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[Securities Regulation Daily Wrap Up, TOP STORY—W.D.N.C.: Utility co. to pay \\$146M for alleged fibs in registration statement, \(Mar. 10, 2015\)](#)

Securities Regulation Daily Wrap Up

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By Amy Leisinger, J.D.

The Western District of North Carolina has issued a stipulation of settlement in a class action involving false and misleading statements in SEC filings in connection with the merger of utility companies **Duke Energy** Corporation with Progress Energy, Inc. While continuing to expressly deny all allegations of wrongdoing, the defendants agreed to pay over \$146 million to settle the matter ([Nieman v. Duke Energy Corporation](#), March 10, 2015).

Background. On January 10, 2011, Duke and Progress announced that their respective boards of directors had unanimously approved a definitive merger agreement pursuant to which Duke would acquire Progress in a stock-for-stock transaction. According to Duke, the transaction was a merger-of-equals in that Progress and Duke participants would share power and management in a new combined company (New Duke). Upon closing of the merger, Duke represented in the registration statement New Duke would be managed by executives and directors of both companies, with Progress' CEO becoming CEO of the combined entity and Duke's CEO becoming its chairman, creating a merger-of-equals.

A Progress/New Duke shareholder filed a class action [complaint](#) alleging that the defendants knew or should have known that the registration statement prepared and distributed in connection with the merger was inaccurate and misleading in violation of Securities Act Section 12. According to the complaint, the defendants knew that the Duke members of the New Duke board intended to oust Progress' CEO and entered into an a three-year employment agreement with him that provided for substantial compensation in the event of termination. Thus, the complaint contended, contrary to statements in the registration statement, there has been no "merger-of-equals" or any combination of the companies to create a stronger unified whole for the benefit of shareholders.

The complaint also noted that, after the truth came to light, Standard & Poor's placed New Duke on a credit watch, and multiple regulators launched investigations.

Settlement. After the court recommended denial of the defendants' motion to dismiss, the parties engaged in mediation. Following extensive negotiations, they reached an agreement-in-principle to settle the action and consented to class certification for settlement purposes. While continuing to expressly deny all allegations of wrongdoing, the settling defendants agreed to pay \$146,250,000 within 20 business days of the court's preliminary approval of the settlement in exchange for the release of claims.

Following preliminary approval, costs will be paid from the settlement fund, and lead counsel will apply to the court for fees and expenses from the fund. Thereafter, the funds will be distributed to authorized claimants on a pro rata basis.

The case is [No. 3:12-cv-00456-MOC-DSC](#).

Attorneys: Jennifer Sarnelli (Gardy & Notis LLP) for Maurine Nieman. Debbie Weston Harden (Womble, Carlyle, Sandridge & Rice, PLLC) and Steven M. Bierman (Sidley Austin LLP) for **Duke Energy** Corp.

Companies: **Duke Energy** Corp.; Progress Energy, Inc.

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