviated the need for a new 618-megawatt plant.[36]

Duke's partner Bechtel also was aware of Duke's management issues. Bechtel project manager Brian Hartman charged in an October 2010 letter to Mike Womack, Duke's vice president and project manager, that Duke breached its contract with Bechtel by shuffling staff, stopping monthly project reports and review meetings and reducing documentation of certain work. "You have acknowledged in our discussions that there are significant risks involved with such changes," he wrote. "In addition, the precipitous speed with which you intend to implement these transitions will almost certainly have a detrimental impact on the work, and potentially the long term interest of the project"[37]

In addition to the systemic issues, several incidents also raise doubts about Duke's management skills. Notably, the company wasted *$100 million* by plowing ahead with a water-disposal system that would have injected poisonous water deep underground,[38] despite warnings seven months earlier from GE that "grey water," a byproduct of the coal-gasification process, would be hazardous.[39] Even after learning that grey water contained enough arsenic and selenium to be characterized as hazardous under federal law, Duke wanted to move ahead, so executives recruited Gov. Mitch Daniels to ask the U.S. Environmental Protection Agency (EPA) to let Duke do so. The EPA said "no," and Duke had to abandon the wells it had drilled and switch to a water-

# DUKE OBFUSCATES ABOUT CARBON CONTROLS

Duke wanted to be the first utility in America to build a large-scale coal-gasification plant, and one way to secure supporters was to promote the Edwardsport plant's alleged "green" qualities.

So its executives talked from Day 1 about carbon capture and sequestration,[1] a process in which carbon dioxide — the primary culprit in worldwide climate change — is captured, compressed into a liquid, and injected underground for permanent storage. But they have always been careful to discuss the "potential" for the carbon sequestration to be employed at "capture-ready" Edwardsport.

Gov. Mitch Daniels bought it; he has hailed Edwardsport's use of clean-coal technology. Some environmentalists did, too; a 2007 *Indianapolis Star* story mentioned some environmentalists who were excited about "the company's pledge to pioneer (the) technology."[2]

Duke sponsored the governor's September 2008 energy summit, which focused on carbon capture and sequestration and for which Duke CEO James Rogers was a keynote speaker. But just three months earlier, the *New York Times Magazine* ran a profile in which Rogers predicted that carbon capture and sequestration was 10 to 15 years away.[3]

If the message was mixed and some jumped to the wrong conclusion, so be it. The fact is, Duke has no firm plans to install and operate the capture and sequestration equipment, which would add considerably to the cost of the plant.[4] And while some scientists and ecologists are hopeful that the technology ultimately will provide a significant part of the answer to climate change,[5] its adoption has stalled: Edwardsport and Southern Co.'s Kemper project in Mississippi are the only IGCC plants under construction out of more than three dozen proposed in the United States in the last decade.[6] Moreover, low natural-gas prices have dampened enthusiasm about the combination of IGCC and carbon-capture technology.[7]

IGCC technology would reduce emissions of sulfur dioxide, nitrogen oxide and mercury, permitting Duke to lay claim to the moniker of "clean coal." Duke contends that the process also would produce 45 percent less carbon dioxide per kilowatt hour while producing 10 times the power of the old coal-fired plant at Edwardsport that Duke plans to mothball.[8] But because the plant is so much bigger than the old, 160-megawatt plant, the total amount of carbon spewed from Edwardsport will dramatically increase when the new plant goes online.

So what to do about *four million tons* of carbon dioxide that a completed Edwardsport will emit annually for at least 30 years? Apparently, Duke's answer is nothing — at least not any time soon. The company says it wants to continue to study carbon capture and sequestration for the indefinite future, assuming the commission orders its customers to pay for the further study.[9]

The four citizens' groups challenging the proposed Edwardsport settlement believe that climate change will not wait for the indefinite future, so they want the commission to act now to mitigate Edwardsport $CO_2$ emissions. Sierra Club witness Nachy Kanfer urged the commission to require Duke to mitigate at least 1.6 million tons of carbon dioxide a year through a combination of "old coal" plant retirements, efficiency and renewable generation.[10]

## ENDNOTES

1 James E. Rogers, Duke president and chief executive officer, in testimony filed Oct. 24, 2006, with the Indiana Utility Regulatory Commission as part of petitioner's case in chief, Cause No. 43114

2 Tim Evans, "Environmentalists split over Duke plans for plant," *Indianapolis Star,* Sept. 20, 2007

3 Clive Thompson, "A Green Coal Baron?," *New York Times Magazine,* June 22, 2008

4 Center for Climate and Energy Solutions, http://www.c2es.org/technology/factsheet/CCS, retrieved Oct. 27, 2012

5 Mike Orcutt, "The Carbon Capture Conundrum," *Technology Review,* Aug. 21, 2012

6 Eileen O'Grady, "Southern, Duke push US coal gasification; others quit," Reuters, June 12, 2012

7 Matthew L. Wald, "With Natural Gas Plentiful and Cheap, Carbon Capture Projects Stumble," *New York Times,* May 18, 2012

8 Tim Evans, "Environmentalists split over Duke plans for plant," *Indianapolis Star,* Sept. 20, 2007

9 Duke Energy Indiana proposed order, submitted on behalf of all settling parties, in Cause No. 43114-IGCC-4S1, filed Aug. 17, 2012

10 Nachy Kanfer of Sierra Club in testimony filed June 29, 2012, with the Indiana Utility Regulatory Commission in Cause No. 43114-IGCC-4S1

treatment process that consultants had recommended much earlier.[40]

In November 2009, a crane's lifting lug failed, dropping a 40,000-pound, 100-foot column that it was attempting to lift from horizontal to vertical. The following August, an erection contractor damaged the shell of a heavy steam turbine while flipping it over.[41]

Another company with such a troubling record might be terrified to take its case in a stringent regulatory-review process, especially with billions of dollars on the line. But Duke executives had some insurance. They paid $3 million — for which ratepayers yet may be charged — to a Washington State management-consulting company to testify before the commission that Duke acted prudently at Edwardsport and did not break laws.[42] Even more important, Duke executives knew their vast shortcomings on managing a construction project would not be a fatal flaw. They had already greased the skids.

## COST OVERRUNS LEAD TO CONCEALMENT AND CORRUPTION

Hardy, the IURC chairman who had spent a good part of his career at PSI, wanted to please his boss, Gov. Daniels, who had embraced "homegrown energy" and the Edwardsport plant. He also wanted to secure cushy and lucrative futures for his best buddies and himself. Duke desperately needed to pass along its massive cost overruns to its electric customers. It was a match made in heaven.

Hardy was nothing if not loyal to his friends, even when it meant breaking the rules. And he had a willing partner in James Turner, Duke's president and chief operating officer in charge of U.S.-franchised electric and gas, who pledged to his boss, CEO James Rogers, in a Jan. 17, 2010, e-mail that "one of my top priorities this year is to reduce the regulatory risk associated with Edwardsport."[43]

Turner said he would pressure contractors and seek partners "to absorb some of the investment."[44] He may have had other ideas in mind about how to reduce the regulatory risk (he may have expressed them in the e-mail, but a good chunk of it was redacted by Duke and remains so by order of the commission).

Over the next several months, Turner schmoozed mightily with the state's top utility regulator, sending Hardy several hundred e-mails in which chit-chat about their lifestyles — fast cars, good meals, travel and families — was intermingled with information about Edwardsport and personnel decisions.[45] He smoothed ruffled feathers, saw to it that two of Hardy's close friends got high-level jobs at Duke and implied that Hardy may someday enjoy the same.

Fortune fell first on W. Michael Reed, who spent much of his career at GTE/Verizon, where he became friends with Earl Goode, the governor's chief of staff. More recently, Reed worked three years as the IURC's executive director before becoming secretary of transportation, a position in Gov. Daniels' cabinet, in 2009. When word leaked that Jim Stanley, president of Duke Energy Indiana, was to be promoted, Hardy apparently arranged for Reed to chat with Turner. Hardy inquired in a March 8, 2010, e-mail how the conversation went, and Turner responded that, while it went well, "Mike's challenge is that he would want to use the chairman of the iurc *(sic)* as a reference, which could end up killing his candidacy in it's *(sic)* cradle."[46]

It did not. When things didn't move quickly enough for Hardy, he sent an e-mail on March 29 to Turner, inquiring about his sick and elderly mother's health and asking "what's the plan for the IN President?" Mother was better, Turner responded, and interviews would be arranged shortly.[47]

Turner offered the job to Reed on May 11 and told Rogers, the CEO, that he would inform David Pippen, the governor's top lawyer and a senior policy director. Reed was to tell Goode.[48] Rogers sent Turner a May 18 e-mail telling him that "Gov is ok" with the hiring and "I told him we would follow his lead as to timing."[49] Duke announced the hiring on June 9, 2010.[50] Reed's hiring was sanctioned by the Indiana Ethics Commission, as required when certain state employees propose to take jobs with a private company with which they did state business. The ethics commission did not require him to wait a year, as the Daniels administration's post-employment restrictions ostensibly require for a state employee who "made a regulatory or licensing decision."[51] Reed began his Duke career on June 14, 2010.[52]

With Reed in place, he and Hardy went about pushing Turner relentlessly to hire Scott Storms, the commission's general counsel and chief administrative law judge. This occurred even as Storms presided over the Edwardsport case, which could make or break the company for which he wanted to work. Reed apparently felt beholden to Storms, who coached Reed for his job interviews with Duke.[53]

Kelley Karn, Duke's lead Indiana regulatory lawyer, called Storms on March 10, 2010, to tell him that a position was opening. She sent an e-mail on April 11 to alert him when the job had been posted. They had lunch on April 16 and spoke at least 10 times about the job from March

through August.[54] But Storms did not recuse himself from Duke-related business until early August, when he officially applied for the job. Interestingly, Hardy e-mailed Reed on July 21 to inform him "its *(sic)* a go."[55]

The process hit a snag a month or so before the job was offered to Storms. Karn e-mailed Catherine Stempien, Duke's senior vice president of corporate legal services, and cc'd Reed on June 30, 2010, to report that "I'll also plan to tell Scott Storms that we will be filling the position and that we cannot consider him at this time." Reed responded: "Do not understand why we cannot consider Scott? Has something changed?" Karn e-mailed Stempien, this time without cc'ing Reed, to say, "Mike is concerned that Hardy has NOT been told we would not hire him… This could all blow up with Hardy being mad that we won't hire Scott. I'm really not sure how to get out of this mess."[56]

Turner took care of it. In a July 26 e-mail to Rogers, he said that he had spoken to Pippen, the governor's chief counsel, and "I think we would be fine to move forward with discussions with Scott Storms." When Rogers raised a concern, Turner reassured him: "I understand the bother point. I will say I was pleasantly surprised by how positive and supportive the gov's chief counsel was."[57]

Reed sent Storms and Hardy an e-mail on July 26, confirming that Storms would be hired. Storms acknowledged the e-mail the next morning and nevertheless presided over a hearing about Edwardsport later that day and over a hearing on another Duke case the next day.[58] Then Hardy and Reed, alarmed by a conversation that Reed had with Goode, the governor's chief of staff, began plotting to make sure Storms' hiring passed the ethics smell test.

Reed played golf with Goode on Aug. 1, and in an e-mail later that day to Hardy, said Goode reported that "he will be surprised if IG (the inspector general) OK's SS to join us. Reason: Eport." The inspector general, who is appointed by the governor, serves as staff to the ethics commission. Hardy responded by return e-mail: "What a crock." Reed came back: "Now we know we have a challenge." Their back-and-forth e-mails continued, with Reed wondering if Pippen, Daniels' general counsel, was the problem, and Hardy opining that "this is just pure pettiness."[59]

Then, remarkably, Reed—the Duke Energy Indiana president—outlined what Loraine Seyfried, the IURC's internal ethics officer, should include in her review of Storms' hiring by Duke Indiana: She "must clearly spell out how (Storms) would be walled off from Edwardsport and therefore meet the (ethics) test."[60] Sure enough, Seyfried submitted a document to Storms that said, "it is my understanding that upon submission of your resume to Duke Energy Indiana, you took steps necessary to immediately screen yourself from pending Duke Energy Indiana proceedings to which you were assigned." The Associated Press later reported that Storms had in fact written his own report and Seyfried merely signed off on it.[61]

Meanwhile, Pippen, the governor's chief counsel, agreed to meet Hardy, Storms and Seyfried for lunch on Aug. 5—Reed had a conflict and could not attend—to discuss Storms' hiring with the Indiana Ethics Commission.[62]

Soon Storms testified before the ethics commission that he had screened himself from matters involving Duke, which offered Storms the job on Aug. 31. The ethics commission signed off on Sept. 9 on his immediate hiring but restricted him from working on any matter he had worked on while at the IURC.[63] Storms demonstrated his gratitude for the lenient ruling and his respect for the process in an e-mail to Reed and Hardy: "It was impressive that you did not laugh during the Ethics hearing."[64]

(The *Indianapolis Business Journal* reported later that year that of 27 rulings dating back to 2006, the ethics commission had prohibited *no one* from taking a private-sector job and required only a few candidates to cool off for a year before doing so.[65])

E-mails also demonstrate Turner's ingratiation and cultivation of a friendship with Hardy. "You're not planning to go anywhere in April 2010, are you?" Turner asked him on Jan. 10, 2010. Hardy, who had three months left on his four-year term, replied: "Is that a job offer?" Turner wrote: "Could be. But I was thinking you have miles to go at the IURC before you sleep."[66] Two months later, Daniels reappointed Hardy to another term.[67]



The e-mails also show how Hardy and others disdained the rules, including the state ethics process. In July 2010, Turner was apparently on a boat on Lake Michigan in the vicinity of Holland, Mich., when he e-mailed Hardy to ask, "Would the ethics police have a cow if you and the woman came up some weekend?" Hardy responded: "Probably — we might 'be in the area' some afternoon, but I won't be doing this forever." Turner: "I think in the global economy we live in that Holland, by geographic definition, is in your neighborhood." Hardy: "I think your 'world view' whilst correct is probably not the one espoused by the ethics tardos and especially the *Indianapolis Star.*"[68]

## CONCEALMENT AND CORRUPTION VIOLATE INDIANA LAW

Indiana law specifically prohibits *ex parte* communications — communications between a regulator and only one party to a proceeding about issues of law or fact being disputed in pending or impending cases — so that neither side has an unfair advantage in what are supposed to be impartial proceedings. But with a growing debacle on its hands and its books, Duke yearned for every advantage it could get. And Hardy was happy to oblige.

E-mails obtained from Duke suggest that *ex parte* communications regularly occurred between Duke and the IURC. They also raise questions as to whether a quid pro quo developed that would ensure Duke got the electric rates it needed to pay for the Edwardsport plant in return for lucrative jobs for Hardy's friends and eventually Hardy himself. Duke, however, claims that it did not break any laws because the communications were only procedural.[69]

In addition to the numerous examples given above, here is a sampling of potential *ex parte* communications that occurred between Duke executives and staffers at the IURC that may have violated Indiana law:

- Hardy and Turner connected at an August 2010 conference of the Electric Power Research Institute in Chicago "to cover several matters" that Turner preferred to discuss "face-to-face."[70]
- In July 2010, Turner, through Reed, attempted to arrange breakfast with Hardy at a Sacramento meeting of the National Association of Regulatory Commissioners to "talk about… Scott." When that face-to-face meeting fell through, Reed urged Turner to call Hardy the next day to smooth things over regarding Storms and "if the mood right, set the 'what if' on Eport." It is not clear to what Edwardsport matter Reed was referring, but the call did occur and Reed's wording suggests that the conversation went beyond procedural matters.[71]
- Rogers, Turner and Stanley met with Hardy in February 2010 to inform him of the anticipated cost increase to $2.88 billion.[72]
- In December 2009, Hardy solicited Rogers to be a speaker at a March 2010 conference in Santa Fe. E-mails showed that they hoped to reprise the dinner they had shared at the same conference the year before. Rogers forwarded the exchange to Turner, whose response is largely redacted. However, in the second half of his reply, he states that "one of my top priorities this year is to reduce the regulatory risk associated with Edwardsport."[73]
- In a Sept. 2, 2009, e-mail, Turner told Hardy: "We're throttling Bechtel. More work to do on that score." Five days later, he was still frustrated. "I'm recalling the annoyances and grievances I've had with the many contractors who have worked on our various homes over the years," Turner wrote. "Scale those issues logarithmically, and you have a $2.35 (billion) construction project."[74]
- In March 2008, Turner and Stanley met with Hardy in Santa Fe to tell him that the cost estimate for Edwardsport had climbed to $2.35 billion.[75]
- On Sept. 25, 2007, Duke sent 15 copies of two articles to Hardy so he could distribute them among other commissioners and IURC staffers. "An Upward Climb" and "Rising Utility Construction Costs: Sources and Impacts" advocated for favorable rate treatment for utilities engaged in construction.[76]
- Hardy met Rogers for lunch in 2007, when Rogers invited Hardy to attend a "strategic retreat" of Duke's board in June 2007 at the corporate mansion in Charlotte, N.C.[77]
- Stanley, then president of Duke Indiana, asked Hardy if Turner, who was visiting from North Carolina, could "do a walk thru and reintroduce himself to folks" at the IURC office in February 2010.[78] It is not clear if that occurred. But such a visit would have been valuable to Duke, sending the message to IURC employees that Turner had a special personal relationship with Hardy and that Duke had a special institutional relationship with the commission.

## DUKE FINDS SUPPORT IN HIGH PLACES

Communications also occurred between Duke and the governor's office, including the governor himself. The governor's office and Duke contend that the communications are not *ex parte* because the governor and his staff do not directly make regulatory decisions. They do, however, have influence on the governor's appointees and an interest in the outcome of the IURC's Edwardsport proceedings.

E-mails provide some insight into meetings that occurred on Feb. 24, 2010, the day after Rogers reported to his Board of Directors that Duke would be filing a new cost estimate that would be vastly higher than anticipated — $2.88 billion, a jump of $530 million.

Rogers and Turner decided they should inform Hardy and Gov. Daniels about the impending filing. They flew from Duke's Charlotte headquarters to Indianapolis to meet Hardy and Stanley, then president of Duke Energy Indiana, for breakfast. Later, they met with Daniels and Pippen, the governor's general counsel, to apprise them of the price increase. The Duke executives asked Daniels to meet with Bechtel and GE executives to "convey to everyone his concern about the ongoing cost pressures and his desire that we complete this project in the best interests of Indiana consumers and stakeholders."[79] The meeting with Bechtel and GE did not occur; the reason is unknown.[80]

Jane Jankowski, Daniel's press secretary, told the *Indianapolis Star* that the meeting was "routine" and that the governor regularly meets with business leaders.[81] But there is no way to know for sure what occurred; most of the documents describing the meeting have been redacted. And one reason for the law against *ex parte* communications is that there is no way to prove what was said when only one side participates in the conversation; another is that one-sided communications give one party access that another party — particularly average electric customers — would never be able to achieve.

In 2008, Grant Smith, then executive director of the Citizens Action Coalition, said that "public statements make it appear the IURC may be acting as an advocate for the governor's energy plan, which itself appears to be tied to advancing Duke's business plan."[82] Indeed, the governor, who appoints commission members, has made no bones about voicing his support for the Edwardsport plant from the beginning. It is a matter of debate whether Daniels and his staff have crossed the line. For example:

- After a July 21, 2008, Duke "celebration" at Edwardsport — as opposed to a groundbreaking, since construction had begun in March — Daniels told the Associated Press that the plant will be worth its high cost because its pollution-removal technologies will open more of southwestern Indiana's coal deposits for use as fuel.[83] In 1983, Gov. Robert D. Orr appointed a task force of five business executives to independently assess whether the Marble Hill nuclear plant, which was fraught with construction problems and cost overruns, was worth its high cost. The task force decided it was not,[84] Gov. Orr endorsed the task force report[85] and PSI cancelled the plant in October 1984.[86]
- At his energy summit on Aug. 30, 2007, Daniels touted the Edwardsport plant as part of his "homegrown energy" plan and the first new power plant to be built in Indiana in 20 years.[87] But he was presupposing the IURC's actions — or signaling what they should be; the IURC held a hearing on the plant only two days earlier and would not issue its decision about Duke's $1.985 billion price tag for three months.
- Daniels' Sept. 3, 2008, energy summit on carbon capture and sequestration featured Rogers as one of the keynote speakers. Duke provided food and an open bar and its employees registered participants.[88]

Comments that Daniels made to the *Indianapolis Star* in December 2010 also raise questions about his and his staff members' involvement with Duke — and whether his staff members were fully informing the governor of their activities. Contrary to Duke e-mails, Daniels said that he and his staffers knew nothing about Storms' hiring until after the fact.[89]

## DUKE CROSSES A BRIDGE TOO FAR

As invincible as they appeared to have felt, the IURC's Hardy and Duke's Turner must have had some concerns from time to time about their cozy relationship — or at least the possibility that it might come to light. Hardy had one of those moments after his Feb. 24, 2010, breakfast with Rogers and Turner. As the two Duke executives waited to meet with Gov. Daniels, Hardy e-mailed them. The subject line was "terseness." The body read: "Whoever reports on the meeting might consider a one-word characterization and a number where you can be reached." Turner responded: "Got it."[90]



Turner telephoned Hardy after the meeting with the governor to report what had occurred. Days later, when Rogers asked Turner to write a summary to inform the board, Turner sent an e-mail: "I don't think it's a good idea to put chm mtg in writing. Happy to do gov mtg." Rogers agreed.[91]

Turner's draft summary, e-mailed to Rogers, said the meeting "went remarkably well. Governor Daniels talked thoughtfully through our issues and even observed at one point that 'well, green is not cheap.'" Turner suggested telling the board that "it appears at this point that Governor Daniels continues to believe strongly in the merits of the Edwardsport IGCC project, even at an increased price."[92]

A few months later, on July 26, when Storms' hiring was imminent, Turner e-mailed Rogers to tell him "I'm calling Pippen at 11 to run the Storms idea by him and get his reaction. Will let you know."[93]

Though he had previously sanctioned the hiring, Rogers was having doubts. He replied: "A bridge too far..."[94]
A while later, Turner reported back: "Just talked with Pippen. I think we would be fine to move forward with discussions with Scott Storms. Are you ok if we do or do you want to chat first?"[95]

Rogers: "Let's talk... it bothers me but I don't know why... feels like a bad move at this time... coming on the heels of Mike — just because no 'obvious' adverse reaction doesn't mean that when the other is announced the combination tilts the scale against us. Let's talk."[96]

Turner should have heeded Rogers' intuition. It was, indeed, a bridge too far.

## DUKE'S BRIDGE COLLAPSES

On Sept. 21, 2010, nine days after the ethics commission sanctioned Duke's hiring of Storms, the Citizens Action Coalition — one of the citizens' groups (or "joint intervenors") — issued a news release that said Storms' hiring "raises serious concerns about the relationship between those who regulate utilities and the utilities themselves." When the coalition issued another news release, Turner sent an e-mail Rogers saying, "Cac not going to let it die."[97]

On Sept. 24, Duke announced that it would bar Storms from representing Duke before the IURC for a year;[98] of course, the ethics commission already said he could not work on any issue he had handled at the IURC. Storms started work for Duke the following Monday, Sept. 27.[99]

On Oct. 5, Daniels fired Hardy for doing nothing to stop Storms from presiding over Duke cases while he was angling for a job. The governor's news release included the text of a memo written by Pippen — who, of course, had helped finesse Storms' appearance at the ethics commission — stating that Daniels "will not tolerate even the appearance of impropriety."[100] Daniels appointed Commissioner James Atterholt to be chairman.

(In August 2011, *The Indianapolis Star* revealed that Atterholt had his own conflicts. He had e-mailed Turner with his thoughts about the right person to replace Stanley as president of Duke Indiana, saying he "confidentially, just between you and me" wanted to put her name in the mix. Atterholt also had dined with Duke executives, including Rogers; was characterized by Reed as having given his blessing to Storms' hiring; and regularly sent warm notes to Duke executives, inviting them to call him "at any time" for help.[101])

Also on Oct. 5, Duke put Reed and Storms on administrative leave.[102] On Oct. 13, Atterholt announced that the IURC would conduct an internal investigation into cases on which Storms worked.[103] On Oct. 14, David Thomas, the state inspector general, filed a complaint against Storms with the Indiana Ethics Commission.[104]

On Nov. 8, Duke fired Reed and Storms. On Dec. 1, the IURC reassigned Seyfried — who had replaced Storms as chief administrative law judge — so she no longer handled cases related to the Edwardsport plant and no longer served as ethics officer.[105]

On Dec. 6, Duke announced that Turner had resigned. He said in a statement: "As a leader, I have a duty to exercise the highest level of professionalism at all times in my communications. In certain e-mails to a former commissioner in Indiana, I fell short of this standard."[106] He did not leave empty-handed, however; Duke allowed him

# EDWARDSPORT IGCC TIMELINE

| | | |
|---|---|---|
| 2006 | September 7 | PSI Energy and Vectren ask the IURC to grant them a certificate of public convenience and necessity and certificates of clean coal technology so they may build an IGCC plant that they say will cost $1.3 billion to $1.6 billion |
| | October 1 | PSI Energy Inc. legally changes its name to Duke Energy Indiana Inc. |
| | November 30 | Federal agencies announce that Duke will be eligible for $133 million in tax incentives if it builds the Edwardsport IGCC plant |
| 2007 | April 2 | Duke files the front-end engineering and design study, which sets the cost of the IGCC plant at $1.985 billion. Duke president and CEO James Rogers and IURC head David Hardy meet; Rogers invites Hardy to attend a "strategic retreat" of Duke's board at the company's corporate mansion |
| | August 1 | Vectren announces it will not participate in the project |
| | October 11 | Joint intervenors (the citizens' groups) make their first allegation of *ex parte* communication after Duke sends two letters to the IURC on Sept. 25 |
| | November 20 | IURC approves construction of the plant at a cost of $1.985 billion |
| 2008 | January 25 | State grants air permit to Duke |
| | March | Construction begins |
| | March 17 | Duke second-in-command James Turner and Jim Stanley, president of Duke Energy Indiana, meet with Hardy at a conference in Santa Fe, NM, to tell him that cost will rise to $2.35 billion |
| | April 21 | Rogers and Turner meet with Gov. Mitch Daniels to tell him cost estimate will go up |
| | May 1 | Duke says publicly that cost will be $2.35 billion; makes filing with IURC |
| | May 9 | U.S. Department of Energy grants Duke $1 million to study permanent storage of carbon dioxide |
| | September 1 | Joint intervenors warn in testimony that "Duke continues to understate the likely and substantial increase in costs" |
| 2009 | January 7 | Commission order approves new cost of $2.35 billion |
| | August 7 | Duke senior vice president Richard Haviland reports to Turner that "we have a low probability of staying in budget" |
| | November 24 | Duke news release: cost up another $150 million but likely will go up more |
| 2010 | January 10 | Turner sends e-mail to Hardy: "You're not planning to go anywhere in April 2010, are you?" Hardy: "Is that a job offer?" Turner: "Could be. But I was thinking you have miles to go at the IURC before you sleep." |
| | January 17 | Turner tells Rogers in an e-mail that "one of my top priorities this year is to reduce the regulatory risk associated with Edwardsport." |
| | February 24 | Rogers and Turner fly to Indianapolis; apprise Hardy and Daniels, in separate meetings, of new cost, up $530 million to $2.88 billion |
| | March 10 | Kelley Karn, who is Duke's counsel in the Edwardsport case, calls Scott Storms, the IURC's general counsel and chief administrative law judge, to tell him about open position for attorney at Duke; Storms communicates with her about 10 times April-July |
| | April 11 | Karn sends an e-mail to Storms to alert him that a "senior counsel" job has been posted on the Duke website |
| | April 16 | Duke files new cost estimate of $2.88 billion |
| | June 9 | Duke names IURC executive Michael Reed president of Duke Energy Indiana; he starts June 14 |
| | July 26 | Rogers sends e-mail to Turner saying the prospect of hiring Storms as senior counsel bothers him: "a bridge too far" |
| | July 27 | Reed sends e-mail to Storms and Hardy confirming that Storms would be securing the open attorney position for Duke |
| | July 28 | Storms acknowledges Reed's e-mail of the previous day; presides over Edwardsport hearing |
| | August 31 | Duke offers a job to Storms |
| | September 9 | IN Ethics Commission rules Storms may take the job without a one-year cooling-off period typically required for utility regulators |
| | September 17 | Duke reaches a proposed settlement with industrial customers that call for a "hard cap" of $2.975 billion to be charged to Duke customers |
| | September 21 | Consumer groups raise concerns about Storms' hiring |
| | September 24 | Duke says it will bar Storms from representing Duke in IURC matters for a year |
| | October 5 | Duke puts Reed and Storms on administrative leave; Daniels fires Hardy |
| | November 3 | Rogers defends plant and actions at a technical conference held by IURC |
| | November 8 | Duke fires Storms and Reed, names Douglass Esamann as Duke Energy Indiana president |
| | December 6 | Turner resigns |
| | December 9 | Duke agrees to renegotiate proposed settlement that had customers paying for most cost overruns |
| 2011 | March 7 | Duke alerts IURC that it has found internal e-mails that "might be construed to suggest" it engaged in improper communications with regulators |
| | May 12 | IN Ethics Commission finds Storms guilty of three ethics-law violations, fines him $12,120 and bars him from future state employment; he is appealing the ruling |
| | June 30 | Indiana Office of Utility Consumer Counselor (OUCC) withdraws support of first proposed settlement |
| | July 14 | OUCC and industrial customers called on IURC to make Duke pay for $1 billion in cost overruns. CAC says customers should pay nothing toward plant; Daniels says Duke should eat cost overruns |
| | November 1 | *Indianapolis Star* reveals that Duke paid more than $3 million to Pegasus Global Holdings, a management consulting firm, to testify that Duke has acted prudently and responsibly |
| | December 9 | A Marion County grand jury indicts Hardy on four felony counts, saying he failed to disclose secret meetings and helped Storms break ethics laws |
| 2012 | April 30 | Proposed settlement filed by OUCC, industrial customers; $2.595 billion would raise rates 14.5 percent over two years |
| | July 2 | Duke and Progress Energy merge in a $32 billion deal to become the largest utility in the U.S.; in surprise move, Rogers becomes CEO |
| | July 6 | North Carolina officials launch two investigations into whether Duke misled consumers over its merger with Progress |
| | October 22 | Indiana Court of Appeals denies Hardy's motion to take medical and legal issues into consideration before trial; a trial date has not yet been set |
| | October 30 | Duke announces another $174 million cost overrun for a total of $3.5 billion and pushes back start date of Edwardsport another three months |

to retire effective Dec. 31 with a package worth nearly $11 million.[107]

On Dec. 7, the IURC reopened a case over which Storms presided and in which the commission had voted July 14 to allow Duke to charge customers $11.9 million for repairs made after a January 2009 ice storm.[108]

On Dec. 9, Duke succumbed to pressure from the industrial customers and agreed to withdraw the $2.975 billion settlement announced on Sept. 17, 2009. Hearings, set for the following week, were postponed so negotiations could begin anew.[109]

In May 2011, the ethics commission found Storms guilty of three violations, fined him $12,120, and barred him from future state employment.[110] He is appealing.

In October 2011, the commission reversed its decision in the ice storm case, denying Duke the ability to recover $11.9 million.[111] Duke is appealing. The commission also dismissed a case in which Duke sought $22 million to begin work on a smart grid, which would have allowed Duke to more effectively monitor and manage power flows and outages.[112]

On Dec. 9, 2011, a Marion County grand jury indicted Hardy on four felony counts, saying he failed to disclose secret meetings and helped Storms break ethics laws. A Marion Superior Court judge denied Hardy's motion to dismiss and set a trial date for Oct. 10; Hardy, who has aplastic anemia, asked the Indiana Court of Appeals to dismiss the case because he said a trial would aggravate his condition. The appeals court denied the motion Oct. 22.[113] The FBI also has been looking into these matters.[114]

## THE COMMISSION MAKES CURIOUS RULINGS

The commission has acknowledged — by conducting an internal audit; by holding a Nov. 3, 2011, technical conference; by reversing the ice storm decision; and by dismissing Duke's smart-grid case — that improper activity occurred. Yet the IURC has decided that none of this mess has any bearing on the Edwardsport project or its certificate of need.

The citizens' groups asked the commission in November 2010 to investigate improper communications, conflicts of interest, undue influence or other misconduct related to the Edwardsport project to ensure that customers do not pay for cost overruns attributable to bad behavior. Anticipating that the commission may say that other agencies are investigating, the citizens' groups pointed out that only the commission has the authority to set the rates that Duke customers pay, return illegally confiscated dollars to ratepayers and modify the Edwardsport certificate of need.[115]

The commission ignored that salient point and denied the request, saying that, although it had broad statutory authority to initiate a formal investigation, alleged undue influence should be investigated by other agencies.[116] So, it would seem, for purposes of the regulatory oversight of Edwardsport, the commission thought the Hardy-Storms affair was irrelevant.

But when it needed to defend itself in another matter, the commission found the Hardy-Storms episode to be useful. Duke appealed the commission's reversal in the ice storm case, and the Indiana Electric Association filed an amicus brief, claiming that the credit and financial markets would react negatively if the commission were allowed to rescind previous rulings. The IURC officially responded that the association's argument ignored these "unique circumstances":

- "The hiring by Duke (within mere weeks of the July 2010 order) of the Commission's general counsel at that time, who was also the chief administrative law judge and the administrative law judge on this proceeding when the July 2010 Order was issued;
- "The firing of the then chairman of the Commission for ethics violations;
- "The firing of the president of Duke Energy Indiana based on the hiring of the former administrative law judge on this proceeding;
- "The resignation of a vice president of the Duke parent company based on email communications with the former chairman."

The IURC went on to say that, "each of these circumstances, much less all of them together, is unprecedented in the almost 100 year history of the Commission."[117] In other words, the circumstances are sufficiently unusual to merit reopening a $12 million case, but they are irrelevant to a $3.554 billion case.

It was not the commission's first curious position. In June 2008 — a month after Duke raised the plant's cost to $2.35 billion — the commission ordered Duke to hire Black & Veatch, a Kansas engineering company, to monitor the project. Though Duke would pay the invoices, it was allowed to charge customers for the cost. Black & Veatch was to meet monthly with the project team, have access to all reports and conferences and make monthly reports to the commission.[118]

From time to time, observers have wondered if Black & Veatch has alerted the commission to the myriad

management issues at Edwardsport and, if not, why. But there's no way to know: the commission claims the reports are confidential and thus will not share them, despite efforts by the Indianapolis Star to obtain them through open-records requests and by the citizens' groups to have them entered as evidence into the record.[119]

The citizens' groups maintain that, as a matter of law, the commission cannot act on information received in secret or independently, such as that provided confidentially by Black & Veatch; it may act only on information that has been made evidence in the case. They have argued—to no avail—that the commission can't have it both ways; it may not withhold the Black & Veatch reports "based upon a claim it has not expressly relied upon them while claiming it does not have to release the reports because they constitute deliberative information that it has relied upon."[120] But the commission denied the groups' motion and their subsequent request for an interlocutory appeal—a request that the Indiana Court of Appeals rule on the specific question only while the broad case is pending.[121] Their only choice now is to file an appeal after the commission makes a final order in the Edwardsport case.

### DUKE AND FRIENDS OFFER A SERIOUSLY FLAWED SETTLEMENT PROPOSAL

The commission is considering the settlement proposed on April 30 by Duke, the industrial customers and the utility consumer counselor. It calls for Duke's electric customers to pay a "hard cap" of $2.595 billion, plus certain financing costs, over and above what they already have paid during construction. Residential customers, whose rates had already increased 5 percent to cover construction costs, would see their bills climb an additional 9.6 percent.

The settlement would award:

- $11.7 million in attorneys' fees and $600,000 for expenses to attorneys representing the industrial customers;
- $800,000 to $1 million to Nucor Steel-Indiana for fees and expenses it incurred;
- $300,000 to the utility consumer counselor for reimbursement of outside litigation expenses;
- $2 million to the Indiana Utility Ratepayer Trust;
- $3.5 million to the Indiana Low Income Home Energy Assistance Program; and
- $1 million to establish a fund for the utility consumer counselor and Duke to develop a clean-energy initiative.

## DUKE'S PENCHANT FOR CONCEALMENT CONTINUES

Duke completed a $32 billion merger with Progress Energy of South Carolina on July 3, creating the biggest electric utility in the country, with 7.1 million customers in six states.[1]

It had been announced that William D. Johnson, who was Progress's chairman, president, and chief executive, would continue in that role in the new company and that Rogers would become executive chairman. But the new board fired Johnson minutes into his tenure and gave him a $44.4 million severance package to stay mum.[2] The board then installed Rogers as its new chairman and chief executive.

Some former Progress board members who were not invited to sit on the new board were furious about the bait-and-switch. "In my opinion this is the most blatant example of corporate deceit that I have witnessed during a long career on Wall Street," former board member John Mullin III said in a letter to the editor of the *Wall Street Journal.*[3]

The incident, said Kerwin Olson, executive director of the Citizens Action Coalition, is "another high-profile illustration of a pattern of Duke corporate misconduct under Mr. Rogers' leadership."[4]

Rogers has managed to emerge on top each time his company—from PSI to Cinergy to Duke and now Progress—has merged.[5] The abrupt change in Duke's post-merger leadership is under investigation by North Carolina's Utilities Commission and its attorney general.[6]

### ENDNOTES

1 Matthew L. Wald, "Duke and Progress Energy Become Largest U.S. Utility," *New York Times,* July 3, 2012

2 Steve Schaefer, "Johnson Rakes In $44 Million After One-Day Gig As Duke Energy CEO," *Forbes,* July 6, 2012

3 John Mullin III, letter to the editor of the *Wall Street Journal,* July 5, 2012, retrieved from http://online.wsj.com/article/SB10001424052702304141204577510761991799778.html Oct. 27, 2012

4 Kerwin Olson, executive director of Citizens Action Coalition, in supplemental responsive testimony in Cause No. 43114 IGCC-4S1, filed July 13, 2012

5 Duke Energy website, http://www.duke-energy.com/about-us/leaders/jim-rogers.asp, retrieved Nov. 3, 2012

6 John Murawski and David Ranii, "NC attorney general, utilities commission to investigate Duke Energy," *Charlotte News & Observer,* July 6, 2012

The settlement also would settle all matters surrounding the Edwardsport plant, "including but not limited to all claims of imprudence, fraud, concealment and gross mismanagement, as well as all issues concerning *ex parte* communications, improper conduct, undue influence, appearances of impropriety, or related issues."[122]

This position was a stunning reversal for the Office of the Utility Consumer Counselor, whose director of resource planning, Barbara Smith, told the commission in July 2011: "Duke personnel were woefully unqualified to manage the construction of this extremely complex multi-billion dollar project, which is the largest (IGCC) facility ever built in the world." Duke's assumption that its experience managing construction of pollution-control projects made it capable of managing construction of an IGCC plant "was short-sighted and resulted in excessive cost overruns that have plagued this project," she said.[123]

It also was quite a reversal for the industrial customers, whose lawyer, Tim Stewart, said, "It's especially bad when the heads of Duke and of the commission are having secret meetings, the sole purpose of which can reasonably be assumed to be to ensure that Duke recovers the massive cost overruns from its ratepayers."[124]

Duke spokeswoman Angeline Protogere told the *Wall Street Journal* that, if the settlement is approved, allegations of fraud and mismanagement simply "go away."[125]

But should they go away? Should Duke electric customers be expected to ignore the myriad instances of gross mismanagement that have resulted in massive cost overruns? Should they be asked to overlook the scandalous behavior of Duke executives and state employees who flouted the rules and laughed at the notion of ethical behavior? Should their pocketbooks be tapped to pay for a plant that was not needed to begin with and that carried extraordinary risks because of its size and its first-of-a-kind status?

The citizens' groups think not. They maintain that customers, at the very least, should be shielded from the cost overruns above $2.35 billion, the last amount approved by the commission. Given Duke's gross mismanagement and malfeasance, it would be even more appropriate, the groups say, for customers to pay nothing at all for the Edwardsport plant. They believe the $650 million-to-$700 million[126] that Duke's electric customers will have paid by the time the plant goes into service should be refunded.

The citizens' groups also worry that, if the commission approves the settlement proposal as is, Duke will have no incentive to take measures to offset the plant's $CO_2$ emissions.

The citizens' groups filed a 180-page brief on Aug. 31 that outlines 12 specific reasons that the commission should reject the hopelessly flawed settlement proposal.[127] Here, briefly, are the most serious flaws with the proposed settlement:

- The commission refused to consider corruption in the regulatory process — improper *ex parte* communications; undue influence; unethical behavior; and the like. The citizens' groups asked the commission several times to investigate the situation, only to be turned down flatly. While the settlement does mention these issues, it cursorily disposes of them. And because the commission refused to address them, it is being asked to ratify an agreement that would resolve matters not allowed in evidence.
- The commission did allow substantial evidence to be introduced to show that Duke and its contractors had been imprudent or engaged in gross mismanagement, concealment or fraud. Yet the settlement calls on the commission to conclude that there has been no such behavior.
- The settlement provides specific instructions for awarding $12.3 million in attorneys' fees and expenses to the industrial customers but it provides no clues as to how the fee award was reached. Attorneys for the industrial customers refused to respond to a discovery request by the citizens' groups, saying Duke shareholders, not customers, will pay the fees so the matter is not the public's business. But customers do have a dog in this hunt; they are being asked to pay $2.595 billion in construction costs plus at least $650 million to $700 million in financing charges, amounts that those very attorneys settled on. Customers have a right to be assured that the fees to be paid to those attorneys are reasonable and were fairly calculated.
- The commission has refused to make the Black & Veatch reports matters of the record and thus available to all parties. This decision precludes the citizens' groups from presenting their best evidence and making their best arguments in the case.
- When Duke filed to build the plant for $1.985 billion, it was required by law to demonstrate to the commission's satisfaction that the amount was

a reasonable estimate of the plant's cost. When the price went to $2.35 billion, Duke again had to prove that the amount was reasonable. But there is nothing in evidence to demonstrate that $2.595 billion is a reasonable estimate.

- Though the settling parties called $2.595 billion a "hard cap," it is really more of a firm floor under costs that Duke wants to recover from customers. According to the proposed settlement, that amount is operative only until the plant is put into service; after that, any additional costs incurred for repairs, for instance, would be eligible to be put into customers' electric rates the next time Duke files for a rate increase. In addition, the settlement permits Duke to accrue additional financing charges on top of the $2.595 billion until the settlement is approved; that amount now has reached $47 million.[128]
- The definition of the "in service" date is nebulous. The proposal requires that, for the plant to be considered in service, Duke must operate it using both natural gas and syngas (a natural gas mixture) created through the coal-gasification process. However, the proposal does not say for how long the plant must operate. So Duke could run the plant for five minutes and then experience a problem requiring that it be shut down for a year. But customers would be on the hook not only for construction costs covered in the settlement but also any repair and replacement power costs that arose during the shutdown .
- At the time the IURC approved construction of the plant for $1.985 billion, Duke said it would begin producing electricity by early 2012.[129] These days, Duke says that likely won't happen until late May 2013.[130] Customers should not be expected to pay for the delays, including finance charges.

For these reasons and several others included in their brief, the citizens' groups have called on the commission to:

- Reject the proposed settlement and ask the parties to submit a revised proposal that addresses *all* the issues that have been raised; or
- Modify the proposed settlement to accept the concerns of the citizens' groups and issue its own order addressing all the issues that have been raised; and
- Order additional hearings as would be just and proper under the circumstances.

## CONCLUSION

The Edwardsport IGCC facility was ill-conceived from the start. As experts pointed out at the time, the project was not needed in the first place. Even if Duke's exaggerated projections of demand growth had proven true, there existed ample evidence of cheaper, more reliable and less polluting technologies to match supply and demand, including energy efficiency and wind.

Duke misled the public about the inherent riskiness of a project involving untested technology at such a large scale. Once the IURC gave approval to begin construction, Duke exhibited gross incompetence in managing the project, leading to repeated delays and exorbitant cost overruns. To ensure that customers, not shareholders, would have to bear the brunt of Duke repeatedly blowing the budget, Duke unethically communicated behind closed doors with the state officials charged with oversight of the project. Sure enough, those regulators continued to approve the cost overruns as first one, then another, was rewarded with a lucrative job at Duke. Even after the scandal was uncovered and many of the guilty parties lost their jobs, Duke continued to bungle the construction. To this day, costs continue to mount, the completion date continues to be delayed and customers are paying more for every day that construction continues.

A decision by the IURC regarding Duke's proposed settlement is imminent, but the nature of that decision should not be a foregone conclusion. It is time for the commission to restore the public's faith that it can function as a fair and unbiased regulatory body. And it is time for the Office of Utility Consumer Counselor to represent customers' best interests by retreating from the proposed settlement and calling for all issues to be fully probed and fairly decided. Gov. Daniels must signal to both the IURC and the Office of Utility Consumer Counselor that the public is properly served only when those agencies perform their statutory responsibilities and provide a full and fair airing of all evidence, allowing a reasonable decision on all key issues to be reached based on that evidence.

The flawed settlement proposed by Duke, the industrial customers and the utility consumer counselor is no way to resolve the Edwardsport fiasco; it requires electric customers to shell out far too much money and does nothing to restore the public's shaken confidence in their public officials' integrity. It must be rejected. Any true resolution must put the burden on Duke shareholders, not innocent Duke customers, to pay the costs of the incompetence and mismanagement exhibited by Duke throughout this sorry saga. Any true resolution must

ensure that Duke is obliged to offset the extra carbon pollution that the Edwardsport facility will produce over its lifetime. Vague, non-binding promises to use untested carbon sequestration technology do not count. Finally, any true resolution must get to the bottom of the improper and unethical behavior exhibited by Duke and state officials throughout the project. Clear steps must be taken by the commission to prevent such behavior from ever happening again.

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