NO. _____

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA *EX REL.* UTILITIES COMMISSION; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION; and DUKE ENERGY PROGRESS, LLC,	)	
Respondents,	)	FROM NC UTILITIES COMMISSION DOCKET NO. E-2, SUB 1089
v.	)	
NC WARN and THE CLIMATE TIMES,	)	
Petitioners.	)	

****

PETITION FOR WRIT OF CERTIORARI,
PETITION FOR WRIT OF SUPERSEDEAS,
AND MOTION FOR TEMPORARY STAY

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

NOW COME the Petitioners, NC WARN and The Climate Times, by and through undersigned counsel, and respectfully petition this Honorable Court, pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, to issue its writ of certiorari to review the Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) entered by the N.C. Utilities Commission on May 10, 2016 ("Bond Order").

Further, Petitioners respectfully petition this Honorable Court, pursuant to N.C. Rule of Appellate Procedure 23(a), to issue its Writ of Supersedeas to stay execution and enforcement of the N.C. Utilities Commission's Bond Order, pending review by this Court of said Bond Order.

Finally, Petitioners respectfully apply to this Court, pursuant to N.C. Rule of Appellate Procedure 23(e), for an order temporarily staying enforcement and execution of the Bond Order that is the subject of the present Petition for Writ of Supersedeas, such order to be in effect until determination by this Court whether it shall issue its Writ of Supersedeas.

In support of these petitions and motion, the Petitioners attach certified copies of all relevant pleadings and a verification of the facts as follows:

STATEMENT OF THE FACTS

1. This controversy surrounds whether the participants to Utilities Commission proceedings have a right to file appeals, or alternatively, whether appellate bond requirements can be set prohibitively high without any supporting evidence or findings of fact.

2. On December 16, 2015, Duke Energy Progress, LLC ("DEP") filed a Notice of Intent to File Application for Certificate of Public Convenience and Necessity for Western Carolinas Modernization Project. (Ex. A, p 1). In its notice, DEP sought permission to construct two (2) new natural gas-fired 280 MW

combined cycle units with fuel oil backup, and one (1) natural gas-fired 192 MW simple cycle combustion turbine unit with fuel oil backup. The actual Application for Certificate of Public Convenience and Necessity was filed on January 15, 2016.

3. On December 18, 2015, The Commission entered an Order Scheduling Public Hearing and Requesting Investigation and Report by the Public Staff. (Ex B, p 1).

4. The Petitioners filed a Motion to Intervene on December 21, 2015, and the Commission granted the Motion to Intervene on January 20, 2016.

5. The Petitioners opposed DEP's Application for Certificate of Public Convenience and Necessity for a number of reasons. For example, there was insufficient evidence to prove that DEP needs the extensive additional capacity requested by the Application. Also, DEP's reliance upon natural gas is problematic because of the volatility of the natural gas market, the risks of shale gas supply shortages, and because of natural gas's harmful impacts upon the environment.

6. The Commission, on March 28, 2016, entered an Order Granting Application in Part, with Conditions, and Denying Application in Part ("CPCN Order"). (Ex C, p 1). The Commission's CPCN Order granted DEP's Application for the two, 280 MW units but denied the request for the additional 192 MW unit. *Id.* at 43-44.

7. During their investigation of a potential appeal of the CPCN Order, the Petitioners discovered that there is a unique bond requirement for appeals from certificates of public convenience and necessity. That bond requirement is found in N.C. Gen. Stat. § 62-82(b), and requires appealing parties to post a bond sufficient to pay for damages incurred by a utility in the event that an unsuccessful appeal causes a delay in the initiation of construction, regardless whether a stay is requested or not.

8. Thus, on April 25, 2016, the Petitioners filed a Motion to Set Bond. (Ex. F, p 1). To allow time for the Commission's ruling on the Motion to Set Bond, the Petitioners simultaneously filed a Motion for Extension of Time to File Notice of Appeal and Exceptions. (Ex D, p 1). In an Order of April 26, 2016, the Commission extended the deadline for filing notices of appeal to May 27, 2016.

9. In the Motion to Set Bond, the Petitioners stated that they are not requesting an injunction or stay of the Commission's CPCN Order granting DEP's Application. (Ex E, ¶ 5). The Petitioners also challenged DEP to state that an appeal will result in delays in the initiation of construction. *Id.* Further, the Petitioners argued that appellate bonds should not be set in an amount so high that appeals become impossible. *Id.* ¶ 6.

10. On April 27, 2016, the Commission entered a Procedural Order providing DEP with an opportunity to file a Response to the Petitioners' Motion to

Set Bond, and providing the Petitioners with an opportunity to file a Reply. (Ex G, p 1). Consistent with this Procedural Order, DEP filed a Response on May 2, 2016, (Ex H, p 1), and the Petitioners filed a Reply on May 5, 2016, (Ex I, p 1).

11. In its Response, DEP refused to state that an appeal would result in delays in the initiation of construction. (Ex H, ¶ 10). Instead, DEP provided general guesses, without any supporting documents or facts, at what a hypothetical delay might cost DEP. *Id.* ¶ 14. Despite a lack of evidence, DEP recommended an impossible $50 million bond.

12. Among other things, the Petitioners' Reply of May 5 called the Commission's attention to the fact that DEP failed to substantiate any of its alleged damages estimates. (Ex I, ¶¶ 5-6). The Petitioners' Reply again challenged DEP to state that an appeal would result in delays in the beginning of construction—which DEP still has not done—and noted that no public interest group, including the Petitioners, could ever post a $50 million bond. *Id.* ¶¶ 11-12. Finally, the Reply reiterated that the Petitioners are not seeking an injunction or stay of the Commission's CPCN Order granting DEP's Application. *Id.* ¶ 3.

13. On May 10, 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Bond Order"). (Ex J, p 1). In its Bond Order, the Commission acknowledged that it was "not aware of any case in which the Commission has determined the amount of a bond or undertaking

pursuant to G.S. 62-82(b)." *Id.* at 4 n.1. Nonetheless, the Commission required a bond or undertaking of $10,000,000.00. *Id.* at 7. The Commission also stated that, by September 1, 2016, DEP must state whether an appeal will cause delays in the beginning of construction. *Id.* However, it goes without saying that the Petitioners cannot afford a $10,000,000.00 bond or undertaking. Thus, the Commission's Bond Order is tantamount to dismissing any appeal of the CPCN Order.

14. The present Petition for Writ of Certiorari is necessary because N.C. Gen. Stat. § 62-82 requires the Petitioners to post a bond ordered by the Commission, yet the Commission erroneously required a prohibitively high bond without any supporting evidence. Hence, the present Petition for Writ of Certiorari requests that this Court review and reverse the Bond Order. Further, the present Petition for Writ of Supersedeas and Motion for Temporary Stay request that the Bond Order be stayed so that the Petitioners can timely file their Notice of Appeal and Exceptions from the CPCN Order by the May 27, 2016 deadline without the need to post the prohibitive and erroneous bond.

REASONS WHY WRIT OF CERTIORARI, WRIT OF SUPERSEDEAS, AND TEMPORARY STAY SHOULD ISSUE

15. Appeals from a certificate of public convenience and necessity are subject to the provisions of N.C. Gen. Stat. § 62-82(b). In relevant part, that statute states:

> *Any party or parties opposing, and appealing from, an order of the Commission which awards a certificate under G.S. 62-110.1 shall be obligated to recompense the party to whom the certificate is awarded, if such award is affirmed upon appeal, for the damages, if any*, which such party sustains by reason of the delay in beginning the construction of the facility which is occasioned by the appeal, such damages to be measured by the increase in the cost of such generating facility (excluding legal fees, court costs, and other expenses incurred in connection with the appeal). *No appeal from any order of the Commission which awards any such certificate may be taken by any party opposing such award unless, within the time limit for filing notice of appeal as provided for in G.S. 62-90, such party shall have filed with the Commission a bond with sureties approved by the Commission*, or an undertaking approved by the Commission, in such amount as the Commission determines will be reasonably sufficient to discharge the obligation hereinabove imposed upon such appealing party.

N.C. Gen. Stat. § 62-82(b) (emphasis added).

16. To summarize, a party losing an appeal challenging a certificate of public convenience and necessity may be obligated to pay "damages, if any, which [the public utility] sustains." However, the damages are explicitly limited to damages related to "delay in beginning the construction of the facility which is occasioned by the appeal," and these damages cannot include "legal fees, court costs, and other expenses incurred in connection with the appeal."

17. Therefore, any bond obligation is limited to damages caused by "delay in beginning the construction of the facility." However, despite being invited to do so, DEP refused to state that an appeal will result in delay in the initiation of construction. (Ex H, ¶ 10). Further, the Commission did not find that

the appeal will cause a delay in beginning construction. The Commission's only finding related to whether construction will be delayed is, "DEP indicates that it has not determined whether it will delay the beginning of construction of the facility if an appeal is filed." (Ex J, p 5). Therefore, the Bond Order is not supported by an essential factual finding necessary to support a bond under N.C. Gen. Stat. § 62-82(b), that construction will be delayed. As noted, the Petitioners are not requesting a stay, and therefore it is highly unlikely that DEP will delay anything. Accordingly, there should be no bond requirement.

18. Opposing counsel is aware of no cases interpreting the bond statute, N.C. Gen. Stat. § 62-82(b), at issue presently. However, this Court has reversed bond requirements in other contexts where the bond was not supported by evidence. For example, in *Currituck Assocs. Res. P'ship v. Hollowell*, 170 N.C. App. 399, 612 S.E.2d 386 (2005), the appellant asked for a stay pending appeal and accordingly requested a bond amount. In response, the appellee in *Hollowell* filed an affidavit stating that, if the stay is granted, it will be damaged by $1,369,040 per year. *Id.* 401, 612 S.E.2d at 388. The trial court ordered a $1 million bond and the appellant appealed. *Id.* This Court held that, "While the amount of the bond lies within the discretion of the trial court, we must determine whether the record contains evidence to support the trial court's decision." *Id.* at 402, 612 S.E.2d at 388. Because the appellee's affidavit in *Hollowell* did not

provide sufficient evidence to support a $1 million bond, this Court reversed the trial court and remanded for further bond proceedings. *Id.* at 404, 612 S.E.2d at 389.

19. The same result should follow here, as DEP failed to provide any evidence or detail in support of its over-the-top damage estimates. For instance, DEP asserted that delay will result in "major equipment contracts cancellation costs of approximately $40 million." (Ex H, ¶ 14). Yet DEP did not reveal the identities of these major equipment contracts; the reasons why delay would require the cancellation of these contracts; or why the cancellation of these contracts would result in $40 million in damages. Similarly, DEP claimed "an additional $8 million in sunk development costs" from a delay, *id.*, but DEP supplied no evidence to support the allegation. Precisely which development costs would be sunk due to delay? What evidence supports the assertion that these costs would be completely sunk, as opposed to only partially sunk, because of a delay?

20. DEP also claimed that "if the project were delayed by two years pending completion of the appellate process," then "the construction delay would amount to approximately $50 million, assuming a 2.5% annual cost escalation rate." *Id.* First, a two-year appellate process is on the high end. Second, DEP provided no evidence to support its proffered "2.5% annual cost escalation rate."

Id. Third, DEP refused to explain the calculation resulting in a supposed $50 million construction delay expense.

21. The Petitioners could, but will not, go on and on about the lack of evidence in DEP's reply. The point is that DEP baldly asserted, without any evidence or detail, that delay will result in millions of dollars in damages. But DEP's bald assertions should not be accepted on blind faith—instead, these allegations must be supported by evidence.

22. Further, the Commission's Bond Order never cited to any facts to support why $10 million is the proper bond amount, versus $5 million or $20 million or $300,000 or any other amount. In the *Hollowell* case, this Court admonished the trial court for being presented with a damages estimate of $1,369,040 yet somehow, without any supporting facts, rounding off the bond to $1 million. *Hollowell*, 170 N.C. App. at 403, 612 S.E.2d at 403. The same applies here. Nothing in DEP's submissions explains how $10 million is the correct number. Again, the Commission's Bond Order is not supported by competent record evidence.

23. It should also be noted that a $10 million bond is the equivalent of preventing appeals. It is doubtful that any Commission litigant other than DEP could post such a bond. This is particularly problematic in the present case, as DEP's Application was subject to the expedited timelines of the Mountain Energy

Act of 2015, S.L. 2015-110. The shortened time for litigation makes error more likely. Thus this is the worst of all possible cases in which to set a bond that is so high that appeal becomes impossible. This is the type of agency decision which should be reviewed by the judiciary.

24. For the foregoing reasons, extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the Commission for a stay order.

ATTACHMENTS

Attached to this Petition for consideration by the Court are certified copies of the Bond Order to be reviewed, as well as certified copies of other papers that are essential to this Court's review:

Exhibit	Document Title
A	Notice of Intent to File Application for Certificate of Public Convenience and Necessity
B	Order Scheduling Public Hearing and Requesting Investigation and Report by the Public Staff
C	Order Granting Application in Part, With Conditions, and Denying Application in Part ("CPCN Order")
D	Motion for Extension of Time to File Notice of Appeal and Exceptions
E	Order Granting Motion for Extension of Time
F	Motion to Set Bond

G	Procedural Order
H	DEP's Response to Motion to Set Bond
I	Petitioners' Reply to Duke's Response to Motion to Set Bond
J	Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Bond Order")

ISSUES TO BE BRIEFED

If this Court issues a Writ of Certiorari, Petitioners would present the following questions:

I. Must bond orders under N.C. Gen. Stat. § 62-82(b) be supported by competent record evidence?

II. Was the Commission's Bond Order supported by competent record evidence?

III. Was the Commission's Bond Order arbitrary and capricious?

CONCLUSION

WHEREFORE, Petitioners NC WARN and The Climate Times respectfully request that this Court issue its Writ of Certiorari to review the North Carolina Utilities Commission's Bond Order; issue its Writ of Supersedeas to stay execution and enforcement of the Commission's Bond Order; and issue a temporary stay of the enforcement and execution of the Bond Order.

Respectfully submitted, this the 19th day of May, 2016.

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(919) 942-0600 – telephone
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Counsel for NC WARN & The Climate Times

NORTH CAROLINA

WAKE COUNTY

I, Matthew D. Quinn, being duly sworn, depose and say that I have read the foregoing Petition for Writ of Certiorari, Petition for Writ of Supersedeas, and Motion for Temporary Stay, know the contents thereof, and that the same are true of my own knowledge, except as to the matters therein stated upon information and belief, and as to those, I believe them true.

Matthew D. Quinn

Sworn to and subscribed before me
this the 19 day of May, 2016.

E. Warren Kuhn
NOTARY PUBLIC

E. WARREN KUHN
Notary Public
Wake County
My Commission Expires
03/06/2017
NORTH CAROLINA

MY COMMISSION EXPIRES:

3/6/17

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing PETITION FOR WRIT OF CERTIORARI, PETITION FOR WRIT OF SUPERSEDEAS, AND MOTION FOR TEMPORARY STAY was served on the following parties to this action, pursuant to Appellate Rule 26, by depositing the same enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department to:

Gail L. Mount
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4300
mount@ncuc.net

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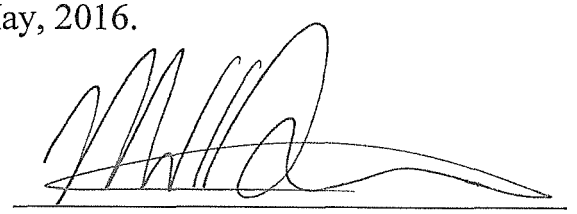
This the 19th day of May, 2016.



Matthew D. Quinn

EXHIBIT A

Lawrence B. Somers
Deputy General Counsel

Mailing Address:
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Raleigh, NC 27602

o: 919.546.6722
f: 919.546.2694

bo.somers@duke-energy.com

December 16, 2015

VIA ELECTRONIC FILING

Ms. Gail Mount, Chief Clerk
North Carolina Utilities Commission
430 North Salisbury Street – Dobbs Building
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

RE: Duke Energy Progress, LLC – Notification of Intent to File Application for Certificate of Public Convenience and Necessity for Western Carolinas Modernization Project
Docket No. E-2, Sub 1089

Dear Ms. Mount:

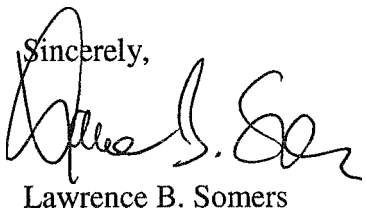
Pursuant to Session Law 2015-110, I write to notify the Commission that Duke Energy Progress, LLC ("DEP" or the "Company") plans to file an Application for a Certificate of Public Convenience and Necessity ("CPCN") to construct the Western Carolinas Modernization Project at the Company's existing Asheville plant site in Buncombe County, North Carolina on or after January 15, 2015. The Western Carolinas Modernization Project consists of two new natural gas-fired 280 MW (winter rating) combined cycle units, with fuel oil back up; a natural gas-fired 192 MW (winter rating) simple cycle combustion turbine unit, with fuel oil back up, whose need may be avoided or delayed due to the utilization of other technologies and programs to meet the future peak demand requirements of DEP customers in the region; and future new solar generation at the Asheville plant site. DEP is currently in the early stages of exploring these alternative peak load resources and will be working with DEP customers to maximize their deployment and effectiveness. The Western Carolinas Modernization Project will enable the early retirement of the 379 MW (winter rating) Asheville 1 and 2 coal units on or before the commercial operation of the new combined cycle units, thereby permanently ceasing operations of all coal-fired units at the site.

As will be set forth in detail in the Company's forthcoming CPCN application, the Asheville Combined Cycle units will provide cost-effective baseload generation for DEP's customers in North Carolina and South Carolina, and are planned for commercial operation in the Fall of 2019. The contingent Asheville Combustion Turbine unit would provide cost-effective peaking generation for DEP's North Carolina and South Carolina customers, and would potentially begin commercial operation in 2023 if the current peak demand growth is not sufficiently reduced by the alternative approach discussed above.

The new solar generation facility will be subject to a future CPCN application once the coal unit demolition plans have been sufficiently completed to determine the site configuration that will enable the optimum amount of new solar generation facility at the Asheville site for the benefit of the Company's customers in North Carolina and South Carolina.

Thank you for your attention to this matter. If you have any questions, please let me know.

Sincerely,



Lawrence B. Somers

cc: Antoinette R. Wike

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Progress, LLC's Notification of Intent to File Application for Certificate of Public Convenience and Necessity for Western Carolinas Modernization Project, in Docket No. E-2, Sub 1089, has been served by electronic mail, hand delivery or by depositing a copy in the United States mail, postage prepaid to the following parties:

Antoinette R. Wike
Public Staff
North Carolina Utilities Commission
4326 Mail Service Center
Raleigh, NC 27699-4300
Antoinette.wike@psncuc.nc.gov

This the 16th day of December, 2015.

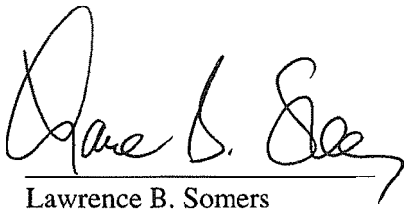


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EXHIBIT B

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Progress, LLC, for a Certificate of Public Convenience and Necessity to Construct a 752 Megawatt Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville	)	ORDER SCHEDULING PUBLIC HEARING AND REQUESTING INVESTIGATION AND REPORT BY THE PUBLIC STAFF

BY THE CHAIRMAN: On December 16, 2015, Duke Energy Progress, LLC (DEP), filed a letter in this docket giving notice of its intent to file an application on or after January 15, 2016, for a certificate of public convenience and necessity to construct a 752 MW natural gas-fueled electric generation facility consisting of two new natural gas-fueled 280 MW (winter rating) combined cycle units and a natural gas-fueled 192 MW (winter rating) simple cycle combustion turbine unit, each with fuel oil back up, in Buncombe County near the City of Asheville. In its letter, DEP states, "The Western Carolinas Modernization Project will enable the early retirement of the 379 MW (winter rating) Asheville 1 and 2 coal units on or before the commercial operation of the new combined cycle units, thereby permanently ceasing operations of all coal-fired units at the site."

The notice of intent was filed pursuant to Session Law 2115-110, which provides as follows:

> Notwithstanding G.S. 62-110.1, the Commission shall provide an expedited decision on an application for a certificate to construct a generating facility that uses natural gas as the primary fuel if the application meets the requirements of this section. A public utility shall provide written notice to the Commission of the date the utility intends to file an application under this section no less than 30 days prior to the submission of the application. When the public utility applies for a certificate as provided in this section, it shall submit to the Commission an estimate of the costs of construction of the gas-fired generating unit in such detail as the Commission may require. G.S. 62-110.1(e) and G.S. 62-82(a) shall not apply to a certificate applied for under this section. The Commission shall hold a single public hearing on the application applied for under this section and require the applicant to publish a single notice of the public hearing in a newspaper of general circulation in Buncombe County. The Commission shall render its decision on an application for a certificate, including any related transmission line located on the site of the new generation facility, within 45 days of the date the application is filed if all of the following apply:
>
> (1) The application for a certificate is for a generating facility to be constructed at the site of the Asheville Steam Electric Generating Plant located in Buncombe County.

(2) The public utility will permanently cease operations of all coal-fired generating units at the site on or before the commercial operation of the generating unit that is the subject of the certificate application.

(3) The new natural gas-fired generating facility has no more than twice the generation capacity as the coal-fired generating units to be retired.

In view of the 45-day decision-making deadline, the Chairman finds good cause to now schedule the required public hearing, require publication of notice as provided by law, and request the Public Staff to investigate the application, when filed, and present its findings, conclusions, and recommendations to the Commission at its Regular Staff Conference to be held on Monday, February 22, 2016.

IT IS, THEREFORE, ORDERED as follows:

1. That a hearing for the purpose of receiving non-expert public witness testimony is scheduled for 7:00 p.m., on Tuesday, January 26, 2016, at the Buncombe County Courthouse, 60 Court Plaza, Courtroom 1A, Asheville, North Carolina 28801;

2. That any person having an interest in this proceeding may file a petition to intervene stating such interest on or before Friday, February 12, 2016;

3. That the Public Staff shall investigate the application, when filed in this docket, and present its findings, conclusions, and recommendations to the Commission at its Regular Staff Conference to be held on Monday, February 22, 2016, at 10:00 a.m. in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina;

4. That DEP shall publish once, pursuant to S.L. 2015-110, the Public Notice attached hereto as Attachment A in a newspaper of general circulation in Buncombe County not less than three weeks prior to the date of the hearing, and shall file an affidavit of publication with the Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 18th day of December, 2015.

NORTH CAROLINA UTILITIES COMMISSION

Jackie Cox, Deputy Clerk

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Progress, LLC, for a Certificate of Public Convenience and Necessity to Construct a 752 Megawatt Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville	))))))	PUBLIC NOTICE

NOTICE IS HEREBY GIVEN that on December 16, 2015, Duke Energy Progress, LLC (DEP), filed a letter in this docket giving notice of its intent to file an application on or after January 15, 2016, for a certificate of public convenience and necessity to construct a 752 MW natural gas-fueled electric generation facility consisting of two new natural gas-fueled 280 MW (winter rating) combined cycle units and a natural gas-fueled 192 MW (winter rating) simple cycle combustion turbine unit, each with fuel oil back up, in Buncombe County near the City of Asheville. DEP further states that construction of this facility "will enable the early retirement of the 379 MW (winter rating) Asheville 1 and 2 coal units on or before the commercial operation of the new combined cycle units, thereby permanently ceasing operations of all coal-fired units at the site."

The North Carolina Utilities Commission (Commission) has scheduled a public hearing for the purpose of taking public witness testimony regarding the application, once filed, on Tuesday, January 26, 2016, at 7:00 p.m., in the Buncombe County Courthouse, 60 Court Plaza, Courtroom 1A, Asheville, North Carolina 28801. Petitions to intervene shall be filed with the Commission on or before Friday, February 12, 2016.

Details of the application, once filed, may be obtained from the Office of the Chief Clerk of the North Carolina Utilities Commission, 430 N. Salisbury Street, 5th Floor, Dobbs Building, Raleigh, North Carolina 27603 or 4325 Mail Service Center, Raleigh, North Carolina 27699-4325 or on the Commission's website at www.ncuc.net.

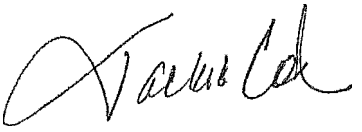
Persons desiring to be heard with respect to the application may file a statement with the Commission and should include in such statement any information that they wish to be considered by the Commission in connection with the application. Such statements will be included in the Commission's official files; however, any such written statements are not evidence unless those persons appear at a public hearing and testify concerning the information contained in their written statements. Such statements should reference Docket No. E-2, Sub 1089 and should be addressed to Chief Clerk, North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, NC 27699-4325.

Statements may also be directed to Christopher J. Ayers, Executive Director, Public Staff-North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326 or to The Honorable Roy Cooper, Attorney General of North Carolina, 9001 Mail Service Center, Raleigh, North Carolina 27699-9001.

ISSUED BY ORDER OF THE COMMISSION.

This the 18th day of December, 2015.

NORTH CAROLINA UTILITIES COMMISSION



Jackie Cox, Deputy Clerk

NOTE TO PRINTER: Advertising cost shall be paid by Duke Energy Progress, LLC. It is required that an Affidavit of Publication be filed with the Commission by Duke Energy Progress, LLC.

EXHIBIT C

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Progress, LLC, for a Certificate of Public Convenience and Necessity To Construct a 752 MW Natural Gas-Fired Electric Generation Facility in Buncombe County Near the City of Asheville	)))))))	ORDER GRANTING APPLICATION IN PART, WITH CONDITIONS, AND DENYING APPLICATION IN PART

HEARD: Tuesday, January 26, 2016, at 7:00 p.m., in Courtroom 1A, Buncombe County Courthouse, 60 Court Plaza, Asheville, North Carolina; and Monday, February 22, 2016, at 10:00 a.m., in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Chairman Edward S. Finley, Jr., Presiding, Commissioners Bryan E. Beatty, ToNola D. Brown-Bland, Don M. Bailey, Jerry C. Dockham and James G. Patterson

APPEARANCES:

For Duke Energy Progress, LLC:

Lawrence B. Somers, Deputy General Counsel, Duke Energy Corporation, P. O. Box 1551/NCRH20, Raleigh, North Carolina 27602

For NC WARN and The Climate Times:

John D. Runkle, 2121 Damascus Church Road, Chapel Hill, North Carolina 27516

For Columbia Energy, LLC:

Daniel C. Higgins, Burns, Day & Presnell, P.A., Post Office Box 10867, Raleigh, North Carolina 27605

For MountainTrue and the Sierra Club:

Gudrun Thompson, Southern Environmental Law Center, 601 W. Rosemary Street, Suite 220, Chapel Hill, North Carolina 27516.

D. J. Gerkin, Southern Environmental Law Center, located at 22 South Pack Square, Suite 700, Asheville, North Carolina 28801

For Grant Millin:

Grant Millin, 48 Riceville Road, B314, Asheville, North Carolina 28805, pro se

For Brad Rouse:

Brad Rouse, 3 Stegall Lane, Asheville, North Carolina 28805, pro se

For the Using and Consuming Public:

Diana Downey and Robert S. Gillam, Staff Attorneys, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On December 16, 2015, Duke Energy Progress, LLC (DEP), filed a letter in the above-captioned docket giving notice of its intent to file an application on or after January 15, 2016, for a certificate of public convenience and necessity (CPCN) to construct a 752 MW natural gas-fired electric generation facility consisting of two new natural gas-fired 280 MW (winter rating) combined cycle (CC) units and a natural gas-fired 192 MW (winter rating) simple cycle combustion turbine (CT) unit, each with fuel back up, in Buncombe County near the City of Asheville. In its letter, DEP states, "The Western Carolinas Modernization Project (Project or WCMP) will enable the early retirement of the 379 MW (winter rating) Asheville 1 and 2 coal units on or before the commercial operation of the new combined cycle units, thereby permanently ceasing operations of all coal-fired units at the site."

The notice of intent was filed by DEP pursuant to Section 1 of the Mountain Energy Act, Session Law 2015-110, which provides:

> Notwithstanding G.S. 62-110.1, the Commission shall provide an expedited decision on an application for a certificate to construct a generating facility that uses natural gas as the primary fuel if the application meets the requirements of this section. A public utility shall provide written notice to the Commission of the date the utility intends to file an application under this section no less than 30 days prior to the submission of the application. When the public utility applies for a certificate as provided in this section, it shall submit to the Commission an estimate of the costs of construction of the gas-fired generating unit in such detail as the Commission may require. G.S. 62-110.1(e) and G.S. 62-82(a) shall not apply to a certificate applied for under this section. The Commission shall hold a single public hearing on the application applied for under this section and require the applicant to publish a single notice of the public hearing in a newspaper of general circulation in Buncombe County. The Commission shall render its decision

on an application for a certificate, including any related transmission line located on the site of the new generation facility, within 45 days of the date the application is filed if all of the following apply:

(1) The application for a certificate is for a generating facility to be constructed at the site of the Asheville Steam Electric Generating Plant located in Buncombe County.

(2) The public utility will permanently cease operations of all coal-fired generating units at the site on or before the commercial operation of the generating unit that is the subject of the certificate application.

(3) The new natural gas-fired generating facility has no more than twice the generation capacity as the coal-fired generating units to be retired.

Section 2 of the Mountain Energy Act amends Section 3(b) of the Coal Ash Management Act (CAMA), Session Law 2014-122, by extending the deadline for closing the coal combustion residual (coal ash) surface impoundments at the Asheville Steam Electric Generating Plant (Asheville Plant) by three years if, on or before August 1, 2016, the Commission has issued a CPCN to DEP for a new natural gas-fired facility to replace the coal units at the Asheville Plant, based upon written notice by DEP to the Commission that it will permanently cease operations at the coal units no later than January 31, 2020. In addition, replacement of coal generation with natural gas-fired generation within the deadlines set forth in the Mountain Energy Act exempts impoundments and electric generating facilities located at the Asheville Plant from the prohibitions in CAMA related to storm water discharge and the requirements for conversion to "dry" fly and bottom ash.

On December 18, 2015, the Commission issued an Order Scheduling Public Hearing and Requesting Investigation and Report by the Public Staff. Among other things, in light of the 45-day deadline for making a decision on DEP's application, the Order scheduled the required public hearing on DEP's application for Tuesday, January 26, 2016, at 7:00 p.m. in Asheville. The Commission further found good cause to require the Public Staff to investigate the application and present its findings, conclusions, and recommendations to the Commission at the Commission's Regular Staff Conference on February 22, 2016.

On December 21, 2015, before DEP had filed its application for the CPCN, North Carolina Waste Awareness and Reduction Network and The Climate Times (collectively, NC WARN) filed a motion requesting that the Commission hold an evidentiary hearing for expert witnesses in this docket or, in the alternative, deny DEP's CPCN application as incomplete and insufficient until an evidentiary hearing can be held.

On December 31, 2015, DEP filed a response requesting that the Commission deny NC WARN's motion.

On January 5, 2016, DEP filed an affidavit of publication certifying that DEP caused to be published a notice of the public hearing scheduled for January 26, 2016, in Asheville.

On January 6, 2016, NC WARN filed a reply to DEP's response.

On January 15, 2016, the Commission issued an Order denying NC WARN's motion.

On January 15, 2016, DEP filed a verified application for a CPCN to construct up to 746 MW of natural gas-fired electric generating capacity consisting of two new natural gas-fired 280 MW CC units and a natural gas-fired 186 MW (winter rating) simple cycle CT unit,[1] each with fuel oil back up, and associated transmission in Buncombe County at DEP's Asheville Plant. In addition, DEP requested a waiver of Commission Rule R8-61(a), which requires certain information to be filed 120 days prior to a CPCN application, and a waiver of Rule R8-61(b), which requires the filing of testimony with a CPCN application. The application further notes that the need for the 186 MW CT may be avoided or delayed due to the utilization of other technologies and programs to meet the future peak demand requirements of DEP's customers in the region. The application also includes information about related on-site transmission facilities, DEP's plans to build up to 15 MW of solar generation at the Asheville Plant and plans to invest in a minimum of 5 MW of utility-scale storage pilot in the DEP-Western Region. In addition, DEP notes that the North Carolina Electric Membership Corporation (NCEMC) has an option to purchase 100 MW of the proposed facility, but states that the load required to be served by DEP in the region will be the same regardless of NCEMC's ownership decision.

Attached to the application are four exhibits, portions of which were filed under seal on the grounds that they contain confidential information and are not subject to disclosure pursuant to G.S. 132-1.2. Exhibit 1A is the public version of DEP's 2015 Integrated Resource Plan (IRP). Exhibit 1B is a Statement of Need and contains additional resource planning information required by Commission Rule R8-61(b)(1). Exhibit 2 contains Plant Description, Siting, and Permitting Information. Exhibit 3 contains Cost Information. Exhibit 4 contains Construction Information.

DEP asserts that the application is subject to expedited review under the Mountain Energy Act because it complies with the three factors set forth in the Act for such expedited review: (1) the application is for a CPCN to construct a natural gas-fired generating facility at the Asheville Plant, (2) DEP has proposed to permanently cease operations of its coal-fired units at the Asheville Plant on or before the commercial operation of the Project, and (3) the proposed natural gas-fired generating facility would have no more than twice the generation capacity as the coal-fired units to be retired. In conclusion, DEP requests that the Commission find that the public convenience and

[1] DEP's December 16, 2015 notice of filing indicated that it was planning to request a 192 MW (winter rating) CT, but reduced the capacity to 186 MW (winter rating) prior to filing the application on January 15, 2016.

necessity requires construction of the two 280 MW CC units and the contingent 186 MW CT unit and issue a CPCN for their construction.

On January 22, 2016, the Commission issued an Order on Procedure for Accepting Comments of the Parties. The Order provided that parties could present a brief opening statement at the January 26, 2016 public hearing, that parties could file written comments on or before February 12, 2016, and that parties would have an opportunity to make oral comments at the Commission's Regular Staff Conference on February 22, 2016.

On January 25, 2016, NC WARN filed a motion to compel DEP to provide additional responses to discovery requests submitted by NC WARN and to make public certain information in DEP's application that was filed as confidential trade secrets.

On January 26, 2016, the public hearing was held in Asheville as scheduled, at which 51 public witness testified.

On January 29, 2016, the Commission issued an Order granting DEP's request for a waiver of Commission Rule R8-61(a) and (b).

On February 1, 2016, DEP filed Revised Exhibit 1B, Attachment A, Revised Exhibit 3 and Revised Exhibit 4. In its cover letter, DEP stated that it conducted a comprehensive review of the confidential information filed under seal on January 15, 2016, with its CPCN application and removed the confidential designation on much of the information initially designated as a trade secret.

Also on February 1, 2016, DEP filed a response to NC WARN's motion to compel.

On February 4, 2016, the Commission issued an Order denying NC WARN's motion to compel.

Motions to intervene were filed and granted for the following persons and organizations: Grant Millin, Richard Fireman, Brad Rouse, North Carolina Sustainable Energy Association (NCSEA), Sierra Club, MountainTrue, Carolina Utility Customers Association, Inc. (CUCA), Carolina Industrial Group for Fair Utility Rates II (CIGFUR II), NC WARN,[2] and Columbia Energy, LLC (Columbia Energy). The intervention and participation of the Public Staff is recognized and made pursuant to G.S. 62-15.

The Commission has received numerous statements of position from interested persons. All statements of position have been filed as a part of the record in this docket.

On February 9, 2016, comments were filed by Richard Fireman. On February 10, 2016, comments were filed by Brad Rouse and NCSEA. On February 12, 2016, comments

[2] The Climate Times intervened along with NC WARN and they are collectively referred to as NC WARN in this Order.

were filed by Sierra Club and MountainTrue (collectively, Sierra Club), NC WARN, and Columbia Energy.

On February 17, 2016, the Public Staff filed its agenda item for the Commission's February 22, 2016 Regular Staff Conference to discuss the Public Staff's investigation of DEP's application and its recommendation for Commission action.

On February 19, 2016, NC WARN filed a response to the Public Staff's agenda item and the affidavit of J. David Hughes.

On February 22, 2016, the Public Staff presented the results of its investigation and its recommendation at the Commission's Regular Staff Conference. In addition, Brad Rouse, Columbia Energy, NC WARN, Sierra Club and DEP made statements regarding their positions.

On February 25, 2016, Brad Rouse filed additional comments and DEP filed Reply Comments to Additional Comments of Brad Rouse. On February 26, 2016, Brad Rouse filed 2nd Additional Comments of Brad Rouse and Grant Millin filed a statement. On February 26, 2016, NC WARN filed Additional Comments of NC WARN and the Climate Times.

On February 29, 2016, the Commission issued a Notice of Decision stating that this full Order with discussion and conclusions regarding all issues would follow.

Based on of the filings, comments, and arguments of the parties and the whole record in this case, the Commission makes the following

FINDINGS OF FACT[3]

1. DEP is a corporation existing under the laws of the State of North Carolina and is engaged in the business of generating, transmitting, distributing and selling electric power to the public in its franchised service territory in North Carolina subject to the jurisdiction of the Commission. DEP serves 160,000 households and businesses in its DEP-Western Region.

2. DEP presently operates two coal-fired electric generating units with a combined generating capacity of approximately 379 MW (winter rating) at its Ashville Plant site in Buncombe County.

3. DEP filed an application for a CPCN to construct up to 746 MW of natural gas-fired electric generating capacity consisting of two new natural gas-fired 280 MW CC units and a natural gas-fired 186 MW (winter rating) simple cycle CT unit, each with fuel

[3] If a finding of fact is misidentified herein as a conclusion of law or vice versa, then said item shall be deemed to be that which it should be.

oil back up, and associated transmission in Buncombe County at DEP's Asheville Plant. The Commission has jurisdiction over the application.

4. The issuance of the CPCN will enable the early retirement of the two Asheville coal units on or before the commercial operation of the new CC units, thereby permanently ceasing operations of all coal-fired units at the site and reducing CO_2 emissions. The CC units are planned for commercial operation in the fall of 2019. The existing on-site CT units will continue in operation.

5. From a total system perspective, the DEP 2015 IRP identifies the need for an additional 1,152 MW of new resources by 2020 and 5,099 MW by 2030.

6. As load continues to grow, more local generation is required in Asheville to maintain system reliability pursuant to NERC reliability standards.

7. The public convenience and necessity require the construction of new generation, and it is best served by the proposed two 280 MW CC units because the construction of the CC units in the timeframe provided under the Mountain Energy Act will allow DEP to do the following: (1) retire 379 MW of coal capacity at the Asheville Plant, (2) avoid significant capital investments and environmental controls required by CAMA if the coal units at the Asheville Plant remain in operation, (3) avoid construction of 147 MW of fast start CT capacity shown as a resource need in DEP's 2014 IRP, (4) realize cost saving synergies by participating at incremental cost in a new intrastate natural gas pipeline project being constructed by PSNC in Western North Carolina, (5) serve projected energy and demand growth in its western region while maintaining sufficient reserve transmission capacity into the region to comply with NERC reliability standards, and (6) achieve system-wide fuel and other cost savings by dispatching generation resources more efficiently.

8. DEP cannot rely upon energy efficiency, demand-side management and renewables to eliminate or delay its need for critical generation capacity in the 2019 timeframe.

9. The critical function, nature and location requirements of the CC units require that DEP operate, maintain and control these resources, and therefore DEP's decision not to evaluate the wholesale market alternative to meet these resource needs was reasonable.

10. Issuing a CPCN for the contingent 186 MW CT unit is not appropriate at the present time.

11. Columbia Energy owns an existing 535 MW cogeneration facility in South Carolina which is a qualified facility under the Public Utilities Regulatory Policies Act of 1978 (PURPA), which may be the subject to a future contested case. The CPCN issued herein is without prejudice to the right of any party to assert its relative rights and obligations under PURPA in any future arbitration or other proceeding relating to the Columbia Energy facility.

12. There were no material facts in dispute that could not be resolved on the basis of the written record.

SUMMARY OF PARTIES' COMMENTS

Public Staff

In its investigation, the Public Staff reviewed DEP's application and exhibits and the supporting documentation that DEP provided in response to data requests. This review included evaluation of the methodology, inputs, and assumptions underlying DEP's statement of need and economic justification for the Project compared to viable alternatives. The Public Staff also had discussions and meetings with DEP representatives and with Intervenors, visited the Asheville Plant, attended the public hearing, and reviewed the customer statements of position and Intervenor comments that had been filed with the Commission.

Based on provisions of the Mountain Energy Act modifying CPCN statutory requirements, the Commission is not required to approve the estimated construction costs of the CC and CT units or to make a finding that construction of the units will be consistent with the Commission's plan for expansion of electric generating capacity. However, in order to grant the CPCN the Commission must find that the public convenience and necessity require, or will require, the construction of the new units. That determination necessarily involves consideration of information related to construction costs and generation planning as well as other factors specific to the Project, all of which have been submitted with the verified application in this case.

By passage of the Mountain Energy Act, the General Assembly has expressed, as a matter of public policy, its desire that the coal units at the Asheville Plant be replaced with natural gas-fired generation. Based on its understanding of the Mountain Energy Act and its investigation of DEP's application, the Public Staff concludes that replacement of the coal units at the Asheville Plant with the CC units proposed by DEP is consistent with the purposes of the Act and that the public convenience and necessity requires the construction of the CC units in the time frame proposed. In particular, DEP's historical and projected load growth in the DEP-Western Region, coupled with the retirement of the Asheville Plant coal units, demonstrate the need for the CC units proposed by DEP. In addition, retiring the Asheville Plant coal units will enable DEP to avoid significant capital investments in environmental controls required by CAMA. Another significant benefit is the opportunity for DEP to participate at incremental cost in a new intrastate pipeline project being constructed by PSNC in Western North Carolina.

Moreover, replacement of the coal units at the Asheville Plant with the CC units will provide benefits to both the DEP-Western Region and the DEP system as a whole by 1) easing transmission constraints, 2) assisting in meeting NERC's reliability standards, 3) improving economic dispatch of generation, and 4) providing system-wide fuel cost savings and potential emissions benefits.

However, DEP's request that the CPCN include the construction of a contingent 186 MW natural gas-fired CT is problematic. Based on current projections, it is likely that additional capacity will be required to meet future demand in the DEP-Western Region, but such additional capacity is not expected to be needed until 2024. Further, that need is contingent on (a) the success of energy efficiency and demand-side management efforts, (b) load growth in the area, and (c) potential lower cost developments that may materialize in the future. In the Public Staff's view, the better course of action at this time is for the Commission to wait and see how load growth develops in the region and whether collaboration between DEP and the Asheville community results in reduced electricity usage and demand. CT capacity takes 24 months to construct. Even assuming that the area's load growth will continue as projected, there is time to wait for potential advances in generation, transmission, and storage technologies that might provide other least cost resource options for DEP to consider.

The Public Staff asserts that DEP's cost estimates and proposed contracting process are consistent with recent additions of CC units in the service areas of DEP and Duke Energy Carolinas, LLC (DEC). However, the Public Staff is not making a recommendation with respect to approval of the final costs associated with the CC units, and it reserves the right to take issue with the treatment of the final costs for ratemaking purposes in a future proceeding.

Based on its investigation and review, the Public Staff recommends that the Commission grant DEP a CPCN for the construction of two 280 MW CC units at DEP's Asheville Plant, with the following conditions:

1. That DEP shall retire its existing coal units at the Asheville Plant no later than the commercial operation date of the CC units;

2. That DEP shall construct and operate the CC units in strict accordance with all applicable laws and regulations, including the provisions of all permits issued by the North Carolina Department of Environmental Quality (DEQ);

3. That DEP shall file with the Commission in this docket a progress report and any revisions in the cost estimates for the CC units on an annual basis, with the first report due no later than one year from the issuance of the Commission's Order;

4. That DEP shall file with the Commission in this docket a progress report annually, including actual accomplishments to date, on its efforts to work with its customers in the DEP-Western Region to reduce peak load growth and on its efforts to site solar and storage capacity in the DEP-Western Region, with the first report due no later than one year from the issuance of the Commission's Order; and

5. That for ratemaking purposes, the issuance of the Commission's Order and the CPCN does not constitute approval of the final costs associated therewith, and

that the approval and grant is without prejudice to the right of any party to take issue with the treatment of the final costs for ratemaking purposes in a future proceeding.

Richard Fireman

In his comments, Intervenor Fireman stated that pursuant to G.S. 62-2, the Commission is required to promote harmony between public utilities, their users and the environment, and to promote the development of renewable energy and energy efficiency. The Commission should examine the traditional factors of reliable, adequate and least cost service within the framework of rapidly accelerating climate change. Replacing coal-fired electric generation with natural gas-fired generation is not acceptable because natural gas is a highly potent greenhouse gas. The Commission's decision on DEP's application will have long-term consequences for potential risks to our environment and humans. The risks are too great for making a hurried decision. The Commission should deny DEP's application and proceed with a full evidentiary hearing that will allow expert testimony by DEP and all interested parties.

Brad Rouse

In his comments, Intervenor Rouse stated that the energy and electric utility industries are in a period of rapid change due to two developments. The first is recognition of the need to end the use of fossil fuels because their use is the primary cause of climate change. The second is the technological change that is making renewable energy resources and energy efficiency measures more and more cost effective. Building the large natural gas-fired plant proposed by DEP will subject DEP's ratepayers to the unnecessary risk of a very expensive stranded investment. The Commission should deny DEP's application and require DEP to work with the community to develop renewable energy and energy efficiency options as opposed to building a large natural gas-fired plant.

NCSEA

In its comments, NCSEA stated that pursuant to the public convenience and necessity standard set forth in G.S. 62-110.1(a), the Commission must determine whether there is a need for the generating facilities proposed by DEP, and, if so, whether DEP's proposal will meet the need in a manner consistent with the public policy goals stated in G.S. 62-2. The Commission should examine all of the information and make a determination of the need for the two CC units proposed by DEP. However, the record demonstrates that the 186 MW CT is not needed in the near future and may never be needed. Therefore, the Commission should deny DEP's application to build the CT. Further, the Commission should require DEP to consider several energy efficiency alternatives for implementation in the near future, including residential time-of-use rates, residential smart meters, a smart thermostat demand response program, combined heat and power systems, and small scale solar and battery incentive programs.

Sierra Club

In its comments, Sierra Club stated that the public convenience and necessity standard requires DEP to show that it has considered all reasonable alternatives to building these proposed generating facilities. DEP has failed to meet that burden. Based on findings by consultant Richard S. Hahn, a principal consultant with Daymark Energy Advisors, DEP has not shown that transmission capacity into the Asheville region is constrained, that its projected capacity and reserve requirements are accurate, or that it has considered purchased power, renewable energy and energy efficiency alternatives. DEP can reasonably meet the region's needs with a smaller project, such as two 185 MW CCs and a 100 MW CT. If the Commission grants DEP a CPCN, it should be subject to several conditions, including: (1) require the retirement of coal capacity in addition to the two coal units at the Asheville Plant; (2) require DEP to comply with a specific timeline and reporting requirements to demonstrate its commitment to working towards more renewable energy, energy efficiency and demand response resources; and (3) require DEP to comply with a specific timeline and reporting requirements in meeting its commitment to build 15 MW of solar generation and 5 MW of storage capacity.

NC WARN

In its comments, NC WARN stated that the Commission should deny DEP's application. There are several reasons supporting this conclusion, based on three affidavits and a whitepaper, including: (1) the application does not include sufficient information; (2) the abbreviated decision schedule does not allow the Commission and parties sufficient time to make a well-informed decision; (3) DEP's proposed capacity addition is far larger than is needed; (4) the future supply and price of natural gas is uncertain; and (5) DEP's increased reliance on natural gas-fired generation will contribute to increased environmental harm due to methane leaks. In addition, there are viable alternatives that have not been considered or addressed by DEP, including purchasing hydropower that is available in the western part of North Carolina or other power available in the southeast, and using aluminum wire to "reconductor" DEP's transmission lines to increase their capacity.

Columbia Energy

DEP's application does not meet the public convenience and necessity standard for three reasons. First, DEP did not evaluate the wholesale market as an alternative to building new generation. Columbia Energy noted that it is the owner of a 523 MW generating plant in Gaston, South Carolina, that is a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA). Therefore, DEP is required to purchase Columbia Energy's energy and capacity at DEP's avoided costs. Columbia Energy stands willing and able to sell the energy and capacity from its QF to DEP at DEP's avoided costs, resulting in a lower cost alternative for meeting the Asheville area's electric needs. Second, DEP's estimated cost of $1.1 billion for construction of the Project is about 60 percent higher than the market cost construction estimate of LS Power Development, LLC, Columbia Energy's parent company. Third, the Commission should

deny the CPCN for the 186 MW CT because the public convenience and necessity will not be served by allowing DEP to build generating capacity based on such an uncertain need for it. Finally, if the Commission approves DEP's application, Columbia Energy requests that the Commission include a statement acknowledging DEP's obligation under PURPA to purchase electricity from QFs and stating that the Commission's Order is without prejudice to the assertion of Columbia Energy's rights under PURPA in any future arbitration proceeding.

SUMMARY OF PUBLIC TESTIMONY AND COMMENTS

Between January 15, 2016, and February 25, 2016, 360 members of the public submitted comments to the Commission via e-mail or mail. Of those written comments, 115 were identical, or nearly so, and expressed the following positions: 1) support for closing DEP's coal-fired plant in Asheville; 2) support for replacing that plant with renewable energy rather than an "over-sized gas plant"; 3) support for DEP's proposal to install 15 MW of solar and 5 MW of storage; 4) the belief that DEP has historically over-estimated electricity demand and favored building power plants "which drive profits for its shareholders"; 5) job-creating energy efficiency programs are a viable option; and 6) approval for DEP's proposed third gas unit is premature and would be "betting against the success of the new clean energy partnership it is forming with the City of Asheville and Buncombe County."

The Commission received another 187 statements expressing opposition to DEP's proposal. About half of these expressed opposition to the "fast track" review process created by the Mountain Energy Act. They urged the Commission to slow the CPCN review process down to ensure a thorough review. About a third strongly opposed any gas plant in Asheville and/or wanted DEP's proposal to be scaled back to be as small as possible while maintaining reliability. The major reasons for this opposition were: 1) the plant would contribute to climate change; 2) the plant would directly or indirectly involve natural gas production via hydraulic fracturing, which they asserted causes water pollution, earthquakes, and methane emissions; and 3) any burning of fossil fuels harms the environment. Those who opposed the natural gas-fired units believe solar power and energy efficiency can meet the area's electricity needs, with some also supporting wind power and, to a lesser degree, hydropower. Some stated that these alternatives would create badly needed jobs. Many commenters felt DEP's proposed 15 MW solar installation should be larger and that a CPCN request for that solar facility should have been included in the instant application. Several writers encouraged the Commission to make approval of the pending CPCN contingent on DEP pursuing the solar facility. Similarly, many commenters supported DEP's proposal for 5 MW of battery storage, but thought the Company should build even more.

About a dozen writers asserted that DEP could buy the needed power from other entities. Several people stated that the existing transmission lines could accommodate the needed imports. A few opposed allowing the plant to export power outside of the DEP-Western Region. Several mentioned the option of buying power from Columbia Energy or from unspecified hydropower facilities. About a dozen people expressed

concern that natural gas might not always be available, or that its price could increase in the future, raising costs for consumers. A few writers believe that a carbon tax will eventually be enacted, and oppose DEP's natural gas-fired facilities because those taxes would eventually be borne by consumers.

About two dozen writers urged the Commission to require DEP to be more transparent about its energy consumption forecast and the model it uses to forecast energy and peak demand. Some asserted that DEP has over-estimated its future demand and stated that an independent review of DEP's forecasts is needed.

Among those writers who oppose the natural gas-fired plants, about a dozen expressed support for shutting down the existing coal plant and removing the coal ash.

Twenty-nine writers expressed support for the Project; almost all of them said that they live in the Asheville area. Many stated that they own or work for businesses or Asheville area civic organizations, including: Asheville Area Chamber of Commerce; Asheville Savings Bank; Biltmore Farms; Burlington & Harris, PA; Constangy, Brooks, Smith & Prophet, LLP; Diamond Brand Gear Company; Economic Development Coalition for Asheville-Buncombe County; ECS Carolinas, LLP; First Citizens Bank; GE Aviation; GFoss Consulting, LLC; JB Media Group, LLC; Johnson Price Sprinkle, PA; TD Bank; and Windsor Boutique Hotel.[4]

Those who wrote to support the Project emphasized that natural gas is a cleaner fuel than coal, and that the new facilities would provide reliable, efficient and affordable electricity. They stated that affordable and reliable power is very important for attracting businesses to the area. They acknowledged that Asheville is growing quickly, and half of them specifically supported approval, now, of the contingent peaking unit. On the whole, the supporters expressed support for DEP's efforts to develop renewable energy, but they stated that solar is good "only when the sun shines." One writer expressed concern that development of utility scale solar would require the clearing of many trees. Several stated that DEP's proposed project would create jobs, and several expressed support for removing coal ash from the site. Several supporters acknowledged that there are vocal opponents to the project, but, as one writer stated: "While their voices may be loud, I do not believe that they represent the vast number of customers who will benefit from the plan."

In addition to the written comments summarized above, 51 people testified at the public hearing that the Commission held in Asheville on January 26, 2016: Carolina Arias, Harvard Ayers, Philip Bisesi, Marston Blow, Xavier Boatright, Ken Brame, Rebecca Bringle, Phillip Brown, Rick Burt, Bruce Clarke, Karen Richardson Dunn, Richard Fireman, Sabrey Franks, Avram Friedman, Kelly Gloger, Kendall Hale, Bob Hanna, Scott Hardin-Niery, Beth Henry, Katie Hicks, Ashleigh Hillen, Cathy Holt, Ken Huck, Steve Kaagan, Rowdy Keelor, Jane Laping, Bill Maloney, Kelly Martin, Judy Mattox, Pat Moore,

[4] Some of the entities represented in these twenty-nine filings represent a larger population. For example, there are approximately 1,719 members in the Asheville Area Chamber of Commerce.

Graydon Nance, Steven Norris, Lewis Patrie, Susan Presson, Steffi Rausch, Brad Rouse, Steve Runholt, Cathy Scott, Rachel Shopper, Mac Swicegood, Randy Talley, Ronald Taylor, Sara Lynch Thomason, Keith Thomson, Mark Threlkeld, Macon Verteskjall, William Vine, Joan Walker, Rich Wasch, Gabrielle White, and Alice Wyndham. Many of these individuals stated that, while they are members of the Sierra Club and/or MountainTrue, they were speaking on their own behalf, and most of them stated that they are DEP customers. Five of these speakers also submitted exhibits into the record.

The public witnesses at the hearing echoed the concerns that were raised in the written public comments described above. Many opposed the plant out of environmental concerns with the natural gas production technology called hydraulic fracturing. Many speakers believe that the proposed facility is too large and that DEP's request to build the peaking plant is pre-mature. Many spoke in support of renewable energy and stated that DEP's proposed solar facility should be larger and should have been included in the pending CPCN application. Similarly, many stated a preference for wind power, and several voiced support for hydropower. Some expressed support for DEP's battery storage facility, but asserted that it should have been larger and should have been included in the current CPCN application. A large number of speakers voiced support for energy efficiency and demand response programs. Many expressed support for DEP's closure of the existing coal plant, and several stated support for DEP's cancellation of the Foothills Transmission Line. A few people expressed opposition to the Mountain Energy Act and stated that, due to the Act, there would be no opportunity for DEP's witnesses to be cross-examined. Several asserted that DEP's forecasting methods need review and that its forecasting model should be disclosed. One person asserted that it is inefficient to use natural gas to make electricity and then to use that electricity to heat homes. He asserted that DEP's system wouldn't be peaking in the winter, but "we've been suckered into using electric heat."

The concern most consistently voiced at the public hearing was that of climate change and the belief that methane produced during the natural gas production process, along with emissions from the plant itself, would contribute to global warming. Several speakers cited the recent methane leak from the Porter Ranch, California, natural gas storage facility to emphasize their opposition to natural gas-fired electricity production due to its methane risks. Several speakers mentioned the Clean Power Plan, the United States Environmental Protection Agency (EPA) rules for the reduction of carbon dioxide emissions from existing power plants. They wanted the State to move ahead to comply with these rules and expressed concern that North Carolina has instead challenged the EPA rules in court.

SUMMARY OF PUBLIC STAFF'S RECOMMENDATIONS AND PARTIES' COMMENTS AT STAFF CONFERENCE

Public Staff's Agenda Item and Comments

The Public Staff presented its findings, conclusions and recommendations to the Commission at the Commission's Regular Staff Conference on February 22, 2016. As set

forth in the application, the CC units will consist of two power blocks, each with one CT, one heat recovery steam generator (HRSG), and one steam turbine (ST), which will be designed to operate in a simple cycle configuration if the steam cycle is not available. The power blocks will be sited in the former "1982 Ash Pond" area, which is currently being excavated. One power block will be connected to the Company's existing 230 kV switchyard with a single 230 kV line. Both the ST and the CT will be connected to the single 230 kV line. The other power block will be connected to the existing 115 kV switchyard via two 115 kV lines. The ST will be connected to one 115 kV line, and the CT will be connected to the other 115 kV line. DEP's 2014 IRP calls for continued operation of the Asheville coal units until 2031 with the construction of two fast-start CTs in 2019 to meet reliability requirements in the Company's western region. The contingent CT unit would be sited near the two existing 185 MW (winter rating) CT units at the Asheville facility.

Natural gas for the CC units will be provided by a new intrastate pipeline being constructed by Public Service Company of North Carolina, Inc. (PSNC), pursuant to an agreement for firm transportation redelivery service between PSNC and the Company.

According to the application, DEP serves 160,000 households and businesses in its DEP-Western Region. The Company states that the WCMP will enable the early retirement of the 379 MW (winter rating) Asheville 1 and 2 coal units on or before the commercial operation of the new CC units, thereby permanently ceasing operations of all coal-fired units at the site.[5] The CC units are planned for commercial operation in the fall of 2019. The contingent CT unit would potentially begin commercial operation in 2024 if the current peak demand growth is not sufficiently reduced by the alternative approach discussed in the application. The existing on-site CT units will continue in operation.

As stated in the application, since the year 2000, the annual winter peak loads in the DEP-Western Region have increased at an average rate of 2.5%. Over the next decade, winter peak demand in the DEP-Western Region is projected to outpace that of the rest of the DEP system in North Carolina and South Carolina, and to grow at an annual rate of 1.6%, with a total growth of approximately 17% over the next decade. As a result, the Company's 2014 IRP shows a resource need of 126/147 MW (summer/winter) of fast start CT[6] capacity in the DEP-Western Region. Construction of the CC units will allow for the elimination of this CT capacity as well as the retirement of the 376/379 MW (summer/winter) of coal capacity at the Asheville Plant. Retirement of the coal units at the Asheville Plant in the time frame provided under the Mountain Energy Act (January 31, 2020) will also allow the Company to avoid significant capital investments in environmental controls required by CAMA (i.e., new dry fly ash and bottom ash handling technology and storm water requirements).

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[5] DEP's 2014 IRP calls for continued operation of the Asheville coal units until 2031 with the construction of two fast-start CTs in 2019 to meet reliability requirements in the Company's western region.

[6] Fast start CTs provide greater system reliability and flexibility due to their ability to quickly respond to balancing authority area (BAA) changes in demand or loss of generation. For example, a fast start CT can achieve 100% of its rated output in less than 15 minutes, whereas a coal unit takes several hours before it can produce any power at all after it has been shut down.

A significant additional benefit associated with constructing the CC units in the proposed time frame rather than constructing CC units for commercial operation commencing in 2031, the current projected retirement date of the two coal-fired units at the Asheville Plant, is the opportunity for DEP to participate at incremental cost in a new intrastate natural gas pipeline project being constructed by PSNC in Western North Carolina. Postponement of the Project likely would result in significant future costs associated with incremental capacity upgrades to the pipeline to serve the CC units. The confluence of events involving the extension of natural gas capacity in the region and construction of the CC units in the proposed timeframe produces cost-saving synergies that will benefit ratepayers.

Moreover, replacement of the coal units at the Asheville Plant with the CC units will provide benefits to both the DEP-Western Region and the DEP system as a whole. Currently, at the time of the system peak, all Company-owned resources in the DEP-Western Region are required to meet demand. In addition, even with those resources fully dispatched, the region requires the utilization of imported power via limited transmission options.[7] NERC reliability standards require mandatory compliance by balancing authority areas (BAAs) to ensure sufficient reserve transmission capacity into the BAA to respond to system disturbances in a timely manner.[8] As load continues to grow, either more generation or more power import capability or both is required to maintain system reliability. The Company's original WCMP proposal to add transmission capacity in the region (the Foothills Transmission Line) together with the construction of a 650 MW CC unit at the Asheville Plant was met with extensive community opposition and has been cancelled. The revised configuration of the CC units reduced the size of the CC capacity as originally proposed and was selected by the Company to optimize existing transmission capacity, while improving the economic dispatch of the generation serving the DEP-Western Region and the entire DEP system. The new CC units are projected to operate at significantly higher capacity factors than the existing coal units, providing system-wide fuel cost savings and potential emission benefits. Thus, the new CC units will provide some room for load growth in the region, provide greater operational flexibility due to their ability to operate as intermediate and peaking units, as needed, in addition to their primary use as baseload, and serve as a resource for the broader DEP system when not fully required to meet demand in the DEP-Western Region.

The CC units will have a total generating capacity of 560 MW compared to the 379 MW of coal that DEP will be retiring. However, given the projected energy and peak

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[7] In its application, DEP asserts that there is a maximum Total Transmission Import Capability of 750 MW into the DEP-Western Region. Of this total, 198 MW must be held in reserve as Transmission Reliability Margin in the event of the loss of the largest single unit in the BAA, currently Asheville Unit 1. DEP also has 164 MW of import commitments. DEP uses the remaining 388 MW of import capability into its West BAA to transfer firm capacity and energy from its East BAA into its West BAA. The West BAA has 865 MW of internal generation and a realized peak load of nearly 1,200 MW.

[8] NERC reliability standard TOP-004 requires each transmission operator to operate within certain limits so that instability, uncontrolled separation, or cascading outages will not occur as a result of the most severe credible single contingency (e.g., loss of the largest generating unit or loss of a major transmission line within the BAA).

demand growth along with the transmission constraints in the DEP-Western Region, the Public Staff asserts the incremental additional generating capacity to be reasonable and necessary to maintain adequate and reliable service in the area both now and in the future and, as stated above, will eliminate the need to construct fast start CT capacity in the near future.

While the Public Staff posits that granting the Company's request for a CPCN for the CC units will accomplish the purpose of the Mountain Energy Act and is otherwise required by the public convenience and necessity, DEP's request that the CPCN include the construction of a contingent 186 MW (winter rating) natural gas-fired CT unit at the Asheville Plant is problematic. Unlike the CC units, which must be in commercial operation in time for the coal units to cease operation by January 31, 2020, the CT unit does not require the expedited decision-making prescribed under the Mountain Energy Act. Based on current projections, it is likely that additional capacity eventually will be required to meet future demand in the DEP-Western Region, but such additional capacity (which takes 24 months to construct) is not expected to be needed until 2024, eight years from now, and that need is contingent on (a) the success of energy efficiency and demand side management efforts, (b) load growth in the area and (c) potential lower cost developments that may materialize in the future. In the Public Staff's view, the better course of action at this time would be for the Commission to wait and see how load growth develops in the region and whether collaboration between the Company and the Asheville community results in reduced electricity usage and demand. Not granting a CPCN for the additional CT unit will allow time for advances in generation, transmission, and storage technologies that may provide other least cost resource options for the Company to consider should load growth continue as projected without significant reductions in demand as a result of community collaborative efforts with the Company.

In summary, the Public Staff opined that through the passage of the Mountain Energy Act, the General Assembly has expressed, as a matter of public policy, its desire that the coal units at the Asheville Plant be replaced with on-site natural gas-fired generation. The replacement of these units with the CC units proposed by DEP in its application is consistent with the purposes of the Act, and that the public convenience and necessity require the construction of the CC units in the timeframe proposed.

Finally, the Public Staff indicated that although the Commission is not required to approve a cost estimate for the facility under the Mountain Energy Act, the Public Staff did review the Company's cost estimates for the CC units, including the basis of the estimates and process being undertaken to contract with vendors for the units, and determined that the estimates and contracting process, are consistent with recent additions of CC units in the service areas of DEP and DEC. Based on the foregoing, the Public Staff recommended the issuance of an Order granting the requested CPCN only for the CC units with the conditions as outlined in its filing dated February 17, 2016.

Intervenor Comments

Intervenor Rouse agreed with the Public Staff's recommendation to close the coal units at the Asheville Plant, to deny DEP's request for the construction of the contingent CT unit, and for DEP to provide annual reports on its progress in reducing peak load and building solar capacity at the site. Rouse made two additional requests: (1) the Commission should order Duke to work with the customers in Western North Carolina to develop a specific addendum to its biennial IRP, wherein the contents of this IRP should include the preferred strategy to meet future Western North Carolina needs without the contingent CT, including peak load reductions, solar, storage, along with the consideration of wind, hydropower and additional transmission; and (2) the Commission should only approve two 188 MW CC units, the same capacity as the two coal-fired units to be retired, if the CC units are built instead of DEP's requested two 280 MW CC units. Rouse asked the Commission to visualize what the future will be like in 20 to 30 years. He questioned whether the nation will still be using fossil fuels or whether there will be monumental change because "humanity [is] being challenged to use all of its productivity and innovative capacity to rid itself of fossil fuels." He stated if the Commission's vision is continued use of fossil fuels, then the Commission should adopt the Public Staff's recommendation, but if the Commission's prefers innovation, the future is all renewables and the amount of natural gas-fired capacity being built is too great. He stated that the largest unit in Western North Carolina is increasing from 188 MW to 280 MW and that from a NERC compliance standpoint, nothing will be gained.

Columbia Energy indicated that it owns an existing 535 MW cogeneration power plant in South Carolina that is a QF under PURPA. Columbia Energy stated that its interest in this proceeding is in protecting its rights under PURPA. Columbia Energy posited that DEP acknowledged that it did not evaluate the wholesale market for alternatives to meet the resource needs which are described in its application. While PURPA does not mandate rejection of DEP's application in favor of a power purchase agreement with a QF, Columbia Energy stated that it is concerned that DEP may seek to avoid its PURPA obligations, which include the obligation to purchase all capacity made available at the electric utility's avoided cost rates. Columbia Energy is concerned that DEP will cite approval of this project in arguing in a future case that a power purchase agreement for the output of its facility would not avoid capacity costs for the full capacity made available by this QF. Columbia Energy argues that PURPA does not allow DEP to ignore available QF capacity to meet needs for which it would otherwise build new facilities. Columbia Energy acknowledged that the parties' potential dispute will be the focus of another docket. However, Columbia Energy indicated concern because DEP has rejected an offer by Columbia Energy and proposed only a short-term power purchase agreement with an energy-only rate and no proposal for payment for capacity. Lastly, Columbia Energy stated that with DEP's reported future capacity needs, it might be that DEP can simultaneously construct the 560 MW that the Public Staff has recommended and accommodate a power purchase agreement with Columbia. However, until an agreement is signed under PURPA, Columbia Energy argues that output from its facility is a viable alternative to a significant addition of generation to DEP's system.

NC WARN stated that the primary purpose of G.S. 62-110.1 is to regulate the expansion policy of electric utility plants in North Carolina to provide for the public need for electricity without wasteful duplication or over expansion of generating facilities. NC WARN stated that the Mountain Energy Act unrealistically expedites this process. NC WARN argued that a 30-day notice and a 45-day review period does not allow the Commission the opportunity to review the cost of the facility, the alternatives to the facility, the need for the facility, the long term costs, and the natural gas prices. Therefore, NC WARN opined that the Mountain Energy Act is unconstitutional, as applied. NC WARN argued that the lack of opportunity to put on expert witnesses and testimony and the restricted review period of only 45 days results in the Commission not being able to fairly regulate DEP. NC WARN requested that the Commission deny DEP's application without prejudice so that all parties can conduct a full review with all of the procedures set forth in Chapter 62 as opposed to this expedited procedure. Further, NC WARN argued that a lot of information in DEP's application was confidential and that the public did not have a chance to review that confidential information. NC WARN offered Dr. Howarth's comments, stating that he is one of the leading scientists in the world on the impacts of natural gas and its pollutant methane on the global climate. Dr. Howarth states that methane is 80 to 100 times more dangerous than carbon dioxide to the climate, supporting NC WARN's contention that natural gas is not a bridge fuel; rather, it is as potent or as dangerous in some ways as coal. NC WARN provided an affidavit by Mr. Hughes looking at natural gas prices based on his analysis of different natural gas fields. The affidavit indicates that natural gas is at as low a price now as it has been for a long time, but that the Commission should look to the future and that the price will go up significantly. Building this plant will lock DEP into an expensive natural gas future. NC WARN provided an affidavit by Mr. Powers who looked at the need for the plant as opposed to alternatives in a "responsible energy future." NC WARN argued that there is well over 100 MW of dispatchable hydropower that is not part of this plan and that it was offered to DEP as an alternative. NC WARN also suggested that DEP should look to see whether the transmission lines can be reconductored to allow more power to be delivered to Asheville from Columbia Energy or some other plant. NC WARN requested that DEP honor its commitments to build solar in the DEP-Western Region and that the Commission should create tangible goals for energy efficiency and demand side management in the region. Lastly, NC WARN stated that there is no justification for DEP's 17 percent increase in the growth rate for electric usage in the Asheville area. NC WARN indicated that when looking back at previous IRPs back to 2003, DEP's load forecast was many times higher, as much as 4 or 5 times higher, than the actual demand that was subsequently reached.

Sierra Club stated that it strongly supports DEP's decisions to retire the existing 379 MW Asheville coal units in 2020 and to cancel the Foothills Transmission Line Project. However, it has concerns about the amount and type of capacity being requested to replace the capacity of the coal units. Sierra Club indicated it agrees with and joins the Public Staff in asking the Commission to deny Duke's request to certify the contingent 186 MW CT unit, but it respectfully disagrees with the Public Staff's recommendation to grant a CPCN for the two 280 MW CC units. Sierra Club stated that DEP has an incentive to overbuild its system and maximize revenue for its shareholders. Sierra Club posited

that our courts have recognized that the purpose of G.S. 62-110.1 and of the public convenience and necessity standard is to prevent costly overbuilding. Sierra Club recognizes that the Commission's regulatory oversight provides an important check on DEP's incentive to overbuild. Sierra Club highlighted five points that Richard Hahn, its consultant, made upon his review of DEP's application. First, DEP failed to give serious consideration to cleaner, potentially cheaper alternatives, such as renewable energy resources, demand response, energy efficiency, and purchased power that could eliminate or reduce the need for this Project. Second, DEP has not demonstrated on the record in this proceeding that DEP-West is a legitimate load pocket due to import constraints. Third, DEP recently increased its planning reserve margin from 14.5 percent to 17 percent based on a study that was not even complete at the time, a change that alone results in an increased capacity need of 355 MW across the DEP system. Fourth, even after the coal units are retired there will be enough capacity available in DEP-West except during times of peak demand, suggesting that if DEP needs new natural gas-fired capacity in DEP-West, it should build peaking units which would cost less, run less, and pollute less than CC units that would be run as intermediate or baseload units. Sierra Club indicated that these four points lead to the conclusion that DEP has not shown that its proposal is required by the public convenience and necessity. Finally, assuming what DEP says about the basis for the proposal to build two CC units, a smaller plant would provide the same level of reliability in DEP-West. Sierra Club indicated that DEP could meet customer needs in DEP-West with two 185 MW CC units in 2020 and one contingent 100 MW CT in 2024 without compromising reliability.

Sierra Club stated that even though the General Assembly might have expressed a policy preference that the coal plants at the Asheville site be replaced with natural gas, the legislature did not prescribe a specific result, and it did not relieve the Commission of its duty to apply the public convenience and necessity standard. Further, if the legislature wanted to mandate a new natural gas-fired plant or a specific plant configuration or size, it certainly knew how to do that. The legislature did not do that. Instead, the General Assembly entrusted this Commission, the regulatory body with expertise in utility resource decisions, to make that decision. Sierra Club asked the Commission to deny the application and allow DEP to reapply with the right size project. Sierra Club argued that DEP itself has said that it takes two to three and a half years to build a new natural gas-fired plant, so Sierra Club argued there is still time to reapply without delaying the retirement of the Asheville coal plant. Alternatively, if the Commission does grant a CPCN based on the pending application, it should only issue a certificate for two 185 MW CC units and should deny the certificate for the contingent CT unit. If the Commission does grant a CPCN for any new natural gas-fired capacity at the Asheville site, it should require DEP to retire additional coal-fired generating capacity corresponding to any incremental capacity certificated over and above the 379 MW of coal capacity being retired at the Asheville site, just as the Commission did with the Wayne County CC application several years ago under a similar fast track statute.[9] Lastly, Sierra Club requested that the

[9] Order Granting Certificate of Public Convenience and Necessity Subject to Conditions, In re Application of Progress Energy Carolinas, Inc., Docket No. E-2, Sub 960 (Oct. 22, 2009) (decided under G.S. 62-110.1(h)).

Commission hold Duke to its commitments to invest in clean energy resources in Western North Carolina, including demand response, energy efficiency, solar, and storage.

DEP Response

DEP presented the impetus for DEP's filing requesting a CPCN application for the Project, a summary of the Project, and a response to comments by the Intervenors. DEP stated that the Project provides a unique opportunity to reliably and cost-effectively meet its customer needs while transitioning to a cleaner and smarter energy future. DEP outlined the basics of the Project as set forth in more detail in its 441-page CPCN application filed on January 15, 2016. DEP indicated that the Project will allow it: (1) to retire early the existing 1960s vintage 379 MW coal units at its Asheville Plant; (2) to avoid building 147 MW of fast start CTs in the 2019 timeframe that were included in DEP's 2014 IRP; and (3) to partner with PSNC in its expanded natural gas pipeline to provide much needed natural gas service to Western North Carolina and the Asheville area. DEP will participate in that project at the incremental cost, saving its customers nearly twice what it would cost if Duke paid the full cost to build the pipeline itself. Lastly, DEP indicated that the Project is needed not only for the reliability of the fast-growing, nine county western region, but is also the most cost-effective resource to serve all of DEP's 1.5 million customers in North Carolina and South Carolina.

In response to Intervenor suggestions that DEP focus merely on building a facility of a certain size to "just" meet the reliability needs of the western region, DEP responded that it must plan and build its system with the most cost-effective size of units for its entire customer base because all of DEP's customers will pay for this generation if it is approved.

In response to Intervenor and public concerns about the "fast track process" under the Mountain Energy Act, DEP indicated that the Act, which was signed into law in June of 2015 and passed unanimously by the General Assembly, encourages DEP to retire its existing 1960s coal units and replace them with cleaner, more efficient, and more cost-effective natural gas-fired generation. DEP indicated that despite the expedited process that was required by the General Assembly, DEP has filed a complete CPCN application that includes all of the technical information about the Project, including costs, engineering, need, and benefits of the Project. Every party has had access to that detailed information since January 15, 2016. DEP indicated that portions of only 12 pages out of the 441-page application were filed under seal, and parties agreeing to sign a confidentiality agreement have had access to those pages. NC WARN declined to sign the confidentiality agreement to obtain access to this information.

DEP cautioned the Commission that without the Mountain Energy Act that extends CAMA deadlines and without this Commission's approval of the CPCN for the Project, DEP will be required to invest hundreds of millions of dollars in new environmental controls at the Asheville coal plant. In addition, DEP will have to continue to operate the coal units until their projected retirement date of 2031.

DEP summarized the environmental benefits of the retirement of the coal units and replacement with the cleaner, more efficient natural gas-fired units as detailed in its application. DEP indicated that significant emission reductions will result from the retirement of the coal units: NO_x emissions will be reduced by 35 percent, SO_2 emissions will be reduced by 90 to 95 percent, CO_2 emissions will be reduced by 60 percent per megawatt-hour, and all mercury emissions will be eliminated. DEP stated that there are significant benefits from the standpoint of water usage as well. DEP indicated that the current Asheville coal units use once through cooling water. The new combined cycle units will use cooling towers, eliminating all thermal loading to Lake Julian and 97 percent of the water withdrawal from Lake Julian.

In response to those who have argued that there has been insufficient information shown as to need, DEP questioned whether those individuals have either been misled by someone or whether they have not had an opportunity to read the full application filed with the Commission. DEP indicated that the need for the Project is based on an IRP planning basis. DEP argued that the comments filed by many of the Intervenors appear to demonstrate a lack of fundamental understanding as to the difference between capacity and energy, a fundamental lack of understanding as to how load forecasts are prepared and approved by this Commission, as well as a fundamental lack of understanding of how electric systems are planned and maintained for a reliable and least cost basis. As detailed in the CPCN application, DEP indicated that the basis for this need is demonstrated in the 2015 DEP IRP. DEP stated that there exists a specific, unique situation regarding the DEP-Western Region, which DEP contends is an energy island.

DEP cited to the fact that the DEP-Western Region is an attractive place to live, to visit, to retire, and to work, and is the fastest growing region within DEP's entire service territory. DEP indicated that since 1970, the western region's electric needs have more than tripled. Since 2000, the annual winter peak has increased an average of 2.5 percent, far outpacing the growth in the rest of DEP's system. The DEP-Western Region's peak load forecast is projected to grow at approximately 17 percent over the next 10 years. DEP made clear that it is important to note that the DEP-Western Region is a winter peaking area as opposed to summer peaking, as in the DEP-Eastern Region and in South Carolina. DEP's decisions and the capacity factors stated are based on meeting a peak winter need in its western region.

The original 2015 IRP for DEP included a single combined cycle unit of 733 MW (winter rating) and the construction of the Foothills Transmission Line, a 45-mile 230 kV transmission line from Asheville to Campobello, South Carolina, a community approximately 10 miles south of Asheville across the state border. DEP indicated that the DEP-Western Region is an energy island in that there is insufficient local generation to meet peak demand and that this region is a net importer of energy. The transmission facilities into DEP-West are significantly constrained so as to limit the import of additional energy. This constraint led DEP to propose the Foothills Transmission Line. DEP outlined that the Foothills Transmission Line was met with significant opposition from its customers in North Carolina and South Carolina. DEP indicated that in the face of that opposition and the real likelihood that there would be litigation and appeals that would delay

construction of that line for many years, DEP made the decision to cancel the Foothills Transmission Line in November of 2015, so that DEP could attempt to meet the deadline for retirement of the coal units by January 20, 2020, per the Mountain Energy Act. DEP reconfigured the Project to propose two smaller units in order to maximize the amount of local generation given no new transmission import capability.

DEP noted that even if DEP builds both CC units and the CT unit as part of the Project, the DEP-Western Region will still have insufficient generation to meet its peak load needs and DEP will still rely upon transmission import capability, which is severely limited. DEP referred the Commission to Table 1 of Exhibit 1B to the CPCN application, which shows that even after the Project is built, there will be only 470 MW of usable transmission (or 470 MW of import capability) into the DEP-Western Region. DEP stated that currently that capacity is used to transport purchased power into the region as well as to transfer power from DEP-East to DEP-West. DEP noted that NCEMC has an option to purchase 100 MW of the CC unit. Regardless of whether NCEMC exercises its option and, thus, whether DEP owns 460 MW or 560 MW of the CC units, the load that DEP will have to serve in the western region remains the same.

In responding to comments regarding the capacity factors of the coal units, DEP indicated that DEP operates its system in a least cost manner. DEP indicated that the coal units in Asheville are run out of economic dispatch throughout the year because of the local voltage and reliability needs. DEP, in operating the system in a least cost manner, will, when load conditions enable it, import cheaper energy from the eastern part of the system. Such energy is largely generated in natural gas-fired units, resulting in the lower capacity factors for the coal units.

DEP stressed that its reliability concerns, which are detailed in Attachment A to Exhibit 1B, are real and cannot be ignored as some of the Intervenors would like decision-makers to do. DEP explained that there is a minimum amount of Asheville generation that is required to be online at all times to supply voltage and provide reliable service given planning contingencies. These contingencies include a generator being offline. Also, DEP must review the transmission lines in the area and the impact on them if one or more of those transmission lines is unavailable.

DEP highlighted that since November 2008, DEP has declared four energy emergency alerts (EEA) for DEP-West due to having marginally enough capacity to serve load. Three of these events were EEA Level 2. The next level, EEA Level 3, requires shedding firm load, which is commonly known as rolling blackouts. These events occurred on November 19, 2008, January 4, 2012, January 7, 2014, and February 20, 2015.

DEP stated that the size of the CC units proposed as part of the Project were engineered specifically, based on the criteria to optimally meet the load and reliability requirements given the transmission import constraints and to provide for cost-effective system needs for the benefit of all DEP customers. DEP explained that the Intervenors who argue that the size of the CC units is too large fail to recognize that when there is insufficient load in the western region, those new CC units as part of the Project will be

the most efficient and most cost-effective natural gas-fired units on DEP's system and will be used to serve DEP's customers in eastern North Carolina and in DEP's service territory in South Carolina. The result, as the Public Staff noted in their recommendation, means a lowering of costs to all of DEP's customers.

In response to Intervenor concerns regarding whether DEP has shown a need for the CT unit because the CT unit's need could be delayed or eliminated if DEP is successful in collaborating with its community partners to get the community to reduce its peak load demand growth, DEP stated that the need is real and has been shown. DEP argued that even though there is a need for this CT unit, there is the potential to delay or eliminate the need through other measures, such as energy efficiency (EE), demand side management (DSM) and other technologies.

DEP has committed to work with the community to aggressively seek EE, DSM, renewables, and other technologies that could delay or eliminate the need for the CT unit. DEP summarized actions it has engaged in to date as part of its commitment to a cleaner, smarter energy future. As to EE and DSM measures, DEP has been working with Asheville area community leaders to develop a collaborative effort to maximize participation in its existing programs and to develop new programs and services. Some examples include education and training. DEP's head of Integrated Resource Planning recently participated on a panel with NCSEA, MountainTrue, and New Belgium Brewing at an event sponsored by UNC Asheville to discuss utility planning and efforts to reduce peak demand. DEP has begun working with the City of Asheville to set up training for its building and code enforcement personnel so they can promote EE and DSM measures. DEP has also agreed to participate in several upcoming events and provide demonstrations of EE and DSM measures.

DEP indicated that it has also worked aggressively to promote its existing programs. DEP has used a targeted Facebook ad directed at members of the DEP-Western Region to promote its EE programs, and the ads were somewhat successful in signing up new participants. DEP is canvassing door-to-door to promote its EnergyWise load control programs, signing up 53 new participants on the first day. DEP is also in the process of developing a community steering team that will work with the DEP to develop further efforts to promote and market these programs and hopes to have a team in place by the end of March or early April.

DEP indicated that it has applied for community attendance at the Rocky Mountain Institute's electricity accelerator, or eLab where innovative ways of conserving energy and reducing peak load growth will be discussed. The participants in that program include an Asheville City Council member who is also a leader of Intervenor MountainTrue, the Assistant City Manager for the City of Asheville, a Buncombe County Commissioner who is also an executive with FLS Solar, a local environmental advocate, a community organizer, and several Duke Energy employees.

DEP indicated that some Intervenor comments relate to DEP's commitment to renewables. DEP stated that it is committed to pursuing a CPCN for new solar generation

in Asheville for a minimum of 15 MW. DEP indicated that the size of the solar facility at the Asheville plant cannot be known until the Asheville coal units are demolished and the 1964 ash basin is excavated. DEP explained that it takes approximately 100 acres for a 15 MW utility-scale solar facility. DEP committed that if the Asheville site configuration does not allow the construction of 15 MW or more of solar generation, it will supplement the on-site solar facility with a combination of rooftop, community, or other utility-scale solar facilities at other locations in the Asheville area. Furthermore, DEP did not include the solar facility in this CPCN application because the Mountain Energy Act, under which the present application is filed, only applies to new generation that is primarily fueled by natural gas.

DEP has also committed to pursue new technologies, including battery storage. DEP indicated that it is one of the larger deployers of battery storage in the United States and owns approximately 15 percent of all battery storage that is interconnected to the grid in the entire country. DEP has committed to pursue a pilot project of a minimum of 5 MW of battery storage at the Asheville site, which will be the largest regulated utility battery project in North Carolina. DEP indicated again that the battery storage project is not fired by natural gas and, therefore, is not included in the Mountain Energy Act's CPCN provisions.

DEP stated that it asked counsel for all of the Intervenors to make a commitment to support a future CPCN application for a CT if the Commission denies the current request for a CPCN for the CT unit and the collaborative efforts are unsuccessful, in delaying or eliminating the need for that CT unit but no parties have made such commitment.

DEP concluded the discussion of need by stating that the public convenience and necessity require construction of the Project based upon the facts presented in its application and its presentation at the Commission's Regular Staff Conference. DEP indicated that it does not have the luxury of single issue focus like some the Intervenors in the present docket. DEP indicated that it must look at all of its customers' needs, which include commercial, industrial, and residential customers. DEP has to consider a broad range of scenarios, including whether natural gas prices are going to increase or whether CO_2 prices or a carbon tax will exist, all of which were modeled through a robust IRP process and detailed in the CPCN application. DEP has an obligation to consider all of those factors and many others in making its decision and submits that the record is clear that the Project is the best solution to meet DEP's customers' needs and allow the transition to a cleaner, smarter energy future.

DEP also responded to the Intervenors' comments made at the Regular Staff Conference. Intervenor Rouse and Sierra Club argued for a smaller CC unit. Rouse suggested a 185 MW CC as opposed to a 280 MW CC unit. DEP responded that a 280 MW CC unit is the most cost-effective means of serving the needs reliably, given the transmission import limitations. Some Intervenors suggested that the units be CT versus CC, and DEP indicated that CTs are more appropriately a peaking resource as opposed to a CC, which is used more for baseload reliability. Further, DEP indicated that smaller-

sized units would only meet today's load requirements for 2016 and not for the future load growth. DEP indicated that it must provide for the needs of its customers not just for 2016 but for the future as well.

In response to the arguments of Columbia Energy, DEP agreed that it is a QF, but stated that any issues between DEP and Columbia Energy are matters for another docket to resolve issues surrounding any power purchase agreement (PPA) under PURPA. DEP further opined that the proper Commission to resolve such issues would be the Public Service Commission of South Carolina as the QF is located in South Carolina approximately 170 miles from Asheville. DEP indicated that Columbia Energy first approached DEC in 2015 to ask for some information concerning the Company's avoided cost rates, and that it was only in January 2016 that Columbia Energy first approached DEP. DEP provided Columbia Energy its avoided cost rates in South Carolina because that is where DEP understood the facility would interconnect. DEP indicated it understands now that Columbia Energy is interconnected to the South Carolina Electric & Gas system.

DEP's understanding is that Columbia Energy has submitted a transmission study request into DEP-East in South Carolina, as opposed to Columbia Energy's assertion that there was a firm transmission request pending. DEP further believes that in order to get to DEP-East, Columbia Energy will have to wheel through South Carolina Electric & Gas' transmission system. Thus, the Columbia Energy facility is two wheels away from the DEP-Western Region. Further, DEP's understanding is that Columbia Energy has not yet elected to proceed in response to the avoided cost rates provided by DEP, and there have been no negotiations as to a PPA. DEP argued that if Columbia Energy was contemplating building a new transmission line from south of Columbia to Asheville or obtaining transmission into DEP-West, this option would not meet DEP's reliability needs because the generation is not located in the western region. DEP reiterated that transmission constraints into the western region exist and that voltage requirements require DEP to site the new generation in the Asheville region. DEP argues that if it enters into a PPA with Columbia Energy at some point in the future, this PPA will have no impact on the needs to be served by the Project.

NC WARN questioned the load forecast for the DEP-Western Region and questioned how 17 percent could be a reasonable load forecast. DEP indicated that it answered three sets of data requests from NC WARN. DEP provided all of the details about the load forecast, including all of the equations behind the load forecast and all of the summary statistics. The only information DEP did not provide was the underlying software because DEP has a license from the software owner, Itron. DEP runs the models, and it provided NC WARN with all of the data underlying those model runs. DEP noted that NC WARN makes this exact same argument every year in the IRP docket where these arguments have been repeatedly rejected by the Commission.

DEP indicated that NC WARN has argued that United States Energy Information Administration (EIA) data support its theory of a zero load growth forecast. DEP disagrees and requests that the Commission review the most recent EIA data, which projects a

0.8 percent electric load growth for the entire United States. In looking at the EIA data, it shows annual electric usage growth is projected to be 1 percent per year for the period of 2016 to 2026 for the South Atlantic region, which includes North Carolina. DEP has provided data that show that the DEP-Western Region, which has grown faster from a winter peak standpoint than the rest of the system that DEP serves, has grown an average of 2.5 percent per year since 2000. DEP urged the Commission to note the emergency alert reliability information that DEP discussed earlier, which proves that the load growth and demand growth is real. Finally, DEP provided that in each of the past two winters the DEP-Western Region peak load was nearly 1,200 MW.

DEP briefly indicated that it found NC WARN's concern regarding the confidential portions of the application and lack of full access to information disingenuous when NC WARN has been offered the opportunity to sign a confidentiality agreement and has refused to avail itself of such access. Lastly, DEP noted that NC WARN is inconsistent in criticizing DEP's choice to rely upon natural gas for the Project, but supporting natural gas when it is used by Columbia Energy.

In responding to Sierra Club's argument that DEP failed to show that the transmission import capability into the western region is limited, DEP argued that, given all of the evidence in the detailed CPCN filing, Sierra Club's position is not a credible one. DEP stated that in the affidavit submitted by Sierra Club, Mr. Hahn also argued that any CC unit should be in the 185 MW range. DEP argued that that size unit is going to be very inefficient compared to the 280 MW CC unit that DEP has proposed. Further, a simple cycle CT in that range is going to have a heat rate that is approximately 50 percent higher than the CC units. Thus, DEP stated that while DEP's customers would save money from an upfront capital cost standpoint, the production cost would be significantly higher. Finally, as to Mr. Hahn's analysis in Exhibit C, where he argues that DEP could retire the coal units and rely solely on the existing CT units and the existing hydropower units that DEP has in the western region, DEP states that his argument is basically that DEP should rely on the existing CTs as baseload. DEP argued that relying on CTs for baseload is a very uneconomic choice and that, from an air permitting standpoint, environmental regulators might not allow the CTs to run as baseload.

Many Intervenors questioned the expedited procedure set forth in the Mountain Energy Act. DEP responded stating that DEP has submitted detailed technical information, which has been available to the Public Staff and all parties, and that the confidential portion has been available to all parties that have signed a confidentiality agreement. Further, DEP submits that there is a full and complete record before the Commission. The Public Staff, as did most of the parties in this case, sent multiple data requests to DEP. The Public Staff spent several days in DEP's office reviewing detailed engineering and cost information. DEP indicated that it has not heard any statement from the Public Staff that it was unable to complete its investigation and make a recommendation within the prescribed time.

In response to Commissioner questions, DEP indicated the following:

1. If the application is denied, DEP would not be able to meet the Mountain Energy Act's requirements to obtain a CPCN by August 1, 2016, and the coal unit retirement deadline of January 31, 2020, which would force DEP to continue to run the coal units and make substantial investments in order to meet the original deadlines of CAMA.

2. North Carolina still has the Ridge Law which prohibits wind turbines from being constructed along mountain ridges, where the greatest territorial wind potential exists. Although it could not respond at Staff Conference about the wind potential in the valleys, the potential to use wind energy is part of the comprehensive IRP process, and, to date, wind has not met the reliability and cost-effectiveness test to be part of the short term action plan in the DEP IRP.

3. If DEP is required to enter into a PPA with Columbia Energy, that resource can be used to offset future system needs or other expiring contracts. Paragraph 16 of the application shows that from a total system perspective, the DEP 2015 IRP identifies the need for an additional 1,152 MW of new resources by 2020 and 5,099 MW by 2030.

4. In response to Mr. Hahn's question of import constraints, DEP assumed that what Mr. Hahn concluded is that the tie lines that connect the DEP-Western Region to other systems have a rating of 2,200 megavolt-amperes (MVA), and contrasting that with the 750 MW of import capability that DEP has identified, the numbers just do not add up. Sierra Club's apparent argument that there is at least 2,000 MW of import capability is simply not true. DEP explained that the grid is a complicated interconnected system and that one cannot simply look at the availability in terms of megawatts of transmission line capacity, add them all together, and determine that the sum of the two numbers is the import capability. DEP provided the following examples in response:

> Hypothetically, if a region had two 1,000 MW transmission lines that provided import capability into that region, the maximum transfer capability would not be 2,000 MW, but 1,000 MW. Likewise, if a region had a 1,000 MW line and 100 MW line, the maximum import capability would be 100 MW because one must assume contingencies under the NERC reliability standards. DEP's balancing authority area, again, is connected through multiple lines at different capacities so the calculation is quite more complex than what's been asserted. [See] Table 1 in partially confidential Exhibit 1B for a description of this. Details providing how the transmission import limitations are determined was provided to MountainTrue and Sierra Club's counsel through discovery requests.

DISCUSSION AND CONCLUSIONS

The Commission's findings in this case are based upon matters of record, and its conclusions are based upon the findings and upon the Commission's assessment of the filings, comments, and arguments of the parties and the applicable law. The Commission is acting in this docket upon a verified application of DEP, comments of the Public Staff and Intervenors, including affidavits, public witness testimony, comments by the public filed with the Commission, and the presentations of the Public Staff, certain Intervenors, and DEP at the Commission's Regular Staff Conference. To the extent applicable, the Commission has followed the procedure it followed in Docket No. E-2, Sub 960 pursuant to G.S. 62-110.1(h) in 2009. The Commission asked the Public Staff to investigate the application and to present its findings, conclusions and recommendations to the Commission. The Public Staff prepared an agenda item at the conclusion of its audit and investigation and presented this matter at the Commission's Regular Staff Conference on Monday, February 22, 2016. The Public Staff stated that in its opinion as a result of its investigation the application meets the requirements of the Mountain Energy Act, comports with the public convenience and necessity, and that the Commission should grant DEP a CPCN for the construction of the two 280 MW CC units at the Asheville Plant.

The Mountain Energy Act prescribes procedures under which the Commission must consider and decide an application for a CPCN to construct an electric generating facility meeting the requirements of the Act. As stated in the Chair Order dated January 15, 2016, the hearing requirements of G.S. 62-110.1(e) and 62-82 do not apply if the application meets the requirements of the Act. The Commission concludes that the application filed by DEP is within the scope of Mountain Energy Act and that based on the record compiled by the Commission, the application, as modified, meets the public convenience and necessity test. Acting pursuant to the Mountain Energy Act, the Commission made a decision on the application within 45 days when it issued a Notice of Decision on February 29, 2016. The issues presented by the parties are fully discussed in this Order.

The first issue to be discussed is whether DEP has shown a need for the Project. Under the Mountain Energy Act, the Commission is not required to approve the estimated construction costs of the CC and CT units or make a finding that construction of the units will be consistent with the Commission's plan for expansion of electric generating capacity. However, the expedited procedure under the Act did not remove the Commission's requirement to find that the public convenience and necessity require, or will require, the construction of the new units. The Commission, in making this determination, looks to information regarding construction costs and generation planning, which has been provided by DEP in its verified application and as commented upon by the Public Staff and other Intervenors.

Several Intervenors expressed concern over whether DEP is overbuilding generating capacity with its request to build two 280 MW combined cycle natural gas-fired electric generating units and one 186 MW combustion turbine unit at the Asheville Plant. Section 62-110.1 is intended to provide for the orderly expansion of electric generating

capacity in order to create a reliable and economical power supply and to avoid the costly overbuilding of generation resources. State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 278 (1993), disc. rev. denied, 335 N.C. 564 (1994); State ex rel. Utils. Comm'n v. High Rock Lake Ass'n, 37 N.C. App. 138, 141, disc. rev. denied, 295 N.C. 646 (1978). A public need for a proposed generating facility must be established before a certificate is issued. Empire, 112 N.C. App. at 279-80; High Rock Lake, 37 N.C. App. at 140.

Beyond need, the Commission must also determine if the public convenience and necessity are best served by the generation option being proposed. The standard of public convenience and necessity is relative or elastic, rather than abstract or absolute, and the facts of each case must be considered. State ex rel. Utils. Comm'n v. Casey, 245 N.C. 297, 302 (1957) (emphasis added). Subsections 62-110.1(c)-(f) direct the Commission "to consider the present and future needs for power in the area, the extent, size, mix and location of the utility's plants, arrangements for pooling or purchasing power, and the construction costs of the project before granting a [CPCN] for a new facility." High Rock Lake, 37 N.C. App. at 140-41. As hereinafter discussed, the Commission has considered all of these factors in determining whether the public convenience and necessity are served by DEP's proposal in this docket.

The Commission agrees with the reasoning of DEP, the Public Staff, and a number of the comments from consumers that the replacement of the two coal-fired generating units with the two CC units proposed by DEP in its application is consistent with the purposes of the Mountain Energy Act and that the public convenience and necessity require the construction of the CC units in the timeframe proposed.

Since the year 2000, the annual winter peak loads in the DEP-Western Region have increased at an average rate of 2.5%. Over the next decade, winter peak demand in the DEP-Western Region, based on reasonable assumptions, is projected to outpace that of the rest of the DEP system in North Carolina and South Carolina, and to grow at an annual rate of 1.6%, with a total growth of approximately 17% over the next decade. As a result, as shown in the Company's 2014 IRP, DEP has a resource need of 126/147 MW (summer/winter) of fast start CT capacity in the DEP-Western Region. Construction of the CC units will allow for the elimination of this CT capacity as well as the retirement of the 376/379 MW (summer/winter) of coal-fired generation capacity at the Asheville Plant. Retirement of the coal units at the Asheville Plant in the time frame provided under the Mountain Energy Act (January 31, 2020) will also allow the Company to avoid significant capital investments in environmental controls required by CAMA (i.e., new dry fly ash and bottom ash handling technology and storm water requirements).

A significant benefit associated with constructing the CC units in the proposed time frame rather than constructing CC units for commercial operation commencing in 2031, the current projected retirement date of the two coal-fired units at the Asheville Plant, is the opportunity for DEP to participate at incremental cost in a new intrastate pipeline project being constructed by PSNC in western North Carolina. Postponement of the Project likely would result in significant future costs associated with incremental capacity

upgrades to the pipeline to serve the CC units. The confluence of events involving the extension of natural gas capacity in the region and construction of the CC units in the proposed timeframe produces cost-saving synergies that will benefit ratepayers.

Moreover, replacement of the coal units at the Asheville Plant with the CC units will provide benefits to both the DEP-Western Region and the DEP system as a whole. Under NERC standards, at the time of the system peak, all Company-owned resources in the DEP-Western Region are required to meet demand. In addition, even with those resources fully dispatched, the region requires the utilization of imported power via limited transmission options. NERC reliability standards require mandatory compliance by BAAs to ensure sufficient reserve transmission capacity into the BAA to respond to system disturbances in a timely manner. As load continues to grow, either more generation or more power import capability or both is required to maintain system reliability. DEP's original WCMP proposal to add transmission capacity in the region (the Foothills Transmission Line) together with constructing a 650 MW CC unit at the Asheville Plant was met with extensive community opposition and opposition from some of the same interests that now oppose DEP's application to replace the coal plants with natural gas-fired facilities and has been cancelled. The revised configuration of the CC units reduced the size of the CC capacity as originally proposed and was selected by the Company to optimize existing transmission capacity, while improving the economic dispatch of the generation serving the DEP-Western Region and the entire DEP system. While the revised configuration reduces some economies of scale, increased costs are offset in large measure by elimination of the costs of the 230 kV transmission line. The new CC units are projected to operate at significantly higher capacity factors than the existing coal units, providing system-wide fuel cost savings and potential emission benefits. Thus, the new CC units will provide capacity for load growth in the region, provide greater operational flexibility due to their ability to operate as intermediate and peaking units as needed, in addition to their primary use as baseload, and serve as a resource for the broader DEP system when not fully required to meet demand in the DEP-Western Region.

Even though the Commission does not need to make any findings regarding the estimated construction costs because G.S. 62-110.1(e) does not apply, based upon the Public Staff's review of the Company's cost estimates for the CC units, including the basis of the estimates and process being undertaken to contract with vendors for the units, and its determination that the estimates and contracting process are consistent with recent additions of CC units in DEP's and DEC's service areas, the Commission determines that the estimated construction costs are appropriate and may be relied upon in approving the construction project as modified.

The CC units will have a total generating capacity of 560 MW compared to the 379 MW of coal-fired generation that DEP will be retiring. However, given the projected energy and peak demand growth along with the transmission constraints in the DEP-Western Region, the incremental additional generating capacity is reasonable and necessary to maintain adequate and reliable service in the DEP-Western Region both

now and in the future and, as stated above, will eliminate the need to construct 147 MW of fast start CT capacity in the near future.

Several Intervenors expressed concern over whether the public convenience and necessity standard had been met under the facts of the present case.

Sierra Club highlighted five points that Richard Hahn, its consultant, made upon his review of DEP's application. First, DEP failed to give serious consideration to cleaner, potentially cheaper alternatives like renewable energy resources, demand response, energy efficiency, and purchased power that could eliminate or reduce the need for this Project. Second, DEP has not demonstrated on the record in this proceeding that DEP-West is a legitimate load pocket due to import constraints. Third, DEP recently increased its planning reserve margin from 14.5 percent to 17 percent based on a study that was not complete at the time, a change that alone results in an increased capacity need of 355 MW across the DEP system. Fourth, even after the coal units are retired there will be enough capacity available in DEP-West except during times of peak demand, suggesting that if DEP needs new natural gas-fired capacity in DEP-West, it should build peaking units, which would cost less, run less, and pollute less than CC units that would be run as intermediate or baseload units. Sierra Club indicated that these four points lead to the conclusion that DEP has not shown that its proposal is required by the public convenience and necessity.

In reliance upon all of the evidence in the detailed CPCN application, and the record as a whole, the Commission determines that Mr. Hahn and the Sierra Club's position is not a credible one. With respect to Mr. Hahn's argument that any CC unit should be sized in the 185 MW range, that size unit is going to be less efficient compared to the 280 MW CC unit that DEP has proposed. As to Mr. Hahn's analysis in Exhibit C of his application, where he argues that DEP could retire the coal units and rely solely on the existing CT units and the existing hydro units that DEP has in the western region, his argument is essentially that DEP should rely on CTs as baseload. Relying on CTs as baseload is an uneconomic choice, and from an air permitting standpoint, the CT unit might not be allowed to run as baseload. Mr. Hahn does not address the issue of compliance with required air permits. Further, a simple cycle CT in that range is going to have a heat rate that is approximately 50 percent higher than the CC units. Thus, while DEP's customers would save money from an upfront capital cost standpoint, the plant's production costs over time would be significantly higher.

In response to Mr. Hahn's question of import constraints, Mr. Hahn seems to be arguing that the tie lines that connect DEP-West to other systems have a rating of 2,200 MVA,[10] and contrasting that with the 750 MW of import capacity that DEP has identified, the numbers fail to add up. Sierra Club thus seems to argue that there is at least 2,000 MW of import capability. As DEP correctly explained, this assumption is incorrect. The grid is a complicated interconnected system and one cannot simply look at the availability in terms of megawatts of transmission lines and add those transmission

[10] One megavolt-ampere (MVA) equals one megawatt (MW) with a power factor of 1.0.

megawatts and determine that this sum equals the import capability. DEP correctly explained that hypothetically, if a region had two 1,000 MW transmission lines that provided import capability into that region, the maximum transfer capability would not be 2,000 MW, but 1,000 MW. Likewise, if a region had a 1,000 MW line and 100 MW line, the maximum import capability would be 100 MW because one must assume contingencies under the NERC reliability standards. The contingency is if one line drops, say the 1,000 MW drops off, then DEP is only left with 100 MW of import capability and that is how DEP determines import capability pursuant to NERC standards. DEP's BAA, again, is connected through multiple lines at different capacities, so the calculation is more complex than Mr. Hahn's assertion, as provided in the description in Table 1 in partially confidential Exhibit 1B. Details providing how the transmission import limitations are determined were provided to MountainTrue and Sierra Club's counsel through discovery requests.

NC WARN also argued against issuance of a CPCN in the present case based upon lack of need. NC WARN stated that there is no justification for DEP's forecasted 17 percent increase in the growth rate for electric usage in the Asheville area. NC WARN indicated that when looking back at previous IRPs back to 2003, DEP's load forecast was many times higher, as much as 4 or 5 times higher, than the actual demand that was subsequently reached.

The Commission notes that DEP answered three sets of data requests from NC WARN regarding this issue. DEP provided to Intervenors, including the Public Staff and NC WARN, all of the details addressing the load forecast, including all of the equations behind the load forecast and all of the summary statistics. The only information DEP did not provide NC WARN was the underlying software because DEP has a license from the software owner, Itron, which precludes distribution. DEP runs the models, and it provided NC WARN and others with all of the data underlying those model runs. DEP noted that NC WARN makes the argument that DEP's load forecasts are inaccurate in the IRP docket every year, and NC WARN does not understand the validity of the load forecast models. The Commission has repeatedly rejected the NC WARN criticisms. The Commission notes that during periods like the 2014 Polar Vortex, not only DEP, but nearly all the electric utilities on the east coast struggled to avoid service disruptions. The Commission determines NC WARN's assertions of excess capacity overly simplistic and lacking credibility. Moreover, even if past forecasts had not accurately predicted the future, this alone does not indicate that current forecasts are suspect. Few predicted the 2007-08 recession.

NC WARN argued that there is well over 100 MW of dispatchable hydropower that is not part of DEP's plan and that it was offered to DEP as an alternative. NC WARN also suggests that DEP should look to see whether the transmission lines can be reconductored to allow more power to be delivered to Asheville from Columbia Energy, another natural gas-fired electric generating plant in South Carolina, or some other plant.

DEP provided satisfactory responses to arguments that the record contains insufficient justification of need. The need for the two 280 MW CC units is based on an

IRP planning basis. The comments filed by many of the Intervenors appear to demonstrate a lack of fundamental understanding as to the difference between capacity and energy, a fundamental lack of understanding as to how load forecasts are prepared and approved by this Commission, as well as a fundamental lack of understanding of how electric systems are planned and maintained for a reliable and least cost system. As detailed in the CPCN application, the basis for need is demonstrated in the 2015 DEP IRP. A specific, unique situation exists regarding the DEP-Western Region, which is an energy island. Lastly, the 100 MW of hydropower, as well as wind, is not an available option for DEP or it would have been included as part of DEP's IRP.

The DEP-Western Region is an attractive place to live, to visit, to retire, and to work, and it is the fastest growing region within DEP's entire service territory. According to the United States Census Bureau, North Carolina ranks number nine in numeric increase from July 1, 2014, to July 1, 2015.[11]

DEP-West is an energy island in that there is insufficient local generation to meet peak demand and it is a net importer of energy. The transmission facilities into DEP-West are significantly constrained so as to limit the import of additional energy. This constraint led DEP to propose the Foothills Transmission Line. After intense opposition to the transmission line, DEP reconfigured the Project to propose two smaller units in order to maximize the amount of local generation given no new transmission import capability.

In response to comments regarding the capacity factors of the coal units, DEP operates its system in a least cost manner. The coal units in Asheville are run out of economic dispatch throughout the year because of local voltage and reliability needs. The Commission determines that DEP, in operating the system in a least cost manner, will, when load conditions enable it, import cheaper energy from the eastern part of the system, which is largely natural gas-fired generation, resulting in the lower capacity factors for the existing coal units.

The Commission determines that DEP's reliability concerns detailed in Attachment A to Exhibit 1B to the application are real and cannot be ignored. There is a minimum amount of Asheville generation that is required to be online at all times to supply voltage and provide reliable service given possible contingencies, such as a generator being offline and the impact of also losing transmission lines.

Since November 2008, DEP has declared four energy emergency alerts (EEA) for DEP-West due to having marginally enough capacity to serve load. Three of these events were EEA Level 2. The next level, EEA Level 3, requires shedding firm load, which is commonly known as rolling blackouts. These events occurred on November 19, 2008, January 4, 2012, January 7, 2014, and February 20, 2015.

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[11] According to the Economic Development Coalition of Asheville-Buncombe County, the number of homes sold increased 41.8 percent between December 2014 and December 2015, and new residential building permits increased 42.7 percent. Total employment in the Asheville metro area grew by 7.1 percent from 2010-2014.

The size of the CC units proposed as part of the Project was engineered specifically, based on the criteria to optimally meet the load and reliability requirements given the transmission import constraints and to provide a cost-effective system for the benefit of all DEP customers. Intervenors who argue that the CC units are too large fail to recognize that when there is low customer use in the western region, and that those new CC units will be the most efficient and most cost-effective natural gas-fired units on DEP's system and will be used to serve DEP's customers in eastern North Carolina and in DEP's service territory in South Carolina. The result, as the Public Staff noted in its recommendation, means a lowering of costs to all of DEP's customers.

The Commission concludes, based upon the entire record, that the public convenience and necessity require the construction of two 280 MW CC units at the Asheville Plant. The Commission notes that under North Carolina law, the Commission may agree with only the evidence of one party, no matter the volume of opposing evidence, as long as the record as a whole supports that party's position. See, State ex rel. Utils. Comm'n v. Eddleman, 320 NC 344, 352 (1987). In the present case, viewing the entire record as a whole, sufficient evidence supports the Commission's determination in this matter. The Commission concludes that because of the critical function and need for voltage support through generation in DEP's western region, it was reasonable for DEP to decline to rely upon wholesale purchases and to not place greater reliance on intermittent resources such as wind and solar or to reconductor transmission lines. The Commission has a responsibility to ensure that the utility has the means to provide reliable and affordable electricity, and concludes that it is unwise at the present time for DEP to depend on measures that are outside of DEP's control such as programs that rely on community participation to succeed. DEP knows its system needs more so than any other party. The Commission concludes that DEP properly proposed two 280 MW CC units to further modernize its generation fleet through the replacement and retirement of less efficient 1960s vintage coal-fired units. DEP has shown to the Commission's satisfaction that its customer base is growing and that it needs additional generation resources located in the DEP-Western Region to reliably meet these growing power needs in the 2020 timeframe.

The second related issue is whether the two 280 MW CC units should be reduced to two 185 MW CC units. Several Intervenors, including the Sierra Club and Rouse, argue that constructing two 280 MW CC units to replace the existing 379 MW of coal-fired generation results in an overbuild of facilities. These Intervenors suggest that the Commission should not grant the full capacity requested for these two CC units and should instead require DEP to further investigate and properly size the facilities to meet the current need in Asheville. These Intervenors argue that DEP should instead build two 185 MW CC units and a possible contingent 100 MW CT unit. Sierra Club indicated that a smaller plant would provide the same level of reliability in DEP-West. Rouse questioned whether the current amount of capacity is the minimum amount that is needed.

The Commission determines that those concerns reflect a misunderstanding of transmission limitations as well as least cost system planning. Table 1 of Exhibit 1B to the application shows that even after the Project is built, there will only be 470 MW of usable

transmission (or 470 MW import capability) into the DEP-Western Region. Currently, that capacity is used to transport purchased power as well as to transfer power from DEP-East to DEP-West.

DEP cannot merely build facilities of a certain capacity that minimally meets the reliability needs of only the western region. DEP represented and the Commission agrees that it must plan to serve its entire customer base with the most cost-effective fleet of units because all of DEP's customers will pay for this generation, if approved. Furthermore, DEP stated that even if DEP builds both CC units and the CT unit as part of the Project, the DEP-Western Region will still have insufficient generation to meet its projected peak load needs, and DEP will still rely upon transmission import capability, which is severely limited.

When deliberating on a CPCN application, the Commission must determine whether the public convenience and necessity require, or will require, the construction of the proposed facilities. DEP's application shows that due to projected load growth in the area and within the State, the public needs or will need the proposed two 280 MW CC units at the Asheville Plant. Again, the Intervenors ignore the fact that these CC units will be used for baseload capacity within the DEP-Western Region and will also be used to meet DEP's system needs in DEP-East and in South Carolina. From a total system perspective, the DEP 2015 IRP identifies the need for an additional 1,152 MW of new resources by 2020 and 5,099 MW by 2030.

The Commission concludes that the construction of two 280 MW CC units is needed to meet the projected growth in the DEP-Western Region and to meet DEP's total system needs.

The third issue relates to the construction of the 186 MW simple cycle CT unit. Most, if not all of the Intervenors, as well as the Public Staff, opposed the granting of a CPCN at the present time for this unit. The Public Staff indicated that based on current projections, it is likely that additional CT capacity eventually will be required to meet future demand in the DEP-Western Region, but that such additional capacity, which only takes 24 months to construct, is not expected to be needed until 2024. That need is contingent on the level of success of EE and DSM efforts, load growth in the area, and potential lower cost developments that might materialize in the future.

DEP responded that the need is real and has been shown, but that the potential exists to delay or eliminate the need through other measures. According to the application, the contingent CT unit would potentially begin commercial operation in 2024 if the current peak demand growth is not sufficiently reduced by the alternative approach discussed in the application.

The Commission determines that unlike the two CC units, additional time exists to determine whether other measures will remove the need for the CT unit at the Asheville Plant. More time exists because a CT unit takes approximately 24 months to construct and the projected need for the unit is in 2024. Even DEP admits that it may be appropriate

to delay or forgo construction of the CT through reliance on EE, DSM, renewables and other technologies. Based upon these facts, at the present time, the Commission concludes that the public convenience and necessity standard has not been met for the requested CT unit. However, this determination is without prejudice to any future filing if the generation capacity is still needed and has not been avoided by EE, DSM, or other load reduction measures undertaken by DEP and the Asheville community.

The next issue relates to DEP's commitment to renewables and load reduction measures. The Sierra Club requested that the Commission hold DEP to its commitments to invest in clean energy resources in Western North Carolina, including demand response, EE, solar, and storage. NC WARN also requested that DEP honor its commitments to build solar in the DEP-Western Region and that the Commission should create tangible goals for EE and DSM in the region. NC WARN further sponsored Dr. Howarth's comments, stating that he is one of the leading scientists in the world on the impacts of natural gas and its pollutant methane on the global climate. Dr. Howarth states that methane is 80 to 100 times as dangerous as carbon dioxide to the climate.

All of the Commissioners who participated in this proceeding attended the public hearing in Asheville on January 26, 2016, and heard first-hand the concerns and perspectives of the people who attended the hearing and provided public witness statements regarding the use of renewables and climate change concerns. In addition, the Commission has reviewed the many public comments that were submitted by mail and by e-mail regarding this matter. As explained elsewhere in this Order, the Commission has determined that the public convenience and necessity require the construction of the two CC units at the Asheville Plant in order to assure continued reliable electric service for DEP's western customers and reliable and affordable electric service for all of DEP's customers on its entire system. It simply is not possible to shut down the existing coal-burning units and assure reliable service through dependence on non-fossil fuel, but intermittent power sources such as solar and wind alone as some speakers advocated. The EPA Clean Power Plan rules promulgated to reduce greenhouse gases and address climate change acknowledges that reliance on natural gas-fired electric generation is an important component in meeting the agency's objectives. The natural gas-fired units will emit substantially lower levels of greenhouse gases than the older, less efficient coal plants they will replace. Refusal to grant DEP's CPCN is to perpetuate reliance on these coal-fired plants. No natural gas presently is extracted in North Carolina where methane may be released, and it is unlikely to be in the near term future. Refusal to grant the CPCN is unlikely to impact in any measurable degree methane emissions from natural gas wells or transmission facilities.

Nonetheless, the Commission heard repeatedly the expressed desire for cleaner energy sources. To that end, the Commission is aware that the North Carolina Department of Environmental Quality (DEQ) identified opportunities for some of the coal-burning power plants that are located in North Carolina to cost-effectively reduce their emissions through a variety of plant upgrades. These opportunities are detailed in the DEQ's proposed "Standards of Performance for Existing Electric Generating Units Under Clean Air Act Section 111(d)," which was published in the North Carolina State

Register on November 16, 2015. For DEP, these proposed carbon rules for existing power plants would require upgrades to the Company's four coal-burning units at Roxboro.

On February 9, 2016, the United States Supreme Court issued a stay of the EPA Clean Power Plan rules, and the Commission understands that DEQ's proposed carbon rules for existing power plants are subsequently being held in abeyance pending full judicial review of the EPA regulations. Even so, in light of the public comments, public testimony, and filed comments by Intervenors Firemen and Rouse, the Commission will require DEP to conduct an investigation on retrofitting its Roxboro coal-burning plant pursuant to the DEQ's draft rules cited above. DEP shall include an assessment of the feasibility and cost-effectiveness of conducting the retrofits at Roxboro and shall include this report in the Company's 2016 IRP.

The Commission commends the work that DEP has begun in engaging Asheville community leaders to work collaboratively on load reduction measures. The Commission shall require DEP to continue to update it on these efforts, along with its efforts to site solar and storage in the western region. As to solar and storage, the Commission expects DEP to file as soon as practicable the CPCN to construct at least 15 MW of solar at the Asheville Plant or in the Asheville region. The Commission further urges DEP to move forward in a timely manner with the 5 MW storage project in the Asheville region. To the extent DEP does not do so, the Commission reserves the right on its own motion or on the motion of any interested party to investigate DEP's decision not to move forward with its representations.

The next issue relates to Columbia Energy's concern that DEP may seek to avoid its PURPA obligations, which includes the obligation to purchase all capacity made available at the electric utility's avoided cost rates. Columbia Energy is concerned that DEP will cite approval of this project to argue in a future case that a PPA for the output of its facility would not avoid capacity costs for the full capacity made available by this QF. Columbia Energy acknowledged that the parties' potential dispute will be the focus of another docket. However, Columbia Energy indicated it is concerned because DEP has rejected an offer by Columbia Energy and proposed only a short-term PPA with an energy-only rate and no proposal for payment for capacity.

DEP indicated that if it is required to enter into a PPA with Columbia Energy pursuant to PURPA obligations, that resource can be used to offset DEP's future system needs or other contracts that are expiring. Paragraph 16 of its CPCN application indicates that from a total system perspective, the DEP 2015 IRP identifies the need for an additional 1,152 MW of new resources by 2020 and 5,099 MW by 2030.

DEP indicated that Columbia Energy first approached DEC in 2015 to ask for information about the Company's avoided cost rates. In January 2016, DEP provided Columbia Energy its avoided cost rates in South Carolina because that is where the project would interconnected. Columbia Energy is already interconnected to the South Carolina Electric & Gas system. DEP further indicated that its understanding is that

Columbia Energy has submitted a transmission study request to move power into DEP-East in South Carolina, which contrasts with Columbia Energy's assertion that it has a firm transmission request pending. DEP asserts that Columbia Energy has not yet elected to proceed in response to the avoided cost rates provided by DEP and, thus, there have been no negotiations yet as to a PPA. As to suggestions by Intervenors that DEP rely upon the Columbia Energy natural gas-fired project rather than those proposed by DEP at the Asheville Plant site, the transmission constraint issues DEP has confronted make this alternative problematic.

Columbia Energy's concerns relate to a future PPA and avoided cost decisions which seem to be at the preliminary stages and cannot be addressed in this docket. The Commission concludes that such decisions must be made either through negotiations between the parties or in a future Commission proceeding. This decision is without prejudice to such decisions. The Commission urges the parties to work together to resolve any potential future issues in negotiating a PPA.

Lastly, NC WARN stated that the Mountain Energy Act enacted by the General Assembly unrealistically expedites the process for addressing DEP's request. NC WARN argued that a 30-day notice and a 45-day review period do not allow the Commission the opportunity to review the cost of the facility, the alternatives to the facility, the need for the facility, the long term costs, and the natural gas prices. Therefore, NC WARN opined that the Mountain Energy Act is unconstitutional, as applied. NC WARN argued that the lack of opportunity to put on expert witnesses and testimony and the restricted review period of only 45 days results in the Commission not being able to fairly regulate DEP. NC WARN and Mr. Fireman requested that the Commission deny DEP's application without prejudice so that all parties could conduct a "full review" with all of the procedures set forth in Chapter 62, as opposed to this expedited procedure. Further, NC WARN argued that information in DEP's application was confidential and that the public did not have a chance to review that confidential information.

DEP has submitted detailed technical information about the Project, which has been available to the Public Staff and all parties. The confidential portion has been available to all parties that have signed a confidentiality agreement. NC WARN's concern regarding access to the confidential portions of the filing and lack of full access to information could have been rectified. NC WARN was offered the opportunity to sign a confidentiality agreement, and NC WARN refused such access. NC WARN has made its assertions that the withheld information does not constitute trade secrets, and the Commission has rejected them for reasons set forth in its February 4, 2016 Order Denying Motion to Compel in this docket. The Commission has compiled a full and complete record in this case. The Public Staff, and most of the parties in this case, sent DEP multiple data requests. The Public Staff spent several days in DEP's office reviewing detailed engineering and cost information. The Public Staff has made no suggestion that it has been unable to complete its investigation and make a recommendation within the prescribed time. The Public Staff has a statutory responsibility to represent the using and consuming public. To the extent NC WARN purports to represent a greater segment of

the public than its 1,000 members, it does so on a self-appointed basis and with guidelines only NC WARN itself imposes.

The Commission determines that sufficient evidence is before it to make a determination in this matter within the time required by the Mountain Energy Act. The Commission concludes that the Public Staff, the entity representing the using and consuming public pursuant to G.S. 62-15, whose duties include reviewing, investigating and making recommendations to the Commission, had sufficient time in this matter to make a recommendation. The Public Staff completed its review and examination and presented its findings and recommendations to the Commission within the time established by the Commission under the Mountain Energy Act for the presentation.

DEP, as a public utility with a franchise to serve in its service area as assigned by this Commission, bears a duty to ensure that reasonable, least cost service is provided with minimal disruption. By statute, parties with a direct interest in the subject matter of Commission proceedings are permitted to intervene and participate. The Public Staff's participation arises as a matter of law. The Public Staff is composed of attorneys, engineers, accountants, and economists with expertise in investigating applications such as DEP's at issue in this docket and making recommendations as to actions the Commission should take. The Public Staff's investigative responsibilities may commence well before a formal application is filed, especially as in this case where the Mountain Energy Act forecasts DEP's request and established an expedited schedule for Commission decision.

Parties other than DEP and the Public Staff, with neither the obligation to serve nor the statutory responsibility to investigate and recommend, may find themselves pressed for time and resources in their participation. Such parties have no responsibility to the State's using and consuming public, statutory or otherwise, but more narrow perspectives or agendas, and may not have resources to dedicate to such investigations. Nevertheless, the Commission is justified in relying on presentations by DEP and the Public Staff, especially when the Public Staff represents that it conducted the investigation necessary to make its recommendation. The Commission need not withhold its order or refuse to comply with statutory deadlines imposed by the legislature because other Intervenors represent that they need more time to investigate and make recommendations.

In this case, the Commission has compiled a record sufficient to comply with the controlling statutes. The Commission has conducted the required public hearing at which over a five-hour nighttime hearing in Asheville the Commission accepted the testimony of more than 50 witnesses. The Commission has accepted, relied upon, and addressed the written comments of expert witnesses tendered by Intervenors. The Commission has accepted and studied DEP's comprehensive application. The Commission continuously monitors and reviews IRP filings. The Commission has accepted the Public Staff's summary of its investigation. The Commission has permitted any Intervenor to argue its position at the February 22, 2016 agenda conference. The Commission has been forced to modify the procedures it would have followed, including those set forth in G.S. 62-82, had not the General Assembly passed the Mountain Energy Act. But in this case, the

General Assembly in the Mountain Energy Act expressed its desire that natural gas-fired electric generation facilities be approved for DEP's western region and established procedures and timelines for the Commission to follow, thus modifying the Commission's customary procedure. To comply with the Mountain Energy Act, the Commission compressed the procedural schedule and truncated the process for accepting evidence. The Commission had no choice.[12] The procedures and processes it employed were mandated by provisions of the Mountain Energy Act. Entities and parties dissatisfied by these processes and procedures had opportunity to address provisions of the Mountain Energy Act while the General Assembly deliberated over its provisions. To the extent they failed to do so, efforts to persuade this Commission to disregard the dictates of the Mountain Energy Act are too late and out of place.

Aside from establishing an expedited procedural schedule, the Commission has relied more heavily on paper submissions than on live testimony from the witness stand than the Commission might otherwise have done. Nevertheless, the Commission is an administrative agency with considerable discretion to establish its calendar and procedures. Paper hearings in the administrative agency context, where full documentation establishes a complete record, satisfy due process requirements. As stated by FERC in San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, 127 FERC ¶ 61,269, 2009 FERC LEXIS 1251 (2009) (citing Town of Norwood v. FERC, 202 F.3d 392, 404 (1st Cir.), cert denied, 531 U.S. 818 (2000); Central Maine Power Co. v. FERC, 252 F.3d 34, 46 (1st Cir. 2001); Lomak Petroleum, Inc. v. FERC, 206 F.3d 1193, 1199 (D.C. Cir. 2000); Conoco Inc. v. FERC, 90 F.3d 536, 543 n.15 (D.C. Cir. 1996); Environmental Action v. FERC, 996 F.2d 401, 413 (D.C. Cir. 1993)):

> 96. Finally, we reject the due process arguments raised by Cal Parties. We note that Cal Parties have twice previously raised these arguments, in their rehearing request of the August 8, 2005 Order and in their Common Comments on Sellers' Cost Filings filed on October 11, 2005. The Commission has already explained twice why a paper hearing with full documentation filed was sufficient to establish a complete record on the cost filings. We again find that Cal Parties fail to raise any persuasive concerns as to the adequacy of the paper hearing process. First, as we have stated above, the Commission has considerable discretion to establish its calendar and procedures. In particular, within the context of administrative law, it is well established that "[t]he term 'hearing' is notoriously malleable." Moreover, in this proceeding, parties have received a form of paper hearing that courts agree is now quite common in utility regulation. As the Commission has previously stated, "[n]ot every factual dispute requires a trial-type hearing. The use of a paper hearing rather than a trial-type evidentiary hearing has been addressed in numerous cases ... It is well

[12] Commission Rule R1-30 states that the Commission may deviate from its rules where compliance is impossible or impracticable.

settled that the Commission may determine disputed facts in a paper hearing."

97. Indeed, the Commission has previously found that a paper hearing is sufficient process to protect parties' rights even when there are material issues of fact raised. As noted in the January 26, 2006, and November 19, 2007 Rehearing Orders, courts have repeatedly held that the Commission is required to provide a trial-type hearing only if the material facts in dispute cannot be resolved on the basis of written submissions in the record. Here, the Commission found that there were no material facts in dispute that could not be resolved on the basis of the written record. Accordingly, the paper hearing constituted adequate due process. A voluminous written record has been amassed in this proceeding. The Commission has considered all the arguments presented by Cal Parties, along with the numerous submissions by all parties in this case. The Commission finds that its procedures have provided parties with more than adequate means to establish a complete record that is sufficient to enable the Commission to achieve just and reasonable results in these proceedings. Accordingly, the Commission again maintains that it will not order trial-type hearings on any of the cost filings.

98. Moreover, mere allegations by Cal Parties of disputed fact and lack of due process are insufficient to mandate an evidentiary hearing. Such allegations must be supported by an adequate proffer of evidence. Despite Cal Parties' complaints regarding the inadequacy of the period for reviewing and commenting on cost filings, Cal Parties managed to produce literally hundreds of pages of carefully footnoted comments on all cost filings of interest to them. Where Cal Parties challenged the inclusion of specific cost items or a lack of support by an individual filer, we were able to address those challenges on the basis of the voluminous written record amassed in this proceeding. Trial-type evidentiary hearings are not necessary to dispense with purely technical issues, such as the specific categories of information raised by Cal Parties in their comments. Cal Parties failed to show either that the existing written record is insufficient to address any specific disputes or that the administrative process already provided requires additional steps in order to adjudicate fairly the cost filings.

99. Further, we again reject Cal Parties' request for additional discovery and/or cross-examination of witnesses. The August 8, 2005 Order required each seller submitting a cost filing to include the sworn affidavit of a corporate officer, verifying the accuracy of its submission. As we previously found, the written testimony provided by witnesses by way of sworn affidavits in this proceeding pertained to actual historic operations. In addition, we found that such written testimony was supplied by witnesses whose corporate positions placed them in the best position to explain those historic operations. The Commission maintains that these corporate

officers' attestations are sufficient to verify the actual historic cost data. Accordingly, the Commission again maintains that it will not and need not permit additional discovery or cross-examination of witnesses.

(Footnotes omitted.)

Therefore, based upon the foregoing and the record in this proceeding, and based on the conditions contained in the Ordering Paragraphs below, the Commission concludes that construction of the two 280 MW CC units with fuel oil backup and associated transmission at the Asheville Plant is required by the public convenience and necessity and that a CPCN for the two 280 MW CC should be issued. It has been demonstrated that DEP's customer base is growing, that the Company is taking steps to modernize its generation fleet through the retirement of older, less-efficient coal units, and that the Company needs additional generation resources in the DEP-Western Region. The Commission concludes that the CC units will also assist DEP to avoid building 147 MW of fast start CTs in the 2019 timeframe that were included in DEP's 2014 IRP. The Commission concludes that this project is cost-effective for DEP's customers in that it presents a unique opportunity for DEP to partner with PSNC in its expanded natural gas pipeline to provide much needed natural gas service to Western North Carolina and the Asheville area allowing for cost-saving synergies. In order to reliably meet the growing power supply needs of the DEP-Western Region and of the State in the 2020 timeframe, DEP must take steps now to begin construction of the two 280 MW CC units at the Asheville Plant. The Company shall submit annual progress reports during construction pursuant to G.S. 62-110.1(f).

IT IS, THEREFORE, ORDERED as follows:

1. That the application filed in this docket shall be, and the same is hereby, approved and a certificate of public convenience and necessity for the two 280 MW CC natural gas-fired electric generating units, with fuel oil backup, along with the associated transmission facilities, is hereby granted;

2. That the request for a CPCN for the 186 MW CT unit is denied without prejudice to DEP's right to file a future CPCN application;

3. That DEP shall retire its existing Asheville coal units 1 and 2 no later than the commercial operation of the two 280 MW CC units;

4. That DEP shall construct and operate the two 280 MW CC units in strict accordance with all applicable laws and regulations, including the provisions of all permits issued by the North Carolina Department of Environmental Quality;

5. That DEP shall file with the Commission in this docket a progress report and any revisions in cost estimates for these CC units on an annual basis, with the first report due one year from the issuance of this Order;

6. That DEP shall file with the Commission a progress report annually in this docket, and the report shall include actual accomplishments to date on its efforts to work with its customers in the DEP-Western Region to reduce peak load through demand-side management, energy efficiency or other measures, and on DEP's efforts to site solar and storage capacity in the DEP-Western Region, with the first report due one year from the issuance of this order;

7. That DEP shall conduct an investigation on retrofitting its four Roxboro coal-burning power plants as proposed by the North Carolina Department of Environmental Quality in its November 16, 2015 draft rule entitled "Standards of Performance for Existing Electric Generating Units Under Clean Air Act Section 111(d)," and submit a report to the Commission in the Company's 2016 Integrated Resource Plan regarding the feasibility and cost-effectiveness of conducting such retrofits;

8. That for ratemaking purposes, the issuance of this order and CPCN does not constitute approval of the final costs associated therewith, and that the approval and grant is without prejudice to the right of any party to take issue with the treatment of the final costs for ratemaking purposes in a future proceeding; and

9. That the attached Attachment A shall constitute the certificate of public convenience and necessity issued to DEP for the two 280 MW CC natural gas-fired electric generating units to be located at the Asheville Plant in Buncombe County, North Carolina.

ISSUED BY ORDER OF THE COMMISSION.

This the 28th day of March, 2016.

NORTH CAROLINA UTILITIES COMMISSION

Paige J. Morris

Paige J. Morris, Deputy Clerk

Commissioner Lyons Gray did not participate in this decision.

ATTACHMENT A

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1089

Duke Energy Progress, LLC
410 South Wilmington Street
Raleigh, North Carolina 27601

is hereby issued this

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
PURSUANT TO G.S. 62-110.1

for two 280-MW_{AC} combined cycle natural gas-fired electric generating units with fuel oil backup, along with the associated transmission facilities,

to be located at

the Asheville Steam Electric Generating Plant, Asheville,
Buncombe County, North Carolina

subject to all orders, rules, regulations and conditions as are now or may hereafter be lawfully made by the North Carolina Utilities Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 28th day of March, 2016.

NORTH CAROLINA UTILITIES COMMISSION

Paige J. Morris

Paige J. Morris, Deputy Clerk

EXHIBIT D

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Progress, LLC for a Certificate of Public Convenience and Necessity to Construct a 752 Megawatt Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville	)) MOTION FOR EXTENSION) OF TIME TO FILE NOTICE) OF APPEAL AND)EXCEPTIONS OF NC WARN) AND THE CLIMATE TIMES

NOW COMES the North Carolina Waste Awareness and Reduction Network ("NC WARN") and The Climate Times, by and through undersigned counsel, and move for an extension of time in which to file a notice of appeal and exceptions to the Commission's Order Granting Application in Part, With Conditions, and Denying Application in Part, issued on March 28, 2016 (hereinafter, the "Order"), in the above-captioned matter. In support thereof, NC WARN and The Climate Times state the following:

1. Pursuant to N.C. Gen. Stat. § 62-90(a), NC WARN and The Climate Times may file a notice of appeal and exceptions to the Order within thirty (30) days of its issuance, "or within such time thereafter as may be fixed by the Commission, not to exceed 30 additional days." The current deadline for filing an appeal is Wednesday, April 27, 2016.

2. While conducting its research for an anticipated appeal of the Order, counsel for NC WARN and The Climate Times learned that appeals from the granting of a certificate of public convenience and necessity are subject to a

unique requirement not present in other types of appeals from the Commission. According to N.C. Gen. Stat. § 62-82(a), the party appealing from a certificate of public convenience and necessity must "file[] with the Commission a bond with sureties approved by the Commission, or an undertaking approved by the Commission, in such amount as the Commission determines." Hence, contemporaneous with the filing of the present Motion, NC WARN and The Climate Times are filing a motion to set bond for the anticipated appeal of the Order.

3. NC WARN and The Climate Times respectfully request that the deadline for a notice of appeal and exceptions be extended so that the Commission can rule upon NC WARN and The Climate Times's motion for bond. After the bond is set, NC WARN and The Climate Times anticipate posting the bond and filing a notice of appeal and exceptions.

4. Counsel for NC WARN and The Climate Times conferred with Duke Energy Progress LLC concerning this Motion. Undersigned counsel is authorized to report that Duke Energy Progress LLC does not object to the extension of time requested in the present Motion.

THEREFORE, NC WARN and The Climate Times respectfully request an extension of an additional thirty (30) days, up to and including May 27, 2016, in which to file a notice of appeal and exceptions to the Commission's Order.

Respectfully submitted, this the 25th day of April, 2016.

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Counsel for NC WARN & The Climate Times

CERTIFICATE OF SERVICE

The undersigned certifies that on this day he served a copy of the foregoing MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL AND EXCEPTIONS OF NC WARN AND THE CLIMATE TIMES upon each of the parties of record in this proceeding or their attorneys of record by electronic mail, or by hand delivery, or by depositing a copy of the same in the United States Mail, postage prepaid.

This the 25th day of April, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: _____
Matthew D. Quinn

EXHIBIT E

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Progress, LLC, for a Certificate of Public Convenience and Necessity to Construct a 752-MW Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville	))))))	ORDER EXTENDING TIME TO FILE NOTICE OF APPEAL AND EXCEPTIONS

BY THE CHAIRMAN: On March 28, 2016, the Commission issued an Order in the above-captioned docket which, among other things, granted Duke Energy Progress, LLC (DEP) a certificate of public convenience and necessity to construct two 280-MW combined cycle natural gas-fired electric generating facilities in Buncombe County, North Carolina.

On April 25, 2016, the North Carolina Waste Awareness and Reduction Network and The Climate Times (collectively, NC WARN) filed a Motion for Extension of Time pursuant to G.S. 62-90(a) requesting that the Commission extend the time within which to file notice of appeal and exceptions to the Commission's Order from April 27, 2016 to May 27, 2016. In summary, the motion states that NC WARN needs additional time to obtain an order from the Commission setting the bond required by G.S. 62-82(a). In addition, NC WARN states that it is authorized to report that DEP has no objection to the requested extension of time.

Based upon the record in this docket and NC WARN's motion, the Chairman is of the opinion that good cause exists to grant the requested extension of time for all parties to this docket.

IT IS THEREFORE, ORDERED that all parties to this docket shall be, and the same are hereby, granted an extension of time until May 27, 2016, within which to file their notice of appeal and exceptions to the Commission's Order.

ISSUED BY ORDER OF THE COMMISSION.

This the 26th day of April, 2016.

NORTH CAROLINA UTILITIES COMMISSION

Paige J. Morris

Paige J. Morris, Deputy Clerk

EXHIBIT F

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Progress, LLC for a Certificate of Public Convenience and Necessity to Construct a 752 Megawatt Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville	))))))	MOTION TO SET BOND OF NC WARN AND THE CLIMATE TIMES

NOW COMES the North Carolina Waste Awareness and Reduction Network ("NC WARN") and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-82(b), and move for the Commission to set a bond for an anticipated appeal of the Commission's Order Granting Application in Part, With Conditions, and Denying Application in Part, issued on March 28, 2016 (hereinafter, the "Order"), in the above-captioned matter. In support thereof, NC WARN and The Climate Times state the following:

1. Pursuant to N.C. Gen. Stat. § 62-90(a), NC WARN and The Climate Times may file a notice of appeal and exceptions to the Order within thirty (30) days of its issuance, "or within such time thereafter as may be fixed by the Commission, not to exceed 30 additional days." The current deadline for filing an appeal is Wednesday, April 27, 2016. To allow time for the Commission's consideration of the present Motion, NC WARN and The Climate Times filed a motion to extend the deadline for filing a notice of appeal and exceptions to and including May 27, 2016.

2. Appeals from the granting of a certificate of public convenience and necessity are subject to the provisions of N.C. Gen. Stat. § 62-82(b). In relevant part, that statute says:

> *Any party or parties opposing, and appealing from, an order of the Commission which awards a certificate under G.S. 62-110.1 shall be obligated to recompense the party to whom the certificate is awarded, if such award is affirmed upon appeal, for the damages, if any*, which such party sustains by reason of the delay in beginning the construction of the facility which is occasioned by the appeal, such damages to be measured by the increase in the cost of such generating facility (excluding legal fees, court costs, and other expenses incurred in connection with the appeal). *No appeal from any order of the Commission which awards any such certificate may be taken by any party opposing such award unless, within the time limit for filing notice of appeal as provided for in G.S. 62-90, such party shall have filed with the Commission a bond with sureties approved by the Commission*, or an undertaking approved by the Commission, in such amount as the Commission determines will be reasonably sufficient to discharge the obligation hereinabove imposed upon such appealing party.

N.C. Gen. Stat. § 62-82(b) (emphasis added).

3. To summarize, a party losing an appeal challenging a certificate of public convenience and necessity may be obligated to pay "damages, if any, which [the public utility] sustains." However, the damages are explicitly limited to damages related to "delay in beginning the construction of the facility which is occasioned by the appeal," and these damages cannot include "legal fees, court costs, and other expenses incurred in connection with the appeal." The bond is designed to secure against those damages that may arise if the award is affirmed on appeal.

4. Therefore, any bond obligation is limited to potential damages caused by construction delays due to the appeal.

5. NC WARN and The Climate Times are not requesting an injunction or stay of the Commission's Order. Therefore the anticipated appeal does not prevent Duke Energy Progress LLC ("DEP") from moving forward with the construction of the two 280-MW_{AC} combined cycle natural-gas-fired electric generating units allowed by the Commission's Order. Moreover, NC WARN and The Climate Times are aware of no plans for DEP to delay construction in the event of an appeal. Accordingly, DEP will not suffer damages related to construction delays if the Order is "affirmed upon appeal."

6. The appeals process is important to Utilities Commission proceedings. If bonds are set prohibitively high, then it could be impossible for parties to appeal certificates of public convenience and necessity, thereby practically terminating the rights of parties to appeal Commission orders.

7. Therefore, the bond should be a nominal amount. The bond obligation required by Rule 17(a) of the N.C. Rules of Appellate Procedure is $250.00. NC WARN and The Climate Times request a similar bond of $250.00.

8. NC WARN and The Climate Times respectfully request an oral argument or evidentiary hearing on the bond requirement.

THEREFORE, NC WARN and The Climate Times respectfully request an oral argument or evidentiary hearing on the bond requirement, and furthermore request a bond pursuant to N.C. Gen. Stat. § 62-82(b) of $250.00.

Respectfully submitted, this the 25th day of April, 2016.

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Counsel for NC WARN & The Climate Times

CERTIFICATE OF SERVICE

The undersigned certifies that on this day he served a copy of the foregoing MOTION TO SET BOND OF NC WARN AND THE CLIMATE TIMES upon each of the parties of record in this proceeding or their attorneys of record by electronic mail, or by hand delivery, or by depositing a copy of the same in the United States Mail, postage prepaid.

This the 25th day of April, 2015.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: _____
Matthew D. Quinn

EXHIBIT G

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Progress, LLC, for a Certificate of Public Convenience and Necessity to Construct a 752-MW Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville	))))))	PROCEDURAL ORDER ON BOND

BY THE CHAIRMAN: On March 28, 2016, the Commission issued an Order in the above-captioned docket which, among other things, granted Duke Energy Progress, LLC (DEP) a certificate of public convenience and necessity to construct two 280-MW combined cycle natural gas-fired electric generating facilities in Buncombe County, North Carolina.

On April 25, 2016, the North Carolina Waste Awareness and Reduction Network and The Climate Times (collectively, NC WARN) filed a Motion To Set Bond pursuant to G.S. 62-82(b) requesting that the Commission set the bond amount at $250.00 and requesting an oral argument or evidentiary hearing on the bond requirement.

Based upon the record in this docket and NC WARN's motion, the Chairman is of the opinion that good cause exists to allow DEP to file a response to NC WARN's motion on or before May 2, 2016, and to allow NC WARN to file a reply on or before May 5, 2016. The Chairman will make a determination regarding whether an oral argument or evidentiary hearing is necessary after review of the filings of the parties.

IT IS THEREFORE, SO ORDERED that DEP may file a response to NC WARN's motion on or before May 2, 2016, and NC WARN may file a reply on or before May 5, 2016.

ISSUED BY ORDER OF THE COMMISSION.

This the 27th day of April, 2016.

NORTH CAROLINA UTILITIES COMMISSION

Paige J. Morris

Paige J. Morris, Deputy Clerk

EXHIBIT H

Lawrence B. Somers
Deputy General Counsel

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May 2, 2016

VIA ELECTRONIC FILING

Gail L. Mount
Chief Clerk
North Carolina Utilities Commission
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Raleigh, North Carolina 27699-4300.

RE: Duke Energy Progress, LLC's Verified Response to Motion to Set Bond of NC WARN and the Climate Times
Docket No. E-2, Sub 1089

Dear Ms. Mount:

Pursuant to the Commission's *April 27, 2016 Procedural Order on Bond*, I enclose Duke Energy Progress, LLC's Verified Response to Motion to Set Bond of NC WARN and the Climate Times for filing in connection with the referenced matter.

Thank you for your attention to this matter. If you have any questions, please let me know.

Sincerely,

Lawrence B. Somers

Enclosures

cc: Parties of Record

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1089

In the Matter of	)	
	)	
Application of Duke Energy Progress, LLC for a	)	DUKE ENERGY PROGRESS'
Certificate of Public Convenience and Necessity	)	VERIFIED RESPONSE TO
To Construct a 752-MW Natural Gas-Fueled	)	MOTION TO SET BOND OF NC
Electric Generation Facility in Buncombe	)	WARN AND THE CLIMATE
County Near the City of Asheville	)	TIMES

NOW COMES Duke Energy Progress, LLC, ("DEP" or "the Company") pursuant to N.C. Gen. Stat. §62-82(b), Session Law 2015-110 (the "Mountain Energy Act"), North Carolina Utilities Commission ("Commission") Rule R1-7, and the Commission's April 27, 2016 *Procedural Order on Bond* and responds to the April 25, 2016 Motion to Set Bond of NC WARN and The Climate Times (collectively, "Potential Appellants"). The Company responds specifically as follows:

1. In its March 28, 2016 *Order Granting Application in Part, with Conditions, and Denying Application in Part* ("CPCN Order"), the Commission held that the public convenience and necessity require the construction of the two 280 MW combined cycle units proposed as part of DEP's Western Carolinas Modernization Project. The Commission's forty-four page CPCN Order contains a comprehensive and detailed evaluation of the facts, law, and arguments of all parties, including those of Potential Appellants, that led to the Commission's conclusion that the approximately $1 billion[1] Western Carolinas Modernization Project combined cycle units should be

[1] The detailed cost estimate for the combined cycle units is confidential and was filed under seal with the Commission.

approved as the cost-effective option to reliably meet DEP customers' needs and provide for the early retirement of the 379 MW Asheville Coal Units 1 and 2.

2. On April 25, 2016, Potential Appellants filed a Motion for an Extension of Time to File Notice of Appeal and Exceptions, which indicates that they "*may*" file a notice of appeal and exceptions to the CPCN Order.[2] The Commission granted the motion, extending the period to file notice of appeal until May 27, 2016. Of the seven Intervenors who opposed all or parts of DEP's Western Carolinas Modernization Project CPCN application, Potential Appellants are the only two who sought an extension of time and have asked the Commission to set their appeal bond, which would appear to indicate that they are the only parties who may intend to potentially file a notice of appeal.

3. In their motion for extension of time, Potential Appellants claim that in conducting research for their potential appeal they "learned that appeals from the granting of a certificate of public convenience and necessity are subject to a unique requirement not present in other types of appeals from the Commission."[3] Although irrelevant, Potential Appellants' surprise at this statute is curious, because the statutory bond requirement for any party seeking to appeal a CPCN award order has been the law of North Carolina since 1965.

4. N.C. Gen. Stat. §62-82(b) provides as follows:

> (b) Compensation for Damages Sustained by Appeal from Award of Certificate under G.S. 62-110.1; Bond Prerequisite to Appeal. - Any party or parties opposing, and appealing from, an order of the Commission which awards a certificate under G.S. 62-110.1 shall be obligated to recompense the party to whom the certificate is awarded, if such award is affirmed upon appeal, for the damages, if any, which such party sustains by reason of the delay in beginning the construction of the facility which is occasioned by the appeal, such damages to be measured by the increase in the cost of such generating facility (excluding legal

[2] Motion for Extension, ¶ 1, p. 1
[3] *Id.*, ¶ 2, p. 1.

> fees, court costs, and other expenses incurred in connection with the appeal). No appeal from any order of the Commission which awards any such certificate may be taken by any party opposing such award unless, within the time limit for filing notice of appeal as provided for in G.S. 62-90, such party shall have filed with the Commission a bond with sureties approved by the Commission, or an undertaking approved by the Commission, in such amount as the Commission determines will be reasonably sufficient to discharge the obligation hereinabove imposed upon such appealing party. The Commission may, when there are two or more such appealing parties, permit them to file a joint bond or undertaking. If the award order of the Commission is affirmed on appeal, the Commission shall determine the amount, if any, of damages sustained by the party to whom the certificate was awarded, and shall issue appropriate orders to assure that such damages be paid and, if necessary, that the bond or undertaking be enforced.

The purpose of the CPCN appeal bond is clear: to protect utility customers from having to pay for any potential construction cost increases caused by unsuccessful appeal-related delays and to place an appropriately high burden upon parties seeking to pursue an appeal from a CPCN order. It is important to note that this statute provides for the bond to secure the payment of damages in the event the appeal is *simply unsuccessful*, not upon a higher standard such as a finding that the appeal was frivolous. This distinction shows how important the requirement of the CPCN appeal bond is under North Carolina law.

5. As the Commission noted in its CPCN Order, the Mountain Energy Act states the policy of the State to promote the early retirement of the Asheville coal units and replacement with new natural gas generation at the Asheville plant site.[4] Importantly, the Mountain Energy Act specifically provides that the appeal bond provisions of N.C. Gen. Stat. §62-82(b) apply to any appeals from a CPCN order

[4] CPCN Order at pp. 8; 40-41. Notwithstanding the expedited CPCN procedure provided for by the Mountain Energy Act, the Commission retained the requirement to determine that the public convenience and necessity requires, or will require, the construction of the new Asheville combined cycle units. *Id.* at p. 29.

approving new gas-fired replacement generation at DEP's Asheville Plant.[5] In contrast, N.C. Gen. Stat. §62-110.1(h), essentially identical legislation to the Mountain Energy Act and which provided for an expedited CPCN process for DEP's Wayne County Combined Cycle Project, exempted the appeal bond requirements of N.C. Gen. Stat. §62-82(b) for a CPCN application filed pursuant to that statutory provision. DEP submits that this difference between the Mountain Energy Act and N.C. Gen. Stat. §62-110.1(h) further emphasizes the importance of an appeal bond in this matter.

6. Potential Appellants do not contend that no appellate bond should be required. In their Motion, however, Potential Appellants allege that DEP and its customers would not suffer any damages under N.C. Gen. Stat. §62-82(b) if their appeal is unsuccessful, and therefore the appeal bond should be a "nominal amount," which they contend should be *a mere two-hundred and fifty dollars ($250.00).*[6] By making the absurd argument that a $250.00 appeal bond would provide adequate protection for DEP's customers from potential construction costs delays for a $1 billion generation construction project, Potential Appellants are essentially attempting to argue that the law does not, or should not, somehow apply to them.[7]

7. Potential Appellants' proposed $250.00 appeal bond is grossly inadequate on its face. That the Potential Appellants fail to acknowledge the risk that their potential appeal could impose upon DEP's customers in terms of reliability risks and potential increased construction costs for an approximately $1 billion new generating facility that

[5] The Mountain Energy Act exempts an applicable CPCN application from only the provisions of N.C. Gen. Stat. §62-82(a).
[6] Motion to Set Bond of NC WARN and the Climate Times, ¶ 7, p. 3.
[7] This is not the first time NC WARN has advanced such an argument. *See* Docket No. SP-100, Sub 31.

this Commission has determined is required by the public convenience and necessity to serve the State of North Carolina is baffling and further reveals their true motives.[8]

8. In arguing for a "nominal" appeal bond, Potential Appellants contend that if the bond is set "prohibitively high," it could be impossible for parties to appeal.[9] Potential Appellants ignore the fact, however, that they control, to a large extent, whether they are ultimately required to pay damages pursuant to N.C. Gen. Stat. §62-82(b). First, Potential Appellants are required to pay damages to DEP only if the Commission's CPCN Order is affirmed upon appeal. Thus, Potential Appellants have to assess the merits of their potential appeal. If they believe their appeal will be successful, then they should have no concern that they will be required to pay any damages pursuant to N.C. Gen. Stat. §62-82(b).[10] Second, even if the Commission's CPCN Order is affirmed on appeal, if there are no actual increases in construction costs due to appeal delays, which Potential Appellants assert will be the case, then they likewise should have no concern that they will ultimately be required to pay any damages pursuant to N.C. Gen. Stat. §62-82(b). Again, while not dispositive of the merits of Potential Appellants' potential appeal, the Company notes that no other party has indicated their intent to appeal or sought to have their appeal bond established by the Commission.

9. While the Potential Appellants have the right to pursue the appeal if they so choose, the potential appeal of the CPCN Order in this case it is not a "nominal" matter, and the General Assembly so recognized by specifically retaining the appeal bond

[8] To put Potential Appellants' proposed $250.00 appeal bond in perspective, the cost of an appeal from District Court to Superior Court is $372.50. *NC AOC, "Court Costs and Fees Chart,"* Sept. 2014, p. 13.
[9] Motion to Set Bond of NC WARN and the Climate Times, ¶ 6, p. 3.
[10] The Company notes that this Commission rejected Potential Appellants' arguments in the CPCN proceeding, finding them, at least in part, to be "overly simplistic and lacking credibility" (CPCN Order at p. 33), and to "appear to demonstrate a lack of fundamental understanding" of basic electric utility system and Integrated Resource planning principles. (CPCN Order at p. 34).

requirements of N.C. Gen. Stat. §62-82(b). Potential Appellants state they are not requesting an injunction or stay of the CPCN Order. This is irrelevant. Unlike the traditional appellate bonds governed by N.C. Gen. Stat. §1A, Rule 62, it is not necessary that that the Potential Appellants request an injunction or stay of the Commission's Order under N.C. Gen. Stat. §62-82(b), because the General Assembly recognized the tremendous impact and risk to North Carolina citizens that such an appeal produces. The appeals process by its very nature produces uncertainty and the potential for significant delays. As the Potential Appellants state in the Motion to Set Bond, the bond obligation is designed to provide financial protection for DEP's customers from "*potential* damages caused by construction delays due to the appeal."[11]

10. At this point, the Company has not definitely decided if it would delay beginning construction of the new combined cycle units in response to the potential appeal, or delay construction at some later point in the appellate process once an appeal is actually filed, but the Motions filed by the Potential Appellants have added considerable uncertainty to the process. The Commission's April 27, 2016 Procedural Order on Bond provided only three (3) business days to prepare this response. Even if the response time were unlimited, it would be impossible to evaluate the merits of the possible appeal at this time. The Company has not had the opportunity to review the exceptions that Potential Appellants might take to the CPCN Order, much less their actual briefs supporting a potential appeal, so the Company is unable to adequately evaluate the merits

[11] Motion to Set Bond of NC WARN and the Climate Times, ¶ 4, p. 2 (emphasis added).

of a possible appeal and the commensurate risk to beginning or continuing construction pending the appellate process.[12]

11. The subject matter of this docket and the possible appeal have far reaching implications for DEP's customers and the ability of the Company to provide cost-effective and reliable energy as is its public service obligation. The construction of the generating facilities approved by the Commission in the CPCN Order on the current timeline is essential to accomplishing the State's goals of retiring the older, less efficient Asheville coal units and replacing them with cleaner, more efficient gas-fired generating facilities.

12. As the record in this proceeding and the CPCN Order establishes, the timing of the retirement of the Asheville coal units and the construction of the new combined cycle units is subject to strict timing deadlines under the Mountain Energy Act, which modifies the strict timelines of the Coal Ash Management Act, Session Law 2014-122 ("CAMA"). As such, any potential delays in beginning construction of the combined cycle units, or subsequent delays in completing construction of the combined cycle units, due to an appeal would subject DEP and its customers to material risk. As the CPCN Order recites, the Mountain Energy Act extends the CAMA deadlines applicable to the Asheville coal units, *but only if*, in pertinent part, *DEP retires the Asheville coal units on or before the commercial operation of the new gas generation, and no later than January 31, 2020.*[13]

13. If DEP were to delay construction of the combined cycle units beyond the current Mountain Energy Act deadlines in response to an appeal by Potential Appellants,

[12] Importantly, the customary timelines for completion of the appellate process through the North Carolina Court of Appeals and potentially the North Carolina Supreme Court could take two years or more.
[13] CPCN Order at p. 3

as reflected in the record in the CPCN proceeding, DEP would need to invest approximately $100 million in additional environmental controls to make the Asheville coal units compliant with the CAMA storm water and dry fly and bottom ash requirements otherwise extended by the Mountain Energy Act. Accordingly, one potential increased construction cost associated with a delay should Potential Appellants file an appeal would be the incurrence of the approximately $100 million in new environmental controls associated with the Asheville coal units, which would otherwise be avoided as part of the construction of the combined cycle units approved in the CPCN Order.[14]

14. An appeal-related delay of the combined cycle units' construction would cause additional cost increases. Since receipt of the CPCN Order, the Company has been finalizing contracts with suppliers and contractors and plans to release the major equipment suppliers to proceed in May 2016. May 2016 is the latest date that DEP could fully release these vendors to proceed and still meet the critical path deadlines for timely commercial operation of the project. Commencement of on-site earthworks construction of the combined cycle units is scheduled to commence in October 2016, to support the November 2019 expected commercial operation date and to comply with the deadlines of the Mountain Energy Act. Although it is difficult to estimate the increased construction costs associated with an appeal-related delay of the combined cycle units' construction after issuing notice to proceed, DEP reasonably estimates that if the Company delayed the commencement of construction beginning in October 2016, then such a delay would result in major equipment contracts cancellation costs of approximately $40 million, plus

[14] Consistent with the consequences had their opposition to the combined cycle units been successful in the CPCN proceeding, Potential Appellants' pursuit of an appeal here could potentially extend the operation of the Asheville coal units.

an additional $8 million[15] in sunk development costs associated with the project. The Company further reasonably estimates that if the project were delayed by two years pending completion of the appellate process, the increased project costs of the construction delay would amount to approximately $50 million, assuming a 2.5% annual cost escalation rate. Finally, based upon current estimates, DEP would be obligated to pay Public Service Company of North Carolina, Inc. approximately $45 million in estimated fixed firm gas transportation service costs during a two-year construction delay, even though the combined cycle units would not be in operation. Under these scenarios, the total increased combined cycle project costs due to a two-year appeal-related delay would be approximately $140 million.[16]

15. As with most every issue in which they are involved before the Commission, the Potential Appellants have asked for a hearing or oral argument to address the issue of an appeal bond. DEP submits that the record in this docket is complete and comprehensive, including the submission of this verified response and any reply Potential Appellants may file. The Company respectfully submits that the Commission understands the appeal process, and the risk that it imposes, including the potential for delays and disruptions to impact the cost of the combined cycle units approved in the CPCN Order, and that further hearings or oral argument are unnecessary to decide Potential Appellants' motion.

16. The setting of an appeal bond requires balancing of various interests by the Commission. Under N.C. Gen. Stat. §62-82(b), a bond must provide surety

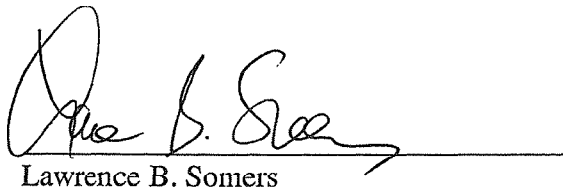
[15] Approximately half of these estimated sunk development costs may need to be written off if the project were to be delayed.

[16] In order to preserve the confidentiality of the cost estimates filed under seal with the Commission, the Company has presented these estimated costs in round numbers.

protection against the potential damages that might be occasioned by a potential delay due to appeal. Clearly, the $250.00 appeal bond proposed by the Potential Appellants is inadequate and relieves them of any risk associated with cost increases due to construction delays caused by their potential appeal, providing no protection to the Company's customers or to the Company as required by N.C. Gen. Stat. §62-82(b). DEP has submitted reasonably-estimated increased costs of approximately $100 million in potential coal unit environmental controls and approximately $140 million in potential increased combined cycle construction costs that could result from delays related to an appeal from Potential Appellants, but cannot fully assess at this time the likelihood that it would delay construction of the combined cycle units due to all of the uncertainties of a potential appeal that has not been filed or briefed and the impact of Mountain Energy Act deadlines.

WHEREFORE, for all the foregoing reasons, Duke Energy Progress respectfully requests that the Commission establish an appeal bond in a minimum amount of $50 million at this time to adequately protect the Company's customers as provided for in N.C. Gen. Stat. §62-82(b) and that the request for hearing and oral argument be denied.

Respectfully submitted, this the 2nd day of May 2016.



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ATTORNEYS FOR DUKE ENERGY PROGRESS, LLC

STATE OF NORTH CAROLINA)
)
COUNTY OF MECKLENBURG)

VERIFICATION

Mark E. Landseidel, being first duly sworn, deposes and says:

That he is Director of Project Development and Initiation in the Project Management and Construction Department of Duke Energy Corporation; that he has read the foregoing Duke Energy Progress' Verified Response to Motion to Set Bond of NC WARN and the Climate Times and knows the contents thereof; that the same is true and correct to the best of his knowledge, information and belief.

Mark E. Landseidel

Sworn to and subscribed before me
this 2 day of May, 2016.

Notary Public

My Commission expires: 7-30-17

THOMAS J. REED-HALL NOTARY PUBLIC GASTON COUNTY, NC

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Progress, LLC's Verified Response to Motion to Set Bond of NC WARN and the Climate Times in Docket No. E-2, Sub 1089, has been served by electronic mail, hand delivery or by depositing a copy in the United States mail, postage prepaid to the following parties:

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This the 2nd day of May, 2016

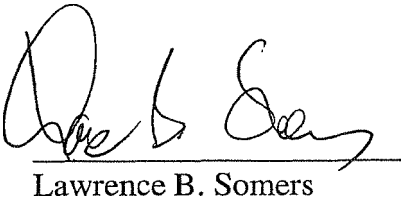

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EXHIBIT I

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Progress, LLC for a Certificate of Public Convenience and Necessity to Construct a 752 Megawatt Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville	))))))	NC WARN AND THE CLIMATE TIMES'S VERIFIED REPLY TO DUKE ENERGY PROGRESS'S RESPONSE TO MOTION TO SET BOND

NOW COMES NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-82(b) and the North Carolina Utilities Commission's ("Commission") April 27, 2016, *Procedural Order on Bond*, and file the present Verified Reply to Duke Energy Progress LLC's ("DEP") Response to Motion to Set Bond. NC WARN and The Climate Times respectfully show unto the Commission the following:

1. DEP's response is an attempt to bully NC WARN and The Climate Times away from an appeal. DEP has the burden to quantify and substantiate the bond amount necessary to secure against damages from appellate-related delays in the initiation of construction. Instead of meeting this burden, DEP is attempting to circumvent the appellate process by hinting that delay might occur and then throwing out unsubstantiated and extravagant estimates at the expense of such a delay.

2. The most striking thing about DEP's response is what is absent: an allegation that an appeal will cause a delay in the initiation of construction. On the one hand, DEP claims that it is "irrelevant" that NC WARN and The Climate Times have not

requested an injunction. *DEP's Response* ¶ 9. Yet on the other hand, DEP acknowledges that it does not know whether delay would result from an appeal by NC WARN and The Climate Times. *DEP's Response* ¶ 10. In other words, DEP wants things both ways—it intentionally declines to assert that an appeal will cause delay (because, as we are all aware, DEP will not delay the construction), yet DEP simultaneously wants the Commission to ignore that no injunction has been sought. DEP's failure to clearly state that an appeal will cause delay in the beginning of construction reveals its true purpose to use the bond requirement to close the courthouse doors.

3. In fact, it is quite important that NC WARN and The Climate Times seek no injunction. DEP mockingly states that "[o]f the seven Intervenors who opposed all or parts of DEP's . . . application, Potential Appellants [NC WARN and The Climate Times] are the only two who . . . intend to potentially file a notice of appeal." *DEP's Response* ¶ 2. The implication is that an appeal is doomed to failure. If DEP is so certain that an appeal will fail, then it has no grounds to delay construction in the absence of an injunction. Indeed, after a thorough case law review, undersigned counsel is aware of zero (0) instances where the Commission ordered a significant appellate bond without an injunction in an appeal from a certificate of public convenience and necessity. The lack of a motion for injunction makes DEP's request for a $50,000,000.00 bond completely unprecedented and transparently an attempt to intimidate parties from filing an appeal.

4. DEP makes threatening claims that an appeal will put ratepayers at risk, and cites these claims as reason for setting a prohibitively high bond. However, without an injunction in place requiring that the company delay the start of construction, any decision by the company to delay (however unlikely) is simply a business decision. It

should be the responsibility of the company and its shareholders—not ratepayers—to absorb the cost of such business decisions.

5. In addition to DEP's refusal to make the statement that an appeal will result in delays, DEP failed to provide any evidence or detail in support of its over-the-top damage estimates. For instance, DEP asserts that delay will result in "major equipment contracts cancellation costs of approximately $40 million." *DEP's Response* ¶ 14. Yet DEP does not reveal the identities of these major equipment contracts; the reasons why delay would require the cancellation of these contracts; or why the cancellation of these contracts would result in $40 million in damages. Similarly, DEP claims "an additional $8 million in sunk development costs" from a delay, *id.*, but DEP supplies no evidence to support the allegation. Precisely which development costs would be sunk due to delay? What evidence supports the assertion that these costs would be completely sunk, as opposed to only partially sunk, because of a delay?

6. DEP also claims that "if the project were delayed by two years pending completion of the appellate process," then "the construction delay would amount to approximately $50 million, assuming a 2.5% annual cost escalation rate." *Id.* First, a two-year appellate process is on the high end. Second, DEP provided no evidence to support its proffered "2.5% annual cost escalation rate." *Id.* Third, DEP refused to explain the calculation resulting in a supposed $50 million construction delay expense.

7. NC WARN and The Climate Times could, but will not, go on and on about the lack of evidence in DEP's reply. The point is that DEP baldly asserted, without any evidence or detail, that delay will result in millions of dollars in damages. But DEP's bald assertions should not be accepted on blind faith. Indeed, in a recent rate-increase

proceeding, DEP's related entity, Duke Energy Carolinas LLC, committed significant "accounting errors" that rightly resulted in the Commission being "quite disturbed and concerned." *Order Granting General Rate Increase*, E-7, Sub 1026, p 65. This history shows that DEP's unsubstantiated damage estimates should be treated with extreme skepticism.

8. Further, there are many reasons why DEP will experience these same expenses from construction delays caused by issues other than an appeal. For example, the facility appears to plan construction of the natural gas units on top of an existing coal ash site. This creates uncertainty about the structural condition of the site and is therefore susceptible to delay. As another example, there is an extensive permitting process forthcoming that might cause delay, including air quality permitting. Prior to the issuance of an air quality permit, the potential permittee is limited on what types of construction can begin. N.C. Gen. Stat. § 143-215.108A(a). Any bond deliberation should recognize that significant construction delays happen with or without appeal, yet DEP does not typically claim such extensive delay expenses.

9. In addition to the above errors, DEP misstated several aspects of applicable law. For instance, DEP stated that "this statute [N.C. Gen. Stat. § 62-82(b)] provides for the bond to secure the payment of damages" from "*any* potential construction cost increases caused by unsuccessful appeal-related delays." *DEP's Response* ¶ 4 (emphasis added). This is inaccurate. The statute requires not just "appeal-related delays" resulting in "any potential construction cost increases"; instead, the statute requires an appeal-related delay specific to the initiation of construction:

> Any party or parties opposing, and appealing from, an order of the Commission which awards a certificate under G.S. 62-110.1 shall be

> obligated to recompense the party to whom the certificate is awarded, if such award is affirmed upon appeal, for the damages, if any, **which such party sustains by reason of the delay in beginning the construction** of the facility which is occasioned by the appeal . . . .

N.C. Gen. Stat. § 62-82(b) (emphasis added). Since DEP did not represent to the Commission that an appeal will result in a "delay in beginning the construction of the facility," no bond should be required.

10. DEP also misstated the terms of the Mountain Energy Act. DEP's Response stated that "the Mountain Energy Act specifically provides that the appeal bond provisions of N.C. Gen. Stat. § 62-82(b) apply to any appeals from a CPCN order approving new gas-fired replacement generation at DEP's Asheville Plant." *DEP's Response* ¶ 5. This is not correct. The Mountain Energy Act sets up a unique process for the Commission's deliberation on the proposed Asheville facility, hence the Act exempts the Asheville project from the generally applicable process, described in N.C. Gen. Stat. § 62-82(a), for certificates of public convenience and necessity. The Act says nothing whatsoever about the generally applicable appellate guidelines of section 62-82(b). Hence it is wrong for DEP to state that the Act says anything "specifically" about subsection (b) when the only provision mentioned in the Act is subsection (a).

11. In its Response, DEP makes light of the fact that NC WARN and The Climate Times previously indicated that they only "may" file a notice of appeal. *DEP's Response* ¶ 2. It is unfortunate that DEP takes such a flippant attitude to the use of the word "may," because it is precisely the prospect of a huge bond requirement that required the use of that word. No public interest group can post the $50 million bond proposed by DEP. DEP naturally knows this, and is angling for a bond that will make appellate review impossible. This is particularly unfortunate in the present case, as the process was

subject to the expedited timeline of the Mountain Energy Act. The combination of an expedited timeline and no appellate review not only creates the possibility of uncorrectable error, but also undermines transparency. DEP claims that NC WARN and The Climate Times are "ignor[ing] . . . that they control . . . whether they are ultimately required to pay damages pursuant to N.C. Gen. Stat. § 62-82(b)." *DEP's Response* ¶ 8. This is exactly backwards—DEP is ignoring that there can be no appellate process if the bond is prohibitively high.

12. DEP refused to state that an appeal would result in the delay of the initiation of construction. Then, to scare off potential appellants, DEP articulated extravagant yet evidence-free guesses at potential damages from a delay that will not even happen. DEP should not be permitted to use these scare tactics to absolve itself of appellate review. DEP failed to meet its burden of proving that a bond is necessary to secure against damages flowing from appeal-related delays in the initiation of construction. For these reasons and others, the Commission should follow the example of N.C. Rule of Appellate Procedure 17(a) and order a $250.00 bond.

THEREFORE, NC WARN and The Climate Times respectfully request a bond pursuant to N.C. Gen. Stat. § 62-82(b) of $250.00, and such other and further relief as the Commission deems just and proper.

Respectfully submitted, this the 5th day of May, 2016.

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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E 2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Progress, LLC for a Certificate of Public Convenience and Necessity to Construct a 752 Megawatt Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville	)	VERIFICATION

I, James Warren, Executive Director of NC WARN, verify that the contents of the above filing in this docket are true to the best of my knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

James Warren

Date 5/4/16

Sworn to and subscribed before me
This the 16th day of May, 2016

Notary Public

My commission expires: 1/6/2018

(seal)

ANNA HENRY
NOTARY PUBLIC, NORTH CAROLINA
WAKE COUNTY
MY COMMISSION EXPIRES
1/6/2018

CERTIFICATE OF SERVICE

The undersigned certifies that on this day he served a copy of the foregoing NC WARN AND THE CLIMATE TIMES' VERIFIED REPLY TO DUKE ENERGY PROGRESS'S RESPONSE TO MOTION TO SET BOND upon each of the parties of record in this proceeding or their attorneys of record by electronic mail, or by hand delivery, or by depositing a copy of the same in the United States Mail, postage prepaid.

This the 5th day of May, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: _____
Matthew D. Quinn

EXHIBIT J

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Progress, LLC, for a Certificate of Public Convenience and Necessity to Construct a 752-MW Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville	))))))	ORDER SETTING UNDERTAKING OR BOND PURSUANT TO G.S. 62-82(b)

BY THE COMMISSION: On March 28, 2016, the Commission issued an Order in the above-captioned docket (CPCN Order) which, among other things, granted Duke Energy Progress, LLC (DEP) a certificate of public convenience and necessity to construct two 280 MW combined cycle natural gas-fired electric generating units in Buncombe County, North Carolina (the facility).

On April 25, 2016, the North Carolina Waste Awareness and Reduction Network and The Climate Times (collectively, NC WARN) filed a Motion To Set Bond pursuant to G.S. 62-82(b) requesting that the Commission set the bond amount at $250.00 and requesting an oral argument or evidentiary hearing on the bond requirement.

On April 27, 2016, the Commission issued Procedural Order on Bond allowing DEP to file a response to NC WARN's motion on or before May 2, 2016, and allowing NC WARN to file a reply on or before May 5, 2016.

On May 2, 2016, DEP filed a Verified Response to Motion to Set Bond of NC WARN and the Climate Times. In its response, DEP first indicates that the Commission's 44-page comprehensive and detailed CPCN Order properly found that the construction of the two 280 MW combine cycle units were necessary to reliably meet the needs of DEP customers and to provide for the early retirement of the 379 MW Asheville Coal Units 1 and 2. DEP indicates that the approximate cost of the Western Carolina Modernization Project was $1 billion.

North Carolina General Statute 62-82 (b) provides:

> (b) Compensation for Damages Sustained by Appeal from Award of Certificate under G.S. 62-110.1; Bond Prerequisite to Appeal. – Any party or parties opposing, and appealing from, an order of the Commission which awards a certificate under G.S. 62-110.1 shall be obligated to recompense the party to whom the certificate is awarded, if such award is affirmed upon appeal, for the damages, if any, which such party sustains by reason of the delay in beginning the construction of the facility which is occasioned by the

> appeal, such damages to be measured by the increase in the cost of such generating facility (excluding legal fees, court costs, and other expenses incurred in connection with the appeal). No appeal from any order of the Commission which awards any such certificate may be taken by any party opposing such award unless, within the time limit for filing notice of appeal as provided for in G.S. 62-90, such party shall have filed with the Commission a bond with sureties approved by the Commission, or an undertaking approved by the Commission, in such amount as the Commission determines will be reasonably sufficient to discharge the obligation hereinabove imposed upon such appealing party. The Commission may, when there are two or more such appealing parties, permit them to file a joint bond or undertaking. If the award order of the Commission is affirmed on appeal, the Commission shall determine the amount, if any, of damages sustained by the party to whom the certificate was awarded, and shall issue appropriate orders to assure that such damages be paid and, if necessary, that the bond or undertaking be enforced.

DEP indicates that the purpose of the CPCN appeal bond is to protect ratepayers from having to pay for "any potential construction cost increases caused by unsuccessful appeal-related delays and to place an appropriately high burden upon the parties seeking to pursue an appeal from a CPCN order." DEP highlights that the appeal bond is to secure funds for the payment of damages for a simply unsuccessful appeal as opposed to a higher standard such as a frivolous appeal.

DEP argues that unlike N.C.G.S. 62-110.1(h), which created an expedited CPCN process for DEP's Wayne County CC Project and which exempted the appeal bond requirement of G.S. 62-82(b), the Mountain Energy Act, which created the expedited process for the CPCN decision in the present case, specifically did not exempt the appeal bond requirement of G.S. 62-82(b). This act of non-exemption strengthens the importance of the appeal bond requirement for the present case.

DEP argues that NC WARN's suggested bond amount of $250.00 is absurd in that the sum of $250.00 cannot provide adequate protection for DEP's customers from potential construction cost delays for a $1 billion generation construction project. DEP states that this nominal bond amount fails to acknowledge the risk that the appeal could impose on DEP's customers in terms of reliability risks and potential increased construction costs.

In responding to NC WARN's argument that a bond that is set "prohibitively high" in essence prohibits the appellate process, DEP states that potential appellants are in control of whether the appellant pays damages, as well as determining the strength of its appeal. DEP argues that if NC WARN's appeal is successful, it will not be required to pay damages. DEP further argues that if the appeal is unsuccessful, if there are no damages in increased costs of the facility due to the appeal, no damages will be awarded. DEP argues that the process of appealing orders allowing for the construction of generating facilities is not a "nominal" matter and the special obligation for an appellant to post an

appeal bond reinforces this fact. DEP has a public service obligation to provide affordable and reliable service and in the present case to construct the facility within a certain timeline so that older, less efficient coal units may be retired.

DEP indicates that G.S. 62-82 does not require an injunction or stay of the order to trigger the bond obligation of the appealing party. DEP highlights that even NC WARN recognized in its Motion to Set Bond that the bond requirement is to provide security for payment of "potential damages cause by construction delays due to the appeal."

DEP states that it has not decided if it will delay the beginning of construction in response to a potential appeal. DEP indicates it would need the opportunity to review the exceptions that potential appellants might assert as well as the briefs in support of an appeal to fully evaluate the risk of beginning or continuing construction of the facility.

DEP explains that in the present case, the two CC units must be operational before January 31, 2020, for the Coal Ash Management Act (CAMA) deadlines to be extended by the Mountain Energy Act. If the two CC units are delayed in response to an appeal, DEP argues that it would need to invest approximately $100 million in additional environmental controls pursuant to CAMA. Thus, one potential damage is the incurrence of approximately $100 million in new environmental controls that would have otherwise been avoided if the CC units were built on schedule.

DEP indicates that since the issuance of the CPCN order, DEP has been finalizing contracts with suppliers and contractors. DEP states that certain contractors will need to be released to proceed in May 2016 to meet critical path deadlines. On-site earthworks construction will need to begin in October 2016. DEP has estimated that if the earthworks construction does not begin in October, 2016 then potential major equipment contract cancellation costs would be approximately $40 million, plus $8 million in sunk development costs. DEP estimates that if the project is delayed two years pending an appellate decision, the increased project costs due to construction delay would be approximately $50 million, assuming a 2.5% annual cost escalation rate. Lastly, DEP indicates that it would still be obligated to pay Public Service Company of North Carolina, Inc. approximately $45 million in estimated fixed firm gas transportation service costs during a two-year construction delay, even though the two CC units would not be in operation. DEP estimates that the potential increased combined cycle facility costs due to a two-year delay would be approximately $140 million.

On May 5, 2016, NC WARN filed a Verified Reply to DEP's Response to Motion to Set Bond. NC WARN argues that DEP's response is an attempt to bully NC WARN away from an appeal. NC WARN states that DEP has the burden to quantify and substantiate the amount of bond needed to secure against damages from appellate-related delays in beginning of construction of the facility. NC WARN states that DEP is attempting to circumvent the appellate process by indicating that delays might occur and by providing unsubstantiated and extravagant estimates of potential damages.

In response to DEP's claim that NC WARN's lack of a request for an injunction is irrelevant to the bond determination, NC WARN states that DEP has not affirmatively indicated that the appeal will cause a delay. Rather, DEP has indicated that it does not know whether any construction delays will occur based upon the appeal. NC WARN alleges that DEP has no plans to delay construction of the facility. NC WARN states that DEP's non-clarity on this point suggests that DEP is attempting to use the bond requirement "to close the courthouse doors."

NC WARN states that it is aware of no case where the Commission has ordered a significant appellate bond without an injunction on appeal, and that DEP's request for a $50 million bond is an attempt to intimidate the parties from filing an appeal.[1]

NC WARN argues that if DEP determines to delay the initiation of construction or to cease the construction of the facility during the pendency of the appeal, that determination is a business decision, as opposed to an injunction. NC WARN states that if DEP makes the determination not to proceed, that decision should be the responsibility of the company and its shareholders and not the ratepayers as stated in DEP's response.

NC WARN indicates that DEP's assertions of potential damages are not sufficiently documented. NC WARN states that DEP does not reveal the identity of the major equipment contracts, why the contracts might be cancelled or detail how DEP estimates that the cancellation of the contracts would result in $40 million in damages. DEP indicates $8 million in sunk development costs but provides no evidence to substantiate such estimate. As for DEP's estimate that based upon a two-year appellate construction delay the increased costs would be $50 million, assuming a 2.5 annual cost escalation, NC WARN indicates that a two-year appellate process is on the high end. Secondly, NC WARN states DEP has provided no evidence regarding the 2.5% annual cost escalation and has not provided an explanation or break-down of its $50 million estimate.

NC WARN further asserts that DEP may experience construction delays based upon other actions unrelated to the appeal. One example is the upcoming environmental permitting process for the facility, including air quality permitting. NC WARN states any bond determination should recognize that construction delays might occur which are unrelated to the appeal.

NC WARN argues that DEP misstates G.S. 62-82(b) when it states that the bond is to secure the payment of damages from "any potential construction cost increases caused by unsuccessful appeal-related delays." NC WARN cites the statute that states an appellant is obligated to recompense a party awarded a CPCN for damages, if any, "which such party sustains by reason of the delay in beginning the construction of the facility." NC WARN contends that because DEP did not represent that an appeal will result in a "delay in the beginning the construction" that no bond should be required.

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[1] The Commission is not aware of any case in which the Commission has determined the amount of a bond or undertaking pursuant to G.S. 62-82(b).

NC WARN posits that DEP also misstates the Mountain Energy Act by stating that the Mountain Energy Act specifically provides that the appeal bond provisions apply to this CPCN order. NC WARN argues that the act says nothing about G.S. 62-82(b).

DISCUSSION

The purpose of G.S. 62-82(b) requiring a bond or an undertaking is to assure that an appealing party pays certain damages caused by an unsuccessful appeal to the CPCN holder. This special statute not only requires but obligates any party seeking an appeal from a CPCN order to recompense the CPCN holder for "damages, **if any**, by reason of the delay in beginning of the construction of the facility." The appealing party must submit a bond or undertaking. It must be approved by the Commission at the time of filing notice of appeal.

The statute further states that the damages will be measured by the increase in the cost of such generating facility. Lastly, the statute commands that the Commission in setting the amount of the bond or undertaking must set it in an amount reasonably sufficient to discharge the obligation imposed on the appealing party. Thus, the purpose of G.S. 62-82(b) is to ensure payment of Commission-determined damages by an appealing party through the enforcement of the bond or undertaking.

Clearly, based upon the plain language of the statute, the obligation to file a bond with sureties or an undertaking is on the party seeking the appeal, not the party awarded the CPCN. The statute makes clear that a bond or undertaking is required even if no damages are ultimately awarded. The Commission therefore rejects NC WARN's contention that no bond or undertaking is required in absence of an injunction. However, the question remains as to the amount of the bond or undertaking.

A nominal bond amount, such as a $250.00 appeal bond, would nullify the purpose and meaning of G.S. 62-82(b). The purpose of the bond is to secure funds to satisfy the appealing party's statutory obligation to compensate the CPCN holder for certain damages that occur from the unsuccessful appeal. The construction of generation facilities is imbued with the public interest, and ultimately the ratepayers of North Carolina are paying for the construction of the facility. Therefore, any party seeking to appeal a CPCN order is set to a higher standard than appellants of other orders from the Commission. This higher statutory standard is the obligation of compensating a CPCN holder for damage caused by an appellate-related delay in the beginning of construction as well as the financial ability to compensate the CPCN holder and ultimately ratepayers for such potential damages.

The issue in the present case is that DEP indicates that it has not determined whether it will delay the beginning of construction of the facility if an appeal is filed as it has no definitive knowledge of exceptions and arguments appellant will assert. G.S. 62-82(b) is explicit in limiting the damages to be assessed to those arising from delay in the beginning of construction. DEP states that the beginning of on-site earthworks construction is currently scheduled for October 2016. Although all potential damages due

to the delay of the beginning of construction cannot be quantified with specific certainty in any case, a determination of whether or not a delay of the beginning of construction is imminent, will be instructive to the Commission in determining the amount of the bond in the present case. However, pursuant to the statute, the Commission is required to make this determination regarding the amount of a bond or undertaking prior to the expiration of the time limit for filing a notice of appeal, and an appealing party must file with the Commission a bond with sureties approved by the Commission or an undertaking approved by the Commission within the time limit for filing a notice of appeal as provided for in G.S. 62-90. NC WARN has already obtained its one extension of time and the time for filing a notice of appeal is on or before May 27, 2016. Therefore, the Commission must make a determination pursuant to G.S. 62-82(b) sufficiently in advance of May 27, 2016, to permit the appellant to comply with the order.

To provide the parties as well as the Commission more time to investigate and determine what amount of bond or undertaking is reasonably sufficient to discharge the appealing party's obligation, the Commission makes the following pre-notice of appeal decision. The Commission, as a condition of notice of appeal, shall require NC WARN to file with the Commission an undertaking or bond in the sum of $10 million on or before May 27, 2016. If NC WARN chooses to file an undertaking, it is attached as Exhibit A. NC WARN's notice of appeal should contain exceptions and justification therefore in compliance with G.S. 62-90(a) sufficient to provide DEP with the basis of NC WARN's appeal. The Commission further orders DEP to inform the Commission on or before September 1, 2016, whether or not DEP plans to delay the beginning of construction of the facility due to the appeal. Should DEP inform the Commission that it will not delay the beginning of construction due to NC WARN's appeal, the Commission will entertain a motion from NC WARN to cancel the required undertaking or bond. On the other hand, should DEP represent that it will delay the beginning of construction due to the appeal, the Commission will schedule a hearing on the bond issue as expeditiously as possible to determine with more specificity the justification for DEP's decision to delay and the estimated amount of damages that will occur due to the delay in beginning construction. During this investigation and hearing, if NC WARN chooses to file an undertaking, the Commission will also determine whether or not the undertaking of $10 million filed by NC WARN should be converted into a bond and what the amount of such bond should be based upon the evidence provided at the hearing or if NC WARN chooses to file a bond in the amount of $10 million in response to this order, the Commission will determine whether the amount of the bond should be modified based upon the evidence.

In its reply, NC WARN argues that DEP's estimate of potential damages in the sum of $50 million is unsubstantiated and extravagant. However, NC WARN ignores the fact that the estimated total cost of the project is $1 billion. The estimate of $50 million for an increase in the cost of the facility due to appellate delays does not appear extravagant. Rather, the sum might be appropriate or conservative considering the total cost of the project. In any event, due to DEP's uncertainty regarding whether it might delay construction due to an appeal and NC WARN's assurance that it will not seek a stay or injunction, the Commission has determined that a lesser sum of $10 million is sufficient at this time to satisfy potential damages that may be incurred by delaying the beginning

of construction of such a large capital investment. Further, due to the fact that NC WARN has the option to file an undertaking in the sum of $10 million as opposed to a bond and that the undertaking or bond is subject to future revision, the Commission determines that $10 million strikes the right balance between the parties until such time as the Commission receives additional information as described above.

IT IS THEREFORE, SO ORDERED as follows:

1. NC WARN shall file as a condition of its notice of appeal an executed undertaking in the sum of $10 million, which is attached as Exhibit A to this Order, or a bond in the sum of $10 million on or before May 27, 2016, and prior to filing a Notice of Appeal;

2. DEP shall notify the Commission on or before September 1, 2016, of its determination on whether it plans to delay the beginning of construction of the facility;

3. If DEP determines it will not delay construction because of the appeal, the Commission will entertain a motion from NC WARN to cancel the required undertaking or bond;

4. If DEP determines that the beginning of construction of the facility will be delayed due to an appeal by NC WARN, the Commission shall schedule a hearing as expeditiously as possible to determine whether the $10 million undertaking should be converted into a bond and to determine the amount of such bond or undertaking to sufficiently discharge the NC WARN's obligation to pay damages if its appeal is unsuccessful or if NC WARN chooses to file a $10 million bond in response to this order, the Commission shall schedule a hearing to determine whether or not the amount of the bond should be modified; and

5. The Commission shall retain jurisdiction over the appeal bond requirement pursuant to G.S. 62-82(b) until such final hearing is held and until such time a final determination is made regarding whether the undertaking required herein is converted to a bond and the amount of such bond or undertaking or if a bond is filed in response to this order whether a modification of the amount of the bond is necessary.

ISSUED BY ORDER OF THE COMMISSION.

This the 10th day of May, 2016.

NORTH CAROLINA UTILITIES COMMISSION

Paige J. Morris

Paige J. Morris, Deputy Clerk

EXHIBIT A

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Progress, LLC, for a Certificate of Public Convenience and Necessity To Construct a 752-MW Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville	))))))	UNDERTAKING PURSUANT TO G.S. 62-82(b)

NOW COME NC WARN and The Climate Times and file this Undertaking as follows:

UNDERTAKING

NC WARN and The Climate Times, by and through its undersigned owner/executive officers, make this written undertaking to the North Carolina Utilities Commission that jointly NC WARN and The Climate Times have the ability and will obligate and pledge the sum of $10 million to recompense Duke Energy Progress, LLC, (DEP) for any damages which DEP sustains by the appeal as determined by the Commission pursuant to G.S. 62-82(b).

This the _____ day of May, 2016.

By: _____

_____
(Owner/President)

By: _____

_____
(Owner/President)

LAW OFFICES OF
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May 19, 2016

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Re: State of North Carolina EX REL. Utilities Commission, et al. v. NC WARN and The Climate Times; NC Utilities Commission; Docket No. E-2, Sub 1089

Dear Counsel:

Enclosed with this letter, please find a filed-stamped copy of the *Petition for Writ of Certiorari, Petition for Writ of Supersedeas, and Motion for Temporary Stay* for the above-referenced matter.

Please do not hesitate to contact our office if you have any questions or concerns. Thank you.

Sincerely,

Jeremy Best

Jeremy L. Best
Paralegal to Matthew D. Quinn

Enclosure