E-2 Sub 1089

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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 file-stamped copy of the *Petition for Writ of Certiorari* 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

NO. _____

NORTH CAROLINA COURT OF APPEALS

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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.	)	

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PETITION FOR WRIT OF CERTIORARI

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NORTH CAROLINA COURT OF APPEALS

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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.	)	

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PETITION FOR WRIT OF CERTIORARI

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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 following orders of the N.C. Utilities Commission ("Commission"): (1) the Order Granting Application in Part, with Conditions, and Denying Application in Part ("CPCN Order") entered on 28 March 2016, (2) the Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)

entered on 8 July 2016 ("Second Bond Order"), (3) the Order Dismissing Appeal for Failure to Comply with Bond Prerequisite entered on 2 August 2016 ("First Dismissal Order"), and (4) the Order Dismissing Appeals entered on 19 September 2016 ("Second Dismissal Order").

In support of this petition, the Petitioners attach copies of all relevant pleadings and a verification of the facts as follows:

SUMMARY OF THIS PETITION

On 28 March 2016, the Commission issued a CPCN Order that allowed Duke Energy Progress, LLC ("DEP") to construct and operate two (2) 280 MW natural gas-fired units in Buncombe County, North Carolina. Petitioners NC WARN and The Climate Times filed a Notice of Appeal and Exceptions as to the CPCN Order on 27 May 2016. In its Second Bond Order, entered on 8 July 2016, the Commission required that Petitioners post a $98 million bond as a condition of appealing from the CPCN Order. On 28 July 2016, Petitioners filed a Notice of Appeal and Exceptions challenging the Second Bond Order. Because Petitioners did not post the erroneous $98 million bond, on 2 August 2016 the Commission entered the First Dismissal Order, which dismissed the Notice of Appeal of 27 May 2016 as to the CPCN Order. In response, Petitioners, on 18 August 2016, filed a Notice of Appeal and Exceptions as to the First Dismissal Order and CPCN Order. Shortly thereafter, on 19 September 2016, the Commission entered a

Second Dismissal Order, which dismissed all Notices of Appeal filed by Petitioners—including challenges to the Second Bond Order and the First Dismissal Order.

Prior to the Second Dismissal Order, Petitioners had filed a Petition for Writ of Certiorari with this Court on 18 August 2016. Due to Petitioners' uncertainty about the proper means to perfect an appeal under these unusually complex circumstances, the prior Petition for Writ of Certiorari was filed while two notices of appeal were alive and pending before the Commission: the Notice of Appeal (filed on 28 July 2016) as to the Second Bond Order, and the Notice of Appeal (filed on 18 August 2016) as to the First Dismissal Order and CPCN Order. This Court declined to issue its Writ.

Petitioners believe that the present Petition is distinguishable from the prior Petition because all notices of appeal before the Commission have been dismissed and therefore there is no path to appellate review without this Court issuing its Writ. If this Court does not issue its Writ, then the Commission will be judge, jury, and executioner—the Commission will be allowed to issues permits, set extravagant and erroneous bonds designed to prevent appellate review of said permits, and then use the erroneous bonds to dismiss any challenges to the permits or to the bonds themselves. Because the Commission should not be given such absolute authority, we ask this Court to issue its Writ of Certiorari to review the

erroneous Second Bond Order, and the First and Second Dismissal Orders that were entirely based upon the erroneous Second Bond Order, and finally, the CPCN Order.

STATEMENT OF THE FACTS

On 16 December 2015, 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 15 January 2016.

DEP's Application was not filed pursuant to the generally applicable procedure governing applications for public convenience and necessity. Instead, DEP's Application relied upon the Mountain Energy Act of 2015, N.C. Sess. Law 2015-110. The Act allows for an "expedited decision on an application for a certificate to construct a generating facility that uses natural gas as the primary fuel." *Id.* § 1. The Act states that DEP must provide thirty (30) days' notice of its intent to file an application; that the Commission may hold only one (1) public hearing on the application; and that the Commission must render its decision on the application within forty-five (45) days of the application. *Id.*

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

NC WARN and The Climate Times filed a joint Motion to Intervene on 21 December 2015, and the Commission granted the Motion to Intervene on 20 January 2016. Also on 21 December 2015, NC WARN and The Climate Times filed a Motion for Evidentiary Hearing. (Ex C, p 3). The Motion for Evidentiary Hearing proposed several methods of conducting the litigation to allow for meaningful discovery and fact-finding in light of the expedited process required by the Mountain Energy Act. *Id.* at 3-6. However, in an Order of 15 January 2016, the Commission denied the Motion for Evidentiary Hearing. (Ex D, p 5).

On 12 February 2016, NC WARN and The Climate Times filed their Position and Comments, which included several affidavits. (Ex E). NC WARN and The Climate Times opposed DEP's Application for a number of reasons. There was insufficient evidence to prove that DEP needs the extensive additional capacity requested by the Application. *Id.* at 1. 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. *Id.* at 2. Further, the Mountain Energy Act's expedited process did not allow for adequate opportunity to review the Application. *Id.* at 1.

The Commission, on 28 March 2016, entered an Order Granting Application in Part, with Conditions, and Denying Application in Part ("CPCN Order"). (Ex F, p 1). The Commission's CPCN Order granted DEP's Application for the two (2) 280 MW units but denied the request for the additional 192 MW unit. *Id.* at 43-44.

During their investigation of a potential appeal of the CPCN Order, NC WARN and The Climate Times 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.

Thus, on 25 April 2016, the Petitioners filed a Motion to Set Bond. (Ex. G, 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. In an Order of 26 April 2016, the Commission extended the deadline for filing notices of appeal to 27 May 2016.

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 G, ¶ 5). Among other things, the Motion to Set Bond argued that appellate bonds should not be set in an amount so high that appeals become impossible. *Id.* ¶ 6.

DEP filed a Response to the Motion to Set Bond on 2 May 2016. (Ex H, p 1). In its Response, DEP refused to state that an appeal would result in delays in the initiation of construction. *Id.* ¶ 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.

Among other things, the Petitioners' Reply of 5 May 2016 called the Commission's attention to the fact that DEP failed to substantiate any of its alleged damage estimates. (Ex I, ¶¶ 5-6). Also, 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.

On 10 May 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("First Bond Order"). (Ex J, p 1). In its First 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. It goes without saying that the Petitioners could not afford a $10,000,000.00 bond, and could not honestly sign an undertaking representing the ability to pay $10,000,000.00 in damages. Thus, the

Commission's First Bond Order was tantamount to dismissing any appeal of the CPCN Order.

On 23 May 2016, NC WARN and The Climate Times filed with this Court a Petition for Writ of Certiorari requesting that the First Bond Order be reviewed and reversed. In an effort to ensure that all appellate deadlines were met, Petitioners, on 27 May 2016, filed a Notice of Appeal and Exceptions as to both the CPCN Order and First Bond Order without posting any bond or undertaking. (Ex K, p 2).

Before this Court ruled upon the first Petition for Writ of Certiorari, DEP filed a Motion to Dismiss Notice of Appeal and Exceptions on 31 May 2016. (Ex L). The basis of the Motion to Dismiss was that Petitioners did not post the bond or undertaking required by the erroneous First Bond Order. *Id.* ¶ 5. Petitioners filed a Response to Motion to Dismiss on 3 June 2016, arguing that the bond amount was erroneous and that the appeal should not be dismissed while this Court was reviewing the prior Petition for Writ of Certiorari. (Ex M, ¶ 10).

This Court ruled upon the first Petition for Writ of Certiorari before the Commission entered an order on DEP's Motion to Dismiss. In an Order of 7 June 2016, this Court allowed the first Petition for Writ of Certiorari for the purpose of vacating and remanding the First Bond Order and requiring the Commission to set a bond based upon competent evidence.

In response to this Court's Order, on 8 June 2016 the Commission entered an Order Setting Hearing. (Ex N). The hearing was noticed for 17 June 2016. *Id.* at 2.

On 14 June 2016, NC WARN and The Climate Times filed a Response to Order Setting Hearing, in which they objected to the Commission's accepting evidence not previously submitted during its deliberation over the First Bond Order. (Ex O, ¶ 1).

The hearing on the bond issue was held on 17 June 2016. (Ex P). NC WARN and The Climate Times filed the Affidavit of William Powers on the bond issue on 27 June 2016. (Ex Q).

On 8 July 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Second Bond Order"). (Ex R). The Second Bond Order required that NC WARN and The Climate Times post a bond of $98 million within five (5) days. *Id.* at 28. Obviously the Petitioners could not afford a $98,000,000.00 bond or undertaking, so no bond or undertaking was filed within the 5-day deadline.

Following expiration of the 5-day deadline, DEP filed a Renewed Motion to Dismiss on 20 July 2016, again based on the purported bond requirement. (Ex S). Petitioners filed a Reply to the Renewed Motion to Dismiss on 26 July 2016. (Ex T). In their Reply, Petitioners argued that the Second Bond Order was

unconstitutional and unsupported by substantial evidence, and therefore should not be the basis for dismissal of any appeal. *Id.* §§ 17, 21-22. The Reply also indicated that Petitioners planned to challenge the Second Bond Order in this Court and therefore recommended that the Commission reserve judgment on the Renewed Motion to Dismiss until the appeal of the Second Bond Order concluded. *Id.* § 23.

Petitioners filed a Notice of Appeal as to the Second Bond Order on 29 July 2016. (Ex U). Shortly thereafter, on 2 August 2016, the Commission entered an Order Dismissing Appeal ("First Dismissal Order") as to the initial Notice of Appeal that was filed on 27 May 2016 and challenged the CPCN Order. (Ex V).

As a result of the First Dismissal Order, there was a dismissed Notice of Appeal (as to the CPCN Order, filed on 27 May 2016, found at Exhibit K) and an active Notice of Appeal (as to the Second Bond Order, filed on 28 July 2016, found at Exhibit U). NC WARN and The Climate Times wanted to ensure appellate review of the CPCN Order and the Second Bond Order, but as a legal matter, it was unclear whether the correct approach was to file another notice of appeal as to the First Dismissal Order, or to file a Petition with this Court for Writ of Certiorari. In an abundance of caution, Petitioners took both routes: on 18 August 2016, Petitioners filed a Petition for Writ of Certiorari with this Court, challenging the CPCN Order, the Second Bond Order, and the Dismissal Order;

and, also on 18 August 2016, the Petitioners filed a Notice of Appeal and Exceptions as to the First Dismissal Order and the CPCN Order, (Ex X).

On 9 September 2016, this Court denied the prior Petition for Writ of Certiorari. On the same day, 9 September 2016, DEP filed a Motion to Dismiss the two pending notices of appeal: the Notice of Appeal (filed on 28 July 2016) as to the Second Bond Order, and the Notice of Appeal (filed on 18 August 2016) as to the First Dismissal Order and CPCN Order. (Ex Z). NC WARN and The Climate Times filed a Response to DEP's Renewed Motion to Dismiss on 14 September 2016. (Ex AA).

On 19 September 2016, the Commission entered an Order Dismissing Appeals ("Second Dismissal Order"). (Ex BB). The Second Dismissal Order dismissed all outstanding notices of appeal. *Id.* at 9. The Commission gave only one reason for dismissing both the appeals of the CPCN Order, Second Bond Order, and First Dismissal Order: Petitioners never posted the $98 million bond required by the Second Bond Order. *Id.* at 7-9.

REASONS WHY WRIT OF CERTIORARI SHOULD BE ISSUED

Appellate review of Commission decisions is governed by N.C. Gen. Stat. § 62-94, which provides that this Court

> may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the

appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commission, or

(3) Made upon unlawful proceedings, or

(4) Affected by other errors of law, or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

Id. § 62-94(b).

I. The CPCN Order should be reviewed and reversed.

Before constructing these new natural gas-fired units, DEP must obtain a certificate of public convenience and necessity. According to the General Statutes, "no public utility or other person shall begin the construction of any . . . facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility service . . . without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction." N.C. Gen. Stat. § 62-110.1(a).

The CPCN Order should be reviewed and reversed for at least four (4) reasons: (a) there is no evidence in the record that DEP needs 560 MW of new natural gas-fired units in the Asheville area; (b) the Commission failed to make

adequate findings of fact concerning how natural gas supply is highly uncertain, and therefore construction of the new units is putting DEP's customers at a higher risk of outages and price spikes; (c) the Commission failed to consider arguments concerning how methane emissions from natural gas poses an extreme risk to the environment; and (d) the Mountain Energy Act of 2015, N.C. Sess. Law 2015-110 is unconstitutional.

A. There is no evidence in the record that DEP needs 560 MW of new natural gas-fired units in the Asheville area.

"Before awarding a certificate, the Commission must comply with section 62-110.1 which requires a showing of public convenience and *necessity* by the applicant." *State ex rel. Utils. Comm'n v. Empire Power Co.*, 112 N.C. App. 265, 278, 435 S.E.2d 553, 560 (1993) (emphasis in original). In assessing this need, the Commission shall consider the "applicant's arrangements with other electric utilities for interchange of power, pooling of plant, purchase of power and other methods for providing reliable, efficient, and economical electric service." N.C. Gen. Stat. § 62-110.1(d). The Commission must "*avoid the costly overbuilding of generation resources.*" *Empire Power Co.*, 112 N.C. App. at 278, 435 S.E.2d at 560 (emphasis added).

There is no evidence in the record of DEP's need for the proposed 560 MW of new natural gas-fired units in the Asheville area. NC WARN and The Climate Times submitted the affidavit of William E. Powers, "a consulting energy and

environmental engineer with over 30 years of experience in the fields of power plant operations and environmental engineering." (Ex E, *Aff. of Powers* ¶ 1). Mr. Powers reviewed the load forecasts of DEP and found that "there is no basis, based on actual [western North Carolina] summer and winter peak loads over the last eight years, to assume any summer or winter peak load growth over the next ten years." *Id.* ¶ 9(d). Mr. Powers concluded that "the DEP projection that growth will increase and accelerate over the years . . . is unsupported by facts and divorced from the reality of static or declining actual peak loads." *Id.*

But even assuming DEP has need for additional capacity, Mr. Powers identified numerous means to create the additional capacity without the construction of these expensive natural gas-fired units: "Distributed generation, demand response (DR), energy efficiency (EE), combined heat and power (CHP), purchased power and solar should be relied upon to displace fossil fuel generation in the Duke Energy Progress Western (DEP-West) North Carolina region over the next 10-15 years." *Id.* ¶ 14. Indeed, a participant to the Commission docket, Columbia Energy, LLC, asserted that it has an existing natural gas-fired unit that can provide 523 MW of capacity and energy to DEP annually. *Id.* ¶ 16. The General Statutes expressly state that these alternatives to constructing new power plants are highly relevant. N.C. Gen. Stat. § 62-110.1(d).

The Commission rejected this evidence and instead blindly adopted DEP's load forecasts, and thereby committed error. DEP did not provide the Commission with models to detail how it generated its load forecasts that supposedly justify the need for 560 MW of natural gas-fired capacity. Instead, DEP merely provided raw data to the Commission and refused to produce its models because the modeling software is supposedly proprietary. (Ex F, p 33). In other words, the Commission accepted the results of DEP's models without actually examining the models themselves. *Id.*

Hence the Commission had no factual basis for accepting DEP's conclusion that the 560 MW of natural gas-fired capacity are needed and rejecting the conclusions of Mr. Powers. Further, even if DEP could prove that it has a need for the 560 MW, the Commission failed to consider viable alternatives to the project that may have been more economical and less harmful to the environment.

B. Natural gas supply is extremely uncertain and therefore DEP's two (2) proposed natural gas-filed units are uneconomical.

The General Statutes state that the policy of North Carolina towards public utilities is "[t]o promote . . . economical utility service to all the citizens and residents of the State." N.C. Gen. Stat. § 62-2(a)(3). Recognizing this policy of economical utility service, this Court has held that "[t]he primary purpose of the [public convenience and necessity] statute is to provide for the orderly expansion

of the State's electric generating capacity in order to create the most reliable and *economical* power supply possible 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, 435 S.E.2d 553, 560 (1993) (emphasis added).

DEP's proposed two (2) natural gas-fired units are anything but economical. NC WARN and The Climate Times filed the Affidavit of J. David Hughes. (Ex E). Mr. Hughes is a geoscientist who has studied U.S. shale gas extensively and published multiple reports on future shale gas production potential. (Ex. E, *Aff. of Hughes* ¶ 1). According to Mr. Hughes, "50% of U.S. natural gas production is now shale gas." *Id.* ¶ 3. Mr. Hughes notes that shale gas production is decreasing far quicker than present projections. *Id.* ¶¶ 4-10.

In order to maintain present shale gas production rates, according to Mr. Hughes it will be necessary to drill many thousands of wells each year. *Id.* ¶ 11. Thus, "[i]f natural gas production declines, as is currently the case, and drilling rates cannot be maintained due to poor economics, fuel prices could skyrocket, putting ratepayers at risk of shortages and price spikes." *Id.* ¶ 12. For this reason, "[s]hale gas (and oil) industries are unsustainable in the longer term unless prices rise considerably." *Id.*

It follows that the CPCN Order permits DEP to construct two cost-ineffective natural gas-fired units. This is grounds to deny DEP's application. *See*

Empire Power Co., 112 N.C. App. at 278, 435 S.E.2d at 560. However, the Commission failed to address this argument in its Order and therefore failed to make essential findings of fact.

C. The two (2) natural gas-fired units have a more harmful greenhouse gas footprint than coal.

The Public Utilities Act declares that the policy of this State is "[t]o encourage and promote harmony between public utilities, their users *and the environment*." N.C. Gen. Stat. § 62-2(a)(5) (emphasis added). Unfortunately, the record evidence in this proceeding shows that DEP's proposed transition to natural-gas units is harmful to the environment.

One of NC WARN and The Climate Times' expert affidavits presented to the Commission was by Robert W. Howarth. (Ex E). Dr. Howarth is "an Earth system scientist and ecologist who has been a tenured faculty member at Cornell University . . . for the past 30 years." (Ex E, *Aff. of Howarth* ¶ 1). Dr. Howarth testified by affidavit that natural gas impacts the environment, specifically global warming, in at least two (2) ways: the emission of CO2 when burned, and in the emission of methane. *Id.* ¶¶ 3-4. Methane is 86 times more potent than CO2 as a greenhouse gas. *Id.* ¶ 15. When considering natural gas's emission of both CO2 and methane, "conventional natural gas and shale gas have larger greenhouse gas footprints than coal." *Id.* ¶ 16. Indeed, "[t]he total greenhouse gas footprint for conventional natural gas is approximately 1.2 times greater than that for coal," and

"[f]or shale gas, the greenhouse gas footprint is approximately 2.7 times greater than that for coal." *Id.*

Despite this grave threat to the environment, the Commission gave the environmental impacts of natural gas only the barest attention: in a four (4) sentence passage, the Commission concluded, without analysis, that "[t]he natural gas-fired units will emit substantially lower levels of greenhouse gases than the older, less efficient coal plants they will replace." (Ex F, p 37). This finding does not address or analyze Dr. Howarth's testimony or make findings of fact as to why Dr. Howarth's testimony was supposedly wrong. *Id.*

Therefore, on this important issue of the environmental impacts of DEP's application, the Commission failed to make essential findings and accordingly should be reversed.

D. The Mountain Energy Act of 2015 is unconstitutional.

In its Application, DEP was exempt by the Mountain Energy Act of 2015, N.C. Sess. Law 2015-110, from complying with the typical Commission process for certificates of public convenience and necessity. The Act allows for an "expedited decision on an application for a certificate to construct a generating facility that uses natural gas as the primary fuel." *Id.* § 1. The Act states that DEP must provide thirty (30) days' notice of its intent to file an application; that the Commission may hold only one (1) public hearing on the application; and that the

Commission must render its decision on the application within forty-five (45) days of the application. *Id.*

The construction of these new facilities is a complex process involving over a billion dollars of ratepayer money —thorough deliberation is therefore essential. NC WARN and The Climate Times sought, but the Commission declined to allow, sufficient time to perform this deliberation. On 21 December 2015, NC WARN and The Climate Times filed a Motion for Evidentiary Hearing. (Ex C, p 3). The Motion for Evidentiary Hearing proposed several methods of conducting the litigation to allow for meaningful discovery and fact-finding in light of the expedited process required by the Mountain Energy Act. *Id.* at 3-6. However, in an Order of 15 January 2016, the Commission denied the Motion for Evidentiary Hearing. (Ex D, p 5). Despite DEP's application not being filed until 15 January 2016, the Commission issued a notice of its decision a mere few weeks later, on 29 February 2016.

This fast-track process violates the North Carolina Constitution. Article I, Section 34 of our State's Constitution provides that "[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." North Carolina's courts have allowed only narrow exceptions to this bar on monopolies:

> In the public utility businesses competition, deemed unnecessary, is curtailed by the requirement that one desiring to engage in such business procure from the Utilities Commission a certificate of public convenience and necessity. However, in those

> fields the State has undertaken to protect the public from the customary consequences of monopoly by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission.

In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 549-50, 193 S.E.2d 729, 734 (1973) (internal citation omitted).

Thus, the process governing applications for certificates of public convenience and necessity reflect our State's policy that monopolies are allowed only when highly regulated. "[B]ecause a public utility is a legally regulated monopoly, '[m]any of the basic principles of the Free Enterprise System, which govern the operations of and the charges by industrial and commercial corporations and those of the corner grocery store, have no application to the regulation of the service or charges of a utility company.'" *State ex rel. Utils. Comm'n v. Edmisten*, 294 N.C. 598, 610, 242 S.E.2d 862, 870 (1978) (*citing Utils. Comm'n v. Gen. Tel. Co.*, 281 N.C. 318, 335, 189 S.E.2d 705, 716-17 (1972)). "The reason for strict regulation of public utilities is that they are either monopolies by nature or given the security of monopolistic authority for better service to the public. The public is best served in many circumstances where destructive competition has been removed and the utility is a regulated monopoly." *State ex rel. Utils. Comm'n v. Carolina Coach Co.*, 260 N.C. 43, 51, 132 S.E.2d 249, 254 (1963).

The scrutiny required of monopolies—like DEP—by the North Carolina Constitution and this State's courts are embedded within the statutes controlling

the typical process for certificates of public convenience and necessity. Yet the Mountain Energy Act of 2016, by creating a fast-track process, prevented the Commission from exercising the scrutiny required.

II. The Second Bond Order should be reviewed and reversed.

In the Second Bond Order, issued on 8 July 2016, the Commission required that NC WARN and The Climate Times post a $98 million bond or undertaking before challenging the CPCN Order. (Ex R). There was no record evidence supporting this extravagant bond requirement, and furthermore, that bond amount is unconstitutional under the Open Courts Clause of the N.C. Constitution.

In relevant part, the bond 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).

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." *Id.* 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." *Id.* Therefore, any bond obligation is limited to damages caused by "delay in beginning the construction of the facility."

Undersigned 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.

Just as in *Hollowell*, there is no record evidence supporting the $98 million bond required by the Commission. The Second Bond Order relied upon the following supposed delay-related damages: "The amount of $98 million represents $40 million in potential damages related to the cancellation costs of three major equipment contracts, $8 million in potential damages related to sunk development costs, and $50 million in increased project costs for the increased cost of labor and materials." (Ex R, p 9). Yet each of these damages estimates is deficient and unsupported by the record.

Consider first the estimate of $40 million in potential damages related to the cancellation of costs of three major equipment contacts. Neither the Commission nor DEP considers whether these contracts can be extended. Further, DEP signed these contracts on 31 May 2016, after NC WARN and The Climate Times filed a Notice of Appeal and Exceptions with the Commission challenging the CPCN Order. (Ex Q, ¶ 5). Thus, when DEP signed these contracts, it was fully aware of NC WARN and The Climate Times' challenge to the CPCN Order. To now claim that an appeal would result in breaches of these contracts is a self-created problem by DEP. DEP should not be permitted to sign contracts as a means of generating

hypothetical damages that have the effect of establishing a prohibitive bond amount and thereby preventing appeals.

As to the $8 million estimate for sunk development costs, DEP is exercising mere speculation. DEP's witness testified: "My estimate would be is that if we were to delay the project for two years, we would have to rework a significant amount of this development effort . . . ." (Ex P, p 46). DEP did not testify, however, that all of these development costs would be sunk, or that development work to date could not be reused.

Also unsupported is the $50 million estimate for increased project costs for the increased cost of labor and materials. DEP arrived at this number by assuming a 2.5 percent annual cost escalation over a 2-year appellate delay. (Ex P, p 48-49). However, NC WARN and The Climate Times submitted an Affidavit from William E. Powers, a consulting and environmental engineer with over 30 years of experience in power plant operations and environmental engineering. (Ex Q, ¶ 1). Mr. Powers testified that "industrial construction costs are lower in 2016 than they were in 2014," and "[t]he current trend in plant construction costs . . . is negative." *Id.* ¶ 7. Thus, "[a] 24-month delay may in fact save DEP substantial money." *Id.* No evidence in the record contradicts Mr. Powers's testimony, yet the Commission accepted DEP's $50 million estimate without question.

But perhaps most importantly, requiring a $98 million bond is completely prohibitive of appeals and is therefore unconstitutional. The Open Courts Clause of the N.C. Constitution, Article I, Section 35, states that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." Obviously no public interest group, including NC WARN and The Climate Times, could post a $98 million bond. Hence the Second Bond Order deprives Petitioners of the right to access this State's appellate courts.

Undersigned counsel is aware of no case in this State addressing whether monetary fees (other than standard filing fees) violate the Open Courts Clause. However, substantial case law throughout the nation provides that substantial monetary fees violation open courts laws in numerous states. *E.g.*, *Fent v. State ex rel. Dept. of Human Servs.*, 236 P.3d 61 (OK 2010); *G.B.B. Invs. Inc. v. Hinterkopf*, 343 So. 2d 899 (Fla. Ct. App. 1977); *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419 (Fla. 1992); *In re Estate of Dionne*, 518 A.2d 178 (N.H. 1986); *R. Commc'ns Inc. v. Sharp*, 875 S.W.2d 314 (Tex. 1994); *Jensen v. State Tax Comm'n*, 835 P.2d 965 (Utah 1992).

Additionally, the bond statute—N.C. Gen. Stat. § 62-82(b)—is itself unconstitutional. After conducting a survey of bond statutes nationwide, Petitioners have discovered that some states vest superior courts or courts of appeal

with the authority to set bonds in commission proceedings, *e.g.*, Del. Code tit. 26, §§ 510 & 511, and other states allow for bonds in commission proceedings where there is a stay order, Cal. Pub. Util. § 1764. However, upon information and belief, North Carolina is the only state in America that allows a utilities commission to enter a bond in a certificate of public convenience and necessity proceeding in the absence of a stay order. This unprecedented authority permits the Commission to act as its own judge and thereby thwarts access to appellate courts. The bond statute, N.C. Gen. Stat. § 62-82(b), is therefore unconstitutional in violation of the Open Courts Clause.

Therefore, the $98 million bond is unsupported by record evidence or essential findings of fact, and furthermore, violates the Open Courts Clause of the State Constitution.

III. The First and Second Dismissal Orders should be reviewed and reversed.

In the First Dismissal Order, entered on 2 August 2016, the Commission dismissed the Petitioners' 27 May 2016 Notice of Appeal and Exceptions challenging the CPCN Order. (Ex V). On 19 September 2016, the Commission entered a Second Dismissal Order that dismissed all remaining notices of appeal, namely: the Notice of Appeal (filed on 28 July 2016) as to the Second Bond Order, and the Notice of Appeal (filed on 18 August 2016) as to the First Dismissal Order and CPCN Order. (Ex BB).

The Commission gave only one reason for dismissing these appeals: Petitioners never posted the $98 million bond required by the Second Bond Order. *Id.* at 7-9. However, as discussed above, the Second Bond Order is itself erroneous because it is unsupported by record evidence and is unconstitutional. Thus, the Second Bond Order should not be the basis for dismissing any appeal.

Further, the bond statute explicitly applies only to appeals from CPCN Orders, and therefore the Second Bond Order cannot justify the dismissal of Petitioners' appeals challenging the Second Bond Order, First Dismissal Order, or Second Dismissal Order. The bond statute states, in relevant part:

> 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 . . . . *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).

Thus, the bond requirement exists only for an "appeal from any order of the Commission which awards any such certificate." *Id.* Yet the Commission relied solely on the bond requirement to justify dismissing Petitioners' challenges to the

Second Bond Order and the First Dismissal Order. Thus, the Commission's rulings were erroneous.

Additionally, these appeals should not be dismissed because they present important legal issues to our State. By way of example but not limitation, the North Carolina Constitution, Article I, Section 35, contains an Open Courts Clause stating that "[a]ll courts shall be open . . . ." Obviously no public interest group, including NC WARN and The Climate Times, could post a $98 million bond. Hence the Second Bond Order deprives NC WARN, The Climate Times, and other public interest groups in subsequent cases from accessing our State's appellate courts in violation of the N.C. Constitution. This argument has been accepted by multiple courts throughout the country. *E.g.*, *R. Commc'ns Inc. v. Sharp*, 875 S.E.2d 314 (Tex. 1994).

Further, the Commission should not be permitted to use the bond requirement to prohibit any and all appeals from CPCN Orders. If this practice is accepted, then in any permitting proceeding, the Commission could set a prohibitively high bond that cannot be challenged because the bond itself would be subject to a bonding requirement. This prevents appellate review and provides the Commission with absolute authority.

ATTACHMENTS

Attached to this Petition for consideration by the Court are copies of the following papers that are essential to this Court's review:

A	Notice of Intent to File Application for Certificate of Public Convenience and Necessity [16 December 2015]
B	Order Scheduling Public Hearing and Requesting Investigation and Report by the Public Staff [18 December 2015]
C	Motion for Evidentiary Hearing by NC WARN and The Climate Times [21 December 2015]
D	Order Denying NC WARN and The Climate Times' Motion for an Evidentiary Hearing [15 January 2016]
E	Position and Comments by NC WARN and The Climate Times [12 February 2016]
F	Order Granting Application in Part, With Conditions, and Denying Application in Part ("CPCN Order") [28 March 2016]
G	Motion to Set Bond [25 April 2016]
H	DEP's Response to Motion to Set Bond [2 May 2016]
I	NC WARN and The Climate Times' Reply to DEP's Response to Motion to Set Bond [5 May 2016]
J	Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("First Bond Order") [10 May 2016]
K	Notice of Appeal and Exceptions as to CPCN Order [27 May 2016]
L	DEP's Motion to Dismiss the Notice of Appeal and Exceptions of NC WARN and The Climate Times [31 May 2016]

M	NC WARN and The Climate Times' Response to Motion to Dismiss Appeal [3 June 2016]
N	Order Setting Hearing [8 June 2016]
O	Response to Order Setting Hearing by NC WARN and The Climate Times [14 June 2016]
P	Transcript of Bond Hearing of 17 June 2016
Q	NC WARN and The Climate Times' Affidavit of William Powers [27 June 2016]
R	Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) of 8 June 2016 ("Second Bond Order") [8 July 2016]
S	DEP's Renewed Motion to Dismiss Appeal [20 July 2016]
T	NC WARN and The Climate Times' Reply to DEP's Renewed Motion to Dismiss [26 July 2016]
U	Notice of Appeal as to the Second Bond Order [28 July 2016]
V	Order Dismissing Appeal for Failure to Comply with Bond Prerequisite ("First Dismissal Order") [2 August 2016]
W	DEP's Motion to Dismiss Appeal of the Second Bond Order [12 August 2016]
X	Notice of Appeal as to First Dismissal Order and CPCN Order [18 August 2016]
Y	NC WARN and The Climate Times' Response to DEP's Motion to Dismiss [23 August 2016]
Z	DEP's Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal [9 September 2016]
AA	NC WARN and The Climate Times' Response to DEP's

Renewed Motion to Dismiss [14 September 2016]

BB Order Dismissing Appeal ("Second Dismissal Order") [19 September 2016]

ISSUES TO BE BRIEFED

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

I. Was the Commission's Second Bond Order supported by competent record evidence and sufficient findings of fact?

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

III. Does the Second Bond Orders violate the North Carolina Constitution?

IV. Is the Second Bond Order affected by errors of law?

V. Was the Commission's CPCN Order supported by competent record evidence and sufficient findings of fact?

VI. Was the Commission's CPCN Order arbitrary and capricious?

VII. Is the CPCN Order affected by errors of law?

VIII. Is the Mountain Energy Act of 2016 unconstitutional?

IX. Were the Commission's First and Second Dismissal Orders supported by competent record evidence and sufficient findings of fact?

X. Were the Commission's First and Second Dismissal Orders arbitrary and capricious?

XI. Are the First and Second Dismissal Orders affected by errors of law?

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 CPCN Order, Second Bond Order, First Dismissal Order, and Second Dismissal Order; and for such other relief as this Court deems just and proper.

Respectfully submitted, this the 17th day of October, 2016.

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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, 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 17 day of October, 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 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:

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This the 17th day of October, 2016.

Matthew D. Quinn

EXHIBIT A

Lawrence B. Somers
Deputy General Counsel

Mailing Address:
NCRH 20 / P.O. Box 1551
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:

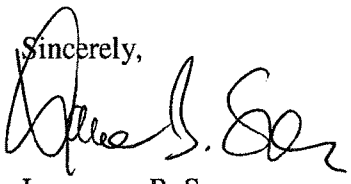
Pursuant to Session Law 2015-110, I write to notify the Commission that Duke Energy Progress, LLC ("DEP" or the "Company") plans to file an Application for a Certificate of Public Convenience and Necessity ("CPCN") to construct the Western Carolinas Modernization Project at the Company's existing Asheville 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.

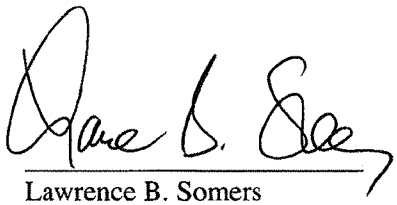


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EXHIBIT B

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 Megawatt Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville	))))))	MOTION TO INTERVENE BY NCWARN AND THE CLIMATE TIMES AND MOTION FOR EVIDENTIARY HEARING

PURSUANT TO NCUC Rule R1-19, and the Order Scheduling Public Hearing and Requesting Investigation and Report by the Public Staff, December 18, 2015, now comes the North Carolina Waste Awareness and Reduction Network, Inc. ("NC WARN") and The Climate Times, by and through the undersigned attorney, with a motion to allow them to intervene in this docket.

Accompanying the motion to intervene is a motion for an evidentiary hearing OR IN THE ALTERNATIVE the denial of the application because the Commission, and parties, will be unable to investigate the costs and impacts of the proposed project if the Commission holds itself to a 45-day timeline.

In support of the motions is the following:

1. NC WARN is a not-for-profit corporation under North Carolina law, with more than one thousand individual members and families across the state, including Asheville, North Carolina. Its primary purpose is to work for climate protection through the advocacy of clean, efficient, and affordable energy. Its address is Post Office Box 61051, Durham, North Carolina 27715-1051.

2. The Climate Times is a recently formed not-for-profit corporation under North Carolina law, dedicated to the use of science and policy to minimize the impacts of climate change. As part of its public education, The Climate Times will publish feature-length pieces based on extended interviews of experienced scientists working on issues related to climate change concerns in our state. Its address is 346 Fieldstream Drive, Boone, North Carolina 28607.

3. The attorney for NC WARN to whom all correspondence and filings should be addressed is John Runkle, Attorney at Law, 2121 Damascus Church Road, Chapel Hill, North Carolina 27516. Rule 1-39 service by email is acceptable and may be sent to jrunkle@pricecreek.com.

4. Many of NC WARN's members are customers of Duke Energy Progress, and several reside in the Asheville area, and use electric power supplied by those utilities in their homes and businesses. NC WARN's members are concerned about the economic and environmental cost of energy and the impacts of those costs on themselves, their families and their livelihood. Of primary concern is the contribution to the climate crisis from Duke Energy Progress's reliance on fossil fuel for generation. NC WARN has intervened in several dockets before the Commission, including the issuance of certificates for public convenience and necessity ("CPCN") for generating facilities.

5. The Climate Times brings with it expertise on the costs and environmental impacts of natural gas generation, primarily from the release of methane.

6. If allowed to intervene in this docket, NC WARN and The Climate Times will advocate that the Commission fully investigate the costs and impacts of the proposed natural gas-fueled generating units prior to the issuance of a CPCN.

MOTION FOR EVIDENTIARY HEARING

7. NC WARN and The Climate Times further move that the Commission establish a considered process for an evidentiary hearing to gather testimony and evidence on the proposed project OR IN THE ALTERNATIVE deny the application because the Commission, and parties, will be unable to investigate the costs and impacts of the proposed project if the Commission holds itself to a 45-day timeline. This motion is included in the present motion to intervene because of the potentially abbreviated timeframe for this project in the Mountain Energy Act of 2015, Session Law 2015-110.

8. On December 16, 2015, Duke Energy Progress ("DEP"), gave its notification that it would file its application for the CPCN on the Western Carolinas Modernization Project on or after January 15, 2015. The project is the proposed closure of the 379 MW Asheville 1 and 2 coal units and construction of approximately 752 MW of natural gas-fueled generation (two 280 MW combined cycle units and a192 MW combustion turbine unit). It should also be noted the present coal units have an average capacity factor of 46% (in 2014) so operate closer to 174 MW. The combined cycle units are proposed for baseload, with the combustion turbine contingent on future peak needs. At some undesignated point in the future, DEP may install a solar system at the site.

9. NC WARN and The Climate Times firmly believe the 45-day time period in S.L. 2015-110, the time the application is filed to when the Commission in its scheduling order expects to render a decision, is both abbreviated and arbitrary.[1] The Commission, the Public Staff, and any intervening parties will not have the opportunity to review the application in any meaningful way, nor will the Commission be able to come to any reasonable decision of whether the project is in the public convenience and is necessary. However, until an evidentiary hearing is held, the Commission can deem the application to be incomplete, clearly within its authority. Further, a statutory provision allows the Commission to require the application to contain "such detail as the Commission may require." S.L. 215-110, Section 1. The Commission will not be able determine the details it requires without a full evidentiary hearing.

10. Without a full evidentiary hearing, the only action available to the Commission is to deny the application because the Commission will not have enough quality information to make its decision. The single public hearing required in S.L. 2015-110 will not provide the Commission with adequate technical testimony from expert witnesses, and the ability to cross-examine DEP witnesses will be eliminated or extremely limited. In recent hearings on CPCN applications, the utility presents its evidence, and allows the Commission and the parties to examine them. In controversial projects, the evidentiary hearings take days or even weeks, and the resulting orders can run hundreds of pages, as the

[1] Duke Energy Progress can of course waive the 45-day period in S.L. 2015-110 in order to provide the Commission the opportunity to hold an evidentiary hearing, just as it can come in pursuant to G.S. 62-110.1 to show the project meets long-standing standards for a CPCN.

Commission examines the various issues relating to the project. As evidenced by the public concern over the proposed transmission line to the new project, the controversies over the air pollution and coal ash at the present facility, and the need to take real actions on the climate crisis, NC WARN and The Climate Times believe this is one of the more controversial projects before the Commission.

11. The investigation of whether the proposed project meets the requirements for a CPCN should look at the full costs of construction. This includes not just the construction of the new natural gas units on the site, but the cost of decommissioning the coal plants, and the cost of coal ash clean up. The costs can be minimized if alternatives to the project are fully utilized, such as a much larger solar energy project and the availability of at least 378 MW of dispatchable hydropower operating at a capacity factor of 42% presently available in western North Carolina. Similar to the application for the Cliffside coal plant, after evidentiary hearings, the Commission may determine only one plant, or a much smaller one, is needed, or again that alternatives exist and should be utilized.

12. The need for the 752-MW natural gas-fueled plants in the Asheville area, much of it baseload generation, is questionable, and especially if limited to the DEP's Western balancing authority area. News reports have based the need for the plants on an astounding projected 15% annual growth rate. An evidentiary hearing on DEP's claims appears crucial before making a multi-billion dollar investment with ratepayer money.

13. Dependence on natural gas is an extremely risky future, both financially and environmentally. The cost of fuel should be an important consideration in the total cost of the project; natural gas prices are considered to be extremely volatile over the next decade and DEP cannot depend on the present low price of natural gas to continue. All ratepayers will be ill-treated from escalating natural gas prices. And of special concern by NC WARN and The Climate Times, the contribution to the climate crisis from the use of natural gas from both conventional wells and fracking is recently coming into focus. The discharge and leakage of methane from the wellhead to the burn point means natural gas may be an even worse choice than coal.

THEREFORE, NC WARN and The Climate Times pray that they are allowed to intervene in this matter and fully participate in the Commission's deliberations. NC WARN and The Climate Times further pray that the Commission hold an evidentiary hearing on the application OR IN THE ALTERNATIVE deny the application as incomplete and insufficient.

Respectfully submitted, this the 21st day of December 2015.

/s/ John D. Runkle

John D. Runkle
Attorney at Law
2121 Damascus Church Rd.
Chapel Hill, N.C. 27516
919-942-0600
jrunkle@pricecreek.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing MOTION TO INTERVENE BY NC WARN AND THE CLIMATE TIMES AND MOTION FOR EVIDENTIARY HEARING (E-2, Sub 1089) upon each of the parties of record in this proceeding or their attorneys of record by deposit in the U.S. Mail, postage prepaid, or by email transmission.

This is the 21st day of December 2015.

/s/ John D. Runkle

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E 2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application for Certification of Public Convenience and Necessity for Western Carolinas Modernization Project	))))	VERIFICATION

I, James Warren, Executive Director of NC WARN, verify that the contents of the MOTION TO INTERVENE BY NC WARN filed 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 12/18/15

Sworn to and subscribed before me
This the -lh day o ecember, 2015.

Notary Public

My commission expires: 1/r.02._01'o

(seal)

ANNA MOOREFIELD NOTARY PUBLIC MY COMMISSION EXPIRES 1/6/2018 WAKE COUNTY, NC

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-MW Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville	)))))))	ORDER DENYING NC WARN AND THE CLIMATE TIMES' MOTION FOR AN EVIDENTIARY HEARING

BY THE CHAIRMAN: 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 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 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.

On December 18, 2015, the Chairman issued an Order Scheduling Public Hearing and Requesting Investigation and Report by the Public Staff. In the order, the Chairman cited to Session Law 2115-110 which provides, in pertinent part:

> 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.

The Chairman reasoned that in light of the 45-day decision-making deadline, good cause existed to schedule the required public hearing. The Chairman further found good cause to require the Public Staff – North Carolina Utilities Commission (Public Staff) to investigate the application and present its findings, conclusions, and recommendations to the Commission at its Regular Staff Conference on February 22, 2016.

On December 21, 2015, NC WARN and The Climate Times (Movants) filed a motion for an evidentiary hearing or, in the alternative, to deny the application as incomplete and insufficient until an evidentiary hearing is held. In the motion, the Movants assert that the Commission, Public Staff, and any intervening party will not have the opportunity to review the application in any meaningful way if the Commission decides the matter within 45 days from the filing of the application. The Movants argue that until a full evidentiary hearing is held, the Commission will not be able to come to any reasoned decision of whether the project is in the public convenience and necessary. Without citing any authority, the Movants assert that the Commission should interpret the statute so that the Commission finds DEP's application incomplete until it can complete a full evidentiary hearing.

In support of their request, the Movants state that in typical CPCN applications, the utility presents evidence subject to cross-examination, and that in controversial projects the evidentiary hearings can last days or weeks and result in comprehensive orders. The Movants predict that this application will be a controversial project. Lastly, the Movants urge the Commission to look at the full cost of the proposed project, to question the need for a 752-MW natural gas-fueled plant in the Asheville area, and to consider that natural gas prices may not remain low.

On December 31, 2015, DEP filed a response to the Movants' motion for an evidentiary hearing, wherein DEP requests that the Commission reject the Movants' motion. In support of its response, DEP states that Session Law 2015-110 directs that "the Commission shall provide an expedited decision on an application for a certificate to construct a generating facility" that meet certain requirements pursuant to the session

law. DEP further states that Session Law 2015-110 dictates that "G.S. 62-110.1(e) and G.S. 62-82(a) shall not apply to a certificate applied for under this section." Lastly, DEP cites to the requirement in Session Law 2015-110 that the "Commission shall hold a single public hearing" and "publish a single notice of the public hearing" in a newspaper of general circulation in Buncombe County.

DEP argues that the language of Session Law 2015-110 is clear that the General Assembly intended an expedited review process for any application meeting the stated requirements of the session law. DEP contends that the Movants have provided no justification for their request that the Commission ignore the express instructions of the General Assembly. DEP further states that the Commission does not have the authority to disregard the General Assembly's directive. As for the Movants' contention that 45 days is not long enough to investigate and make a reasoned decision, DEP again states no evidence exists to support this claim. The Public Staff has not indicated that it is unable to conduct its investigation within the time frame set forth by the Commission. Thus, DEP urges the Commission to deny the Movants' request for an evidentiary hearing.

The Chairman agrees with DEP that Session Law 2015-110 directs the Commission to "provide an expedited decision" when an application meets certain requirements. Session Law 2015-110 explicitly states that G.S. 62-82(a), which provides for a special procedure on the application for a certificate to construct a generating facility, shall not apply. These special procedures include, among other things, notice of the application, the requirement for and timing of an evidentiary hearing, the timing for transcripts, as well as deadlines for briefs and oral arguments. By stating that G.S. 62-82(a) does not apply, the General Assembly directed the Commission to follow the expedited procedure set forth in Session Law 2015-110 rather than the procedure generally applicable in the case of such applications. The Movants have cited no authority and provided no precedent for the Commission to ignore the requirements of Session Law 2015-110 and the Chairman disagrees with the Movants that the Commission is required to do so.

Session Law 2015-110 provides for a single public hearing. The Commission has scheduled such hearing for public testimony on January 26, 2016, at 7:00 p.m. in Asheville at the Buncombe County Courthouse. If the Commission were to grant the Movants' request for an evidentiary hearing, the Commission would not be able to follow the General Assembly's directive to provide an expedited decision within 45 days because, as the Movants' note, an evidentiary hearing in a contested CPCN case can take weeks. Cognizant of this fact, the General Assembly directed the Commission to render an expedited decision in this case following only the procedure set forth in Session Law 2015-110 and not the typical notice, hearing, and other procedures set forth in G.S. 62-82(a).

The Movants, without having seen the application, argue that the Commission should interpret the session law to find DEP's application incomplete so that the Commission may conduct an evidentiary hearing. First, the Commission cannot at this time find the application incomplete because an application has not yet been filed.

Second, to grant the Movants' request to interpret Session Law 2015-110 in such a way as to establish a lengthy evidentiary hearing process would lead to absurd results and counter the plain language of the statute. North Carolina case law has long held that a statute should not be interpreted in such a way that it leads to absurd results. Specifically, our Supreme Court has ruled that:

> The legislative will is controlling. A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language. Where possible, the language of the statute will be interpreted so as to avoid an absurd consequence.

State v. Hart, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975) (citations omitted). To proceed as suggested by the Movants would frustrate and contravene the specific intent of Session Law 2015-110 that the matter be decided on an expedited basis within 45 days after the application is filed. Rather than now, as the Commission is implementing the law, the opportunity to have obtained the relief that the Movants seek appears to have been at the General Assembly during the passage of Session Law 2015-110 where the expedited process was established.

With respect to the Movants' claim that the Public Staff will not have the opportunity to meaningfully review the application, the Chairman agrees with DEP that the Public Staff has not indicated that it is unable to conduct its investigation within the established time frame. Pursuant to G.S. 62-15(d)(5), the Public Staff has the statutory duty to intervene in all certificate applications filed pursuant to G.S. 62-110.1 and provide assistance to the Commission in making its analysis. Upon request, the Public Staff shall further furnish to the Commission such reports or conduct such investigations as may be reasonably required to carry out the laws of the State. G.S. 62-15(g). The Public Staff, thus, is charged by statute by the General Assembly to represent all members of the using and consuming public, not limited groups with special interests and agendas. The Public Staff, therefore, can speak for itself as to whether it can meaningfully provide the necessary information within the time frame set forth by Session Law 2015-110, and need not rely upon Movants to speak for it.

Finally, the Chairman notes that the present case is similar to the proceeding held in Docket No. E-2, Sub 960 pursuant to G.S. 62-110.1(h), where the Commission considered an application filed by DEP for the construction of a 950 MW natural gas-fueled combined cycle generation facility in Wayne County. As in the present case, the General Assembly in that case provided that the procedures set forth in G.S. 62-82(a) would not apply and directed the Commission to render a decision within 45 days of the date the application was filed. Within this expedited review period, the Public Staff, at the Commission's request, investigated the application and presented its recommendation at the Commission's regular Staff Conference. Also, parties were allowed to intervene and were given an opportunity to be heard at the regular Staff Conference. Just as in that case, the Commission fully intends to comply with the General Assembly's directive for

an expedited decision in the present case, even with the additional requirement of the public hearing in Asheville.

After careful consideration, the Chairman, therefore, concludes that the Movants' motion for an evidentiary hearing or, in the alternative, to deny DEP's application as incomplete until an evidentiary hearing is held should be denied.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 15th day of January, 2016.

NORTH CAROLINA UTILITIES COMMISSION

Paige J. Morris

Paige J. Morris, Deputy Clerk

EXHIBIT E

Climate Times and NC WARN

DUKE ENERGY'S MOVE TOWARD A FRACKING GAS FUTURE WOULD BE DISASTROUS FOR CLIMATE CHANGE AND FOR THE NORTH CAROLINA ECONOMY

December 10, 2015

By Harvard Ayers and Nancy LaPlaca

SUMMARY

This paper addresses three of the strongest reasons that North Carolina must not allow Duke Energy to greatly increase the build-out of natural gas-burning power plants and other infrastructure:

1. Methane, the dominant component of natural gas, has a global warming impact 100 times that of carbon dioxide over its initial 10 years in the atmosphere, and a large amount of it is leaking from conventional and shale gas wells. In order to slow global climate change in the critical short term, it is essential to immediately begin to greatly reduce the amount of methane being released into the atmosphere.

2. Estimates of natural gas reserves in the U.S. are overstated by at least 50%, so that future supplies might not be available, leading to fuel shortages and price spikes.

3. There is evidence that the shale gas industry is based on a financial bubble, and because revenues do not cover costs of production, fracking companies continue to lose money. The main beneficiary of this financing arrangement is Wall Street. As a result, investing in a fracking gas future is risky and could lead to a large amount of stranded costs for Duke Energy customers and shareholders.

INTRODUCTION

In recent years, natural gas has been promoted as a "bridge fuel" to a renewable energy future or a path to "energy security" for the United States. Such promotion is due to the advance of drilling based on hydraulic fracturing of shale formations, and to date, almost all shale gas worldwide has been produced in the U.S.[1]

Charlotte-based Duke Energy recently announced plans to build up to the equivalent of 15 large

natural gas-fired power plants in the Carolinas over the next 15 years,[2] including three smaller units in Asheville, N.C., and to acquire Piedmont Natural Gas, Inc. This follows earlier news that Duke plans to take a major role in building and owning a natural gas pipeline from the Gulf states and another from the shale gas fields in West Virginia. Clearly, Duke Energy is betting that natural gas will be a dominant fuel for electricity for the foreseeable future.

NC WARN and the Climate Times believe that increasing North Carolina's dependence on natural gas is extremely short-sighted. Natural gas – in particular shale or "fracked" gas – is now estimated to be far more powerful a greenhouse gas than carbon dioxide, and large amounts are leaking into the atmosphere in recent years due to drilling and handling of natural gas.

2014 was the hottest year on record and 2015 is hotter still and poised to break that record.[3] According to scientists, the Earth will warm to very dangerous levels within the next 15 years, and we must immediately begin reducing greenhouse gas (GHG) emissions – especially methane. Increasing North Carolina's electricity generation from natural gas would be directly at odds with the need to reduce GHG emissions and slow climate change.

The southeastern United States has unique vulnerabilities to the effects of climate change, which is already causing significant damage. An October 2015 report by the U.S. Department of Energy shows the Southeast will suffer increasing temperatures, rising sea levels, flooding, high winds, coastal erosion, large waves from hurricanes, and sea-level-rise-enhanced storm surges.[4] Meanwhile, the Southeast is projected to have the largest increase in natural gas power plants in the U.S. between 2015 and 2030, with each plant having an expected life-span of 30 to 40 years.[5]

BACKGROUND ON DUKE ENERGY'S FRACKING GAS FUTURE

Senate Bill 716,[6] signed into law in June 2015, requires the North Carolina Utilities Commission to render a decision within 45 days on an application for a certificate of public convenience and necessity for new natural gas units at the site of the Asheville Steam Electric Generating Plant, an application Duke Energy says it will submit in January 2016.

It's unlikely that a fully vetted decision can be made within 45 days on whether to permit the 2-unit, 560 total megawatt (MW) natural gas-burning plant, and other proposed infrastructure such as compressing stations and pipeline improvements, as a prudent investment.

According to Duke Energy's 2015 Integrated Resource Plan (IRP), it wants to increase its current production of electricity from natural gas in North Carolina,[7] despite the fact

that the price of natural gas for electric utilities in the state is higher than the U.S. average.[8]

Duke Energy's IRP is a road map of its plans to build power plants over the next fifteen years. The 2015 IRPs for the Carolinas provide two scenarios: the base case plan adds 2,328 MW of new nuclear capacity and 8,578 MW of new natural gas plants. The second option, which is not carbon sensitive, shows far less new nuclear capacity (94 MW) and up to 10,928 MW of new natural gas capacity. All told, Duke Energy Carolinas and Duke Energy Progress would have a total of over 17,400 MW of natural gas in operation by 2030 under its base case planning scenario.[9]

Duke Energy is also moving quickly to own a share of two proposed natural gas pipelines: the 554-mile long, $4.5 - 5 billion Atlantic Coast Pipeline (ACP),[10] and the $3 billion Sabal Trail pipeline that will traverse Alabama, Georgia, and Florida.[11] In October 2015, Duke Energy announced plans to acquire Piedmont Natural Gas in a deal totaling $6.7 billion.[12]

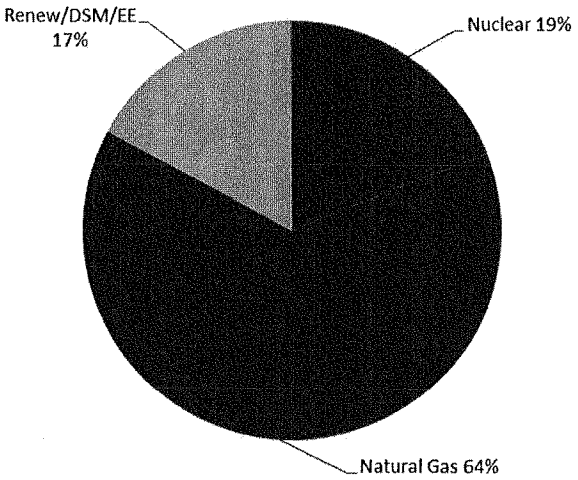


FIGURE 1: Resources Added Over 15 Year Planning Period for Duke Energy Carolinas and Duke Energy Progress. Source: Duke Energy IRP Presentation, November 6, 2015[13]

NATURAL GAS-FIRED ELECTRICITY IS ACCELERATING THE CLIMATE CRISIS

"Switching from coal to shale gas is accelerating rather than slowing global warming."
Dr. Robert Howarth, Cornell University[14]

Mounting evidence shows that power plants burning both conventional and "fracked" natural gas are contributing to accelerating climate change for two core reasons:

1. Large amounts of natural gas, which is mostly methane, leak into the atmosphere during the drilling and transport processes; and

2. Methane is 100 times more potent as a heat-trapping gas than carbon dioxide during the critical first decade after emission, and 86 times more potent over 20 years, according to the latest estimates by the Intergovernmental Panel on Climate Change (IPCC).[15]

Therefore, while the combustion of natural gas at power plants emits less carbon dioxide than does combustion of coal, the climate-warming potential of natural gas is far higher than that of coal when the life-cycle emissions of methane are taken into account. Gas from hydraulic fracturing is worse for the climate than gas from conventional drilling due to greater leakage rates. In 2013 the IPCC reported that the effects of global methane currently being emitted from all sources equal the effects of all sources of carbon dioxide emissions as drivers of global warming.[16]

Because hydraulic fracture drilling into shale formations has grown rapidly, the total greenhouse gas emissions from fossil fuel use in the U.S. increased from 2009 to 2013, even though carbon dioxide emissions decreased during that period.[17]

Life-cycle emissions of methane from natural gas production

"Natural gas – and shale gas in particular – is not a bridge fuel when methane emissions are considered over an appropriate timescale." Dr. Robert Howarth, Cornell University[18]

Hydraulic fracturing ("fracking") of shale gas was not widely used in the U.S. until 2009. While conventional gas wells are drilled vertically, shale or fracked wells drill horizontally into rock formations. As shale gas drilling increased, and shale ("fracked") gas became a larger percentage of total U.S. natural gas supply, scientists including Dr. Robert Howarth of Cornell University became concerned with the potential climate change effects of leaked methane. In a 2011 study, Dr. Howarth found that fracking is much more destructive compared to conventional gas extraction in that it fractures, or crushes, the shale rock to release the tightly held natural gas. Due to this new source of high-leakage shale gas, natural gas is now producing about 42% of the total power plant greenhouse gases in the U.S., rivaling carbon dioxide as the largest GHG source.[19]

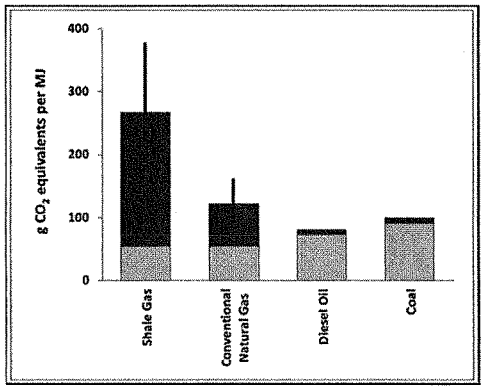
Dr. Howarth's pioneering methane leakage publication was reported by hundreds of newspapers, including *The New York Times*. Dr. Howarth sent out a call to other scientists based on his early work to take a close look at just how problematic methane leakage on the front end of the natural gas cycle could be.

Since 2011, Dr. Howarth's research has expanded and, in October of this year, he incorporated for the first time the observations of satellite imagery by Dr. Oliver Schneising.[20] In this case, Schneising used photographs of the U.S. fracking fields as seen from space, a much more robust, three-dimensional view of leaked methane. Howarth applied the most respected, up-to-date (2013) values for the global warming

potential of methane from the IPCC, which indicate that over its first 20 years, methane averages 86 times the greenhouse gas strength of carbon dioxide. Over the shorter term of 12 years – the lifetime of methane in the atmosphere – the warming effect is more than 100 times that of CO2.

Schneising concludes that the upstream emissions of shale gas (those occurring during the drilling process) are 9.5% of the total extracted. Dr. Howarth states that storage and delivery of gas to customers adds another 2.5%, putting total methane leakage from fracked shale gas at 12% of well production.[21] Thus, using 86x over 20 years, Dr. Howarth estimates the life-cycle CO2 equivalent of shale gas is twice that of conventional gas and nearly three times that of coal when both are burned to produce electricity (see figure 2 below).

Dr. Howarth did this knowing that the utility industry, including Duke Energy, and the U.S. Environmental Protection Agency (EPA) use outdated methane numbers (IPCC 2007) that significantly underestimate methane's strength by 3 to 4 times. Even conventionally extracted natural gas releases significantly more greenhouse gases than coal as shown in the chart below. Despite these clear statements that natural gas, especially shale gas, is emitting much larger quantities of greenhouse gases, Duke Energy plans to construct up to 10,928 MW of new electric generation capacity fueled by natural gas in the next 15 years in the Carolinas.[22]



Red = methane
Orange = CO2

Methane compared to carbon dioxide over a 20-year time period following emission to the atmosphere. Both direct emissions of carbon dioxide and methane emissions expressed as carbon dioxide equivalents are shown. For each fuel, the best estimate for methane emission is used. The vertical bars illustrate the the most probable range of values for shale gas and conventional natural gas.

FIGURE 2. The greenhouse gas footprints of shale gas, conventional natural gas, diesel oil and coal as g CO2 equivalents per MJ of heat produced when the fuel is used to produce electricity. Source: Dr. Robert Howarth, October 8, 2015[23]

A recent study published in *Energy Science and Engineering* in September 2015 supports Dr. Howarth's research,[24] noting that the equipment used to measure methane leakage has serious defects, leading to underestimation of emissions. That study found that uncounted emissions from methane leaks could be extremely high, perhaps 10- to 100-fold for a large leak, and that a relatively small number of large leaks produce a large portion of the methane emissions.[25] Although leakage has been documented for several years, the drilling industry has been unable to correct the problems, apparently because much of the leakage occurs through the well casing.

A national push to recognize the climate damage from natural gas is emerging, as Platts recently noted that the Federal Energy Regulatory Commission, which has authority to approve gas pipelines, is being challenged to consider the full life-cycle of natural gas pipelines "from the well-head to the burner tip."[26]

The U.S. EPA had generally concurred with Howarth's 2011 findings, but later reduced its leakage estimates in response to a non-peer reviewed report by the natural gas industry. The EPA inspector general has criticized the agency's approach to estimating methane emissions.[27]

Dr. Howarth also notes the rapidly increasing literature on the damaging environmental and public health consequences of fracking, such as surface and groundwater contamination, degraded air quality, increased frequency of earthquakes, and harm to human and animal health.[28]

The Next Decade is Critical for the Climate

Methane lasts approximately 12 years in the atmosphere, compared with hundreds of years for CO2. This adds enormous importance to decisions over Duke Energy's plans to greatly increase its burning of natural gas and to amplify the nation's shale gas infrastructure. The urgency of reducing natural gas/methane releases into the atmosphere is high, due to its global warming potency and relatively short lifespan.

Given current emissions of greenhouse gases, the Earth is predicted to warm by 1.5℃ above the preindustrial baseline within the next 15 years and by 2℃ within the next 35 years.[29] Not only will the damage caused by global warming increase markedly but also at these temperatures, the risk of fundamentally altering the climate system of the planet becomes much greater.[30] Further, reducing emissions of carbon dioxide will do little if anything to slow the rate of global warming over these decadal time periods.[31] ***On the other hand, reducing emissions of methane has an immediate effect of slowing the rate of global warming.[32] For these reasons, comparing the global warming consequences of methane and carbon dioxide over relatively short time periods is critical.*** *(emphasis added)*

Dr. Robert Howarth, Cornell University, October 2015[33]

NATURAL GAS RESERVES OVERSTATED BY 50%

In 2011, *The New York Times* reported that the Securities and Exchange Commission relaxed rules governing how companies calculate gas reserves, leading to reserve estimates increasing dramatically in the short term. Higher reserves generally lead to higher stock prices. The SEC also declined to require third party audits, leading to gas developers' reserve estimates not being independently verified.[34] To verify fuel availability, future shale gas production and reserve estimates must be carefully

reviewed, as 40-50% of U.S. natural gas now comes from shale gas produced by hydraulic fracturing.[35]

Geoscientist and shale gas expert J. David Hughes,[36] along with others, has demonstrated that natural gas reserves are overstated by at least 50% by the EIA and natural gas industry. Hughes' work has been widely cited in the press, including *The Economist, Forbes,*[37] *Bloomberg,*[38] *The Los Angeles Times,*[39] *The New York Times,*[40] and *The Atlantic,*[41] and has been featured on CNBC, Canadian Business, and elsewhere.

It is now well documented that fracked gas wells become depleted far more rapidly than earlier believed. Hughes' data analysis of over 88% of 65,000 fracked oil and shale gas wells shows that average well production declined a staggering 74 to 82% over three years.[42] Dr. Hughes' data demonstrates that four of the top seven shale gas "plays" – large geographic areas where shale gas exploration is happening or expected – are already in decline, yet the U.S. Energy Information Administration (EIA) reference case gas forecast calls for plays currently in decline to grow to new production highs. On August 26, 2015, the EIA reported declines in nearly every major shale basin in the U.S.[43]

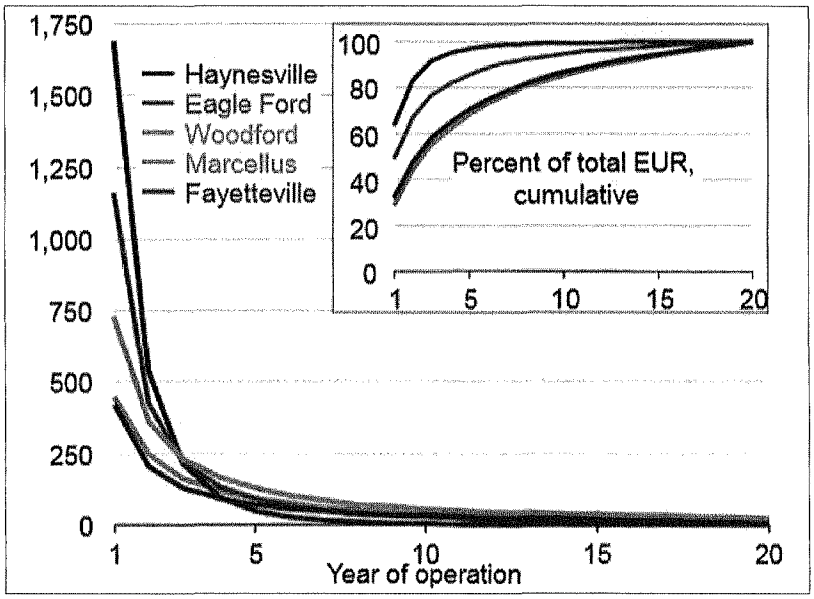


FIGURE 3: Average production profiles for shale gas wells in major U.S. shale plays by years of operation (million cubic feet per year) (EUR is Estimated Ultimate Recovery, or total lifetime well production). Source: U.S. Energy Information Administration[44]

Because productivity of shale wells declines rapidly, many new wells must be drilled just to maintain existing production levels. Approximately 130,000 additional shale gas wells would need to be drilled by 2040 to meet EIA and industry projections, on top of the

50,000 existing wells drilled in these plays through 2013. Assuming an average well cost of $7 million, this would require $910 billion of additional capital input by 2040, not including leasing, operating, and other ancillary costs.[45]

Lawrence Berkeley Lab scientist David Fridley calls this frenetic pace of new drilling an "accelerating treadmill."[46] Hughes is not the only expert disputing the EIA's numbers. Art Berman, a geological consultant with 34 years of experience in petroleum exploration and production, has also sounded the alarm about overly optimistic reserves for many years.[47]

Hughes' analysis was recently proven correct at California's Monterey shale oil play, where he had projected that 2011 estimates by the EIA and industry were overstated by 96%.[48] In October 2015 the U.S. Geological Survey (USGS) downgraded reserve estimates by a startling 99%, thus agreeing with Hughes and others.

USA Today recently reported that several of the largest shale gas regions in the U.S. will post four months in a row of declining production. The article notes that "[w]hile U.S. shale gas remained resilient through several years of low natural gas prices, the collapse in oil prices are finally putting an end to the boom."[49]

The risk of price spikes from fuel shortages is very real, as natural gas is not stored on-site and must be delivered as it is consumed.[50] If natural gas reserves are indeed far lower than estimated, captive ratepayers in monopoly utilities' service areas could be stuck paying the bill for expensive "stranded assets," including pipelines, compressing stations, and power plants.

Figure 4 below shows the price of U.S. natural gas at the wellhead from 1970 to 2014, with price spikes in 2005 (Hurricane Katrina) and 2008 (when crude oil was $147 per barrel). In June 2011, then Duke Energy CEO Jim Rogers famously called natural gas the "crack cocaine" of the electric power industry, due to its cost volatility.[51]

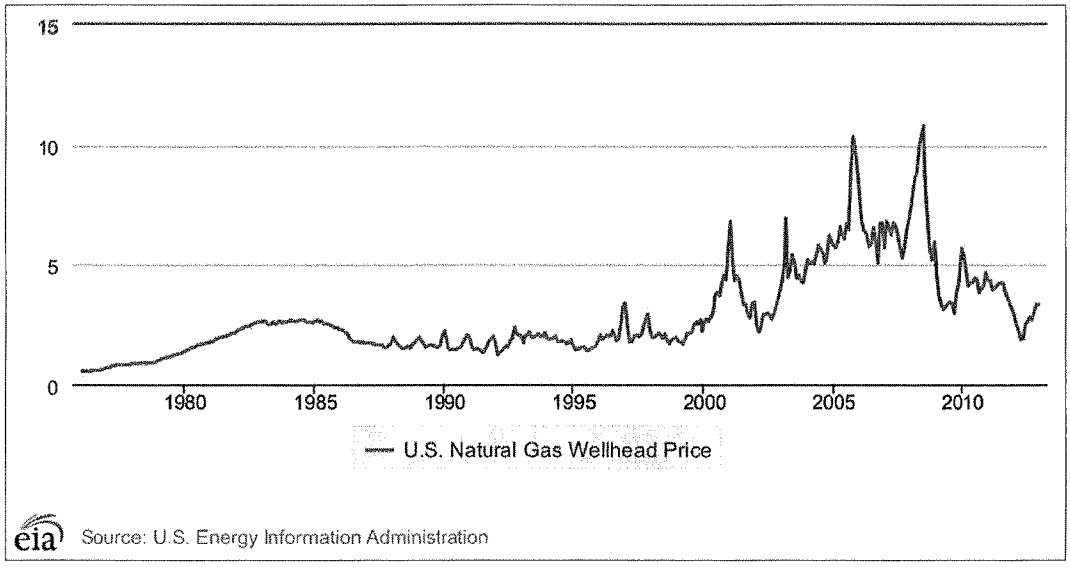


FIGURE 4: U.S. Natural Gas Wellhead Price (dollars per thousand cubic feet). Source: U.S. Energy Information Administration[52]

FINANCIAL RISK

The price of natural gas was at $2.30/MMBtu[53] in early November 2015, a level at which drillers and producers may not be covering the costs incurred to produce the gas. Historically low interest rates have also helped shale gas developers in recent years. However, as interest rates increase, production costs will rise because drillers pay more to borrow money. These cost increases result in the write-down of shale assets.[54]

In order to continue the current level of shale gas production, the U.S. would need to drill 7,000 new wells per year at a cost of $42 to 49 billion annually while U.S. shale gas production in 2012 generated only $33 billion (although some wells also produced substantial liquid hydrocarbons, improving economics).[55]

There is evidence that shale gas plays are a financial "Ponzi scheme" needing ever-more investment capital, driven by "creative financing" whose main beneficiary is Wall Street.[56] In 2011, shale mergers and acquisitions accounted for $46.5 billion in deals, representing one of the largest profit centers for Wall Street investment banks.[57]

Former Wall Street financial consultant Deborah Lawrence asserts that natural gas companies have been illegally, and perhaps intentionally, overstating well production and reserves by 100-500%, creating a cash flow necessary to fund more well drilling while driving higher borrowing and imprudent leverage positions.

Lawrence discovered that companies were spending so much to drill wells and gas prices were so low that many were cash-flow-negative. JP Morgan estimates that the

default rate for energy companies taking on high debt loads could soar from 4% this year to 20% in 2016 if natural gas commodity prices are less than the cost of production.[58]

Bloomberg, *Fortune,* and *USA Today* recently reported that shale gas drillers are experiencing very high debt loads that could "swallow" the industry, with highly-indebted shale oil and gas drillers "in survival mode."[59] Companies in the Bloomberg Intelligence North America Independent Exploration and Production Index ("Index") spent $4.15 for every $1.00 earned selling oil and gas in the first quarter of 2015.[60] An estimated $20 billion in bonds issued by 62 companies in the Index are "distressed," meaning they are paying above Treasury rates to borrow money.

This year, Standard and Poor's has lowered the outlook or credit of almost half of the 105 oil and gas companies it rates. The chief oil analyst at a London consulting firm says the current financial problems are just the beginning, and "we haven't seen the worst."[61] *Fortune* reports that "[f]rackers could soon face mass extinction" and as many as one third of the fracking companies could go bust by the end of next year.[62]

Stranded Costs

Former state public utility regulator Dr. Carl Linvill recently warned that the rapid expansion of natural gas power plants could result in investments that become stranded costs. Gas enthusiasts are pushing for $500-$775 billion to be invested in gas plants and pipelines by 2035-2040, despite the fact that natural gas combined cycle power plants are seen as a medium risk for initial cost, a high risk for fuel cost, and a very high risk for carbon price. By comparison, utility-scale solar, wind, and efficiency are rated as low cost and low risk.[63]

Dr. Linvill points out that the risks of a bad bet on natural gas are borne by ratepayers in regulated monopoly markets, not corporate shareholders, as projects are often guaranteed with ratepayer and taxpayer funds.

The Union of Concerned Scientists reported on the most at-risk states due to high levels of dependence on natural gas. North Carolina's current risk was rated "moderate", but the planned build-out of natural gas plants by Duke Energy could increase the risk rating to "high."[64] Meanwhile, renewable energy can displace fossil fuels and save customers money, as the 2014 "polar vortex" events in the Mid-Atlantic and Great Lakes regions of the U.S. demonstrated when the cost of natural gas spiked due to fuel shortages.[65]

CONCLUSION

The choices Duke Energy makes today will affect North Carolina's economy, health, and the global climate for many decades or longer. Locking North Carolina into a natural gas-intensive future would be a climate tragedy, and would set citizens up for persistent fuel cost volatility and potential shortages. A combination of vastly understated climate impacts, overstated shale gas reserves, high shale well depletion rates, huge debt loads,

and low shale gas prices that do not cover production costs makes natural gas a bad bet for the Tar Heel state, and for the world.

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EXHIBIT E

NC WARN Climate Times
Position and Comments
Docket E-2 Sub 1089

A Responsible Energy Future for North Carolina
Updated November 2015

DUKE ENERGY CONTINUES TO LOOK ONLY AT THE SHORT-TERM AND RELIES HEAVILY ON POLLUTING COAL AND RISKY NATURAL GAS

Each year Duke Energy must file a 15-year plan for meeting electricity demand in North Carolina. In reviewing these integrated resource plans or IRPs, the NC Utilities Commission is required to ensure the "least cost mix" of generation and energy saving measures that is achievable – and the NC Supreme Court has specified that the IRPs are intended to prevent the costly overbuilding of new power plants.

This update of NC WARN's A RESPONSIBLE ENERGY FUTURE FOR NORTH CAROLINA[1] examines the most recent Duke Energy IRPs.[2] Duke Energy continues to exaggerate its growth of electricity sales, and as a result continues to operate polluting coal plants, and increasingly rely on risky and environmentally threatening natural gas plants. Instead of taking actions to mitigate the climate crisis, Duke Energy continues to take the short-term view and double down on dirty energy.

Duke Energy's business model in its monopoly states is to prevent competition, build new power plants that are not needed, and force customers to pay for them through increased rates. In its latest plans, Duke Energy continues to ignore rapid and profound changes in the electricity marketplace, and excludes the external costs of its economic choices such as detrimental contamination of air and water, and contributing to the worsening climate crisis.

If the Commission approves Duke's latest 15-year plan, it approves a status quo threatening to bankrupt North Carolina's economy and continue polluting our air and water, and contributing profoundly to the climate crisis. NC WARN has reviewed Duke Energy's latest IRPs, filed September 2015, and objects to Duke Energy's long range plans for the following reasons:

CONTINUED EXAGGERATION OF GROWTH OF ELECTRICITY SALES

In the Carolinas, Duke's two utilities base their 15-year plans on the projection that electricity usage will increase 1.2% each year. Based on that growth, Duke Energy Carolinas and Duke Energy Progress plan to build a total of 11,003 megawatts (MW) of new power

generation capacity – the equivalent of fourteen large power plants. The combined utilities would effectively increase their generating capacity by 24.2% over the next 15 years.

As noted in NC WARN's full report, the US Energy Information Administration, the American Council for an Energy Efficient Economy (ACEEE), and actual growth for the past decade are evidence that energy sales will remain flat into the future. Duke Energy's growth assumptions are economically irrational.

An exaggerated growth projection is the crutch of Duke Energy's case to build more power plants in the Carolinas that aren't needed. Building unneeded power plants serves as profit center for the monopoly utility while draining money from captive ratepayers.

EVEN MORE EXCESS CAPACITY IN THE SOUTHEAST

In December 2014 NC WARN filed a complaint with federal regulators, arguing that electricity customers are being gouged by billions of dollars in unwarranted rate increases because, despite huge amounts of excess power generation capacity (dozens of large plants sit idle most of the year), Duke Energy and other southeastern utilities keep building more plants instead of buying power from each other.

Instead of taking NC WARN's claims into consideration, Duke Energy's latest plan actually increases the minimum level of excess capacity above peak demand (known as the reserve margin) that the utility uses to plan for energy needs in the future from 14.5% of generation capacity to 17%. The only rationale offered for such an increase was a reserve study performed by a consultant hired by Duke Energy. The study is not publicly available. Duke's projects its reserve margins to be above the 17% level during the peak usage times of almost every single year over the planning horizon – even reaching as high as 27% for Duke Energy Carolinas and 29.4% for Duke Energy Progress.

Meanwhile, both utilities still do not incorporate purchases from neighboring utilities into their plans at any respectable level. Both Duke Energy Carolinas and Duke Energy Progress say in their IRPs that they do not intend to extend power purchase agreements that expire between now and 2020. There are no justifiable reasons why Duke Energy and the other Southeastern utilities should continue building power plants while choosing not to share power as needed.

SQUANDERING RATEPAYER MONEY

The Duke Energy Carolinas IRP has two planning models, one with carbon sensitivity and the other with no carbon sensitivity. The carbon sensitivity model still includes building two nuclear plants at the Lee Nuclear Station in South Carolina, although the timeline has been pushed far into the planning horizon. Duke Energy CEO Lynn Good recently suggested that the utility may be backing off of the project.

The Lee project is by far the most expensive option, with estimates exceeding $24 billion. Similar projects underway in Georgia and South Carolina are suffering huge delays and cost overruns. These extremely risky plants are being pursued only because the utilities in those two states are allowed to automatically pass on construction costs to customers in advance of the plants producing any electricity. The financial cost of the nuclear / natural gas future will be in the $35 billion range, over the next 15 years.

The no carbon sensitivity model eliminates the nuclear plants and replaces them MW for MW with natural gas combustion turbines, replacing baseload nuclear with plants usually relied on for peak periods. This draws into question the need for all of the baseload plants forecast in the IRPs.

Most of Duke Energy's IRPs relies on increasing the use of large natural gas-burning plants, with gas coming from the Gulf of Mexico or from fracking gas fields in Pennsylvania and West Virginia. These plants are also costly. The 750-megawatt combined cycle natural gas plant under construction near Anderson, South Carolina will cost in excess of $1 billion, and a similar $750 million natural gas-burning plant is proposed for construction in Asheville along with a costly transmission and substation project. If the natural gas plants build out, the financial cost to rate payers will be in the $15 billion range, over the next 15 years. Natural gas prices, now low because of fracking, are expected to be extremely volatile over the next decade.[3]

Coal is still a major component of Duke's long-range plans that, along with its devastating impact on the environment, is draining money from the North Carolina economy. The company sends more than $1.76 billion dollars out of the state each year to purchase coal for power generation in the Carolinas.

MAKING THE CLIMATE CRISIS WORSE

Duke Energy's IRP plans for retirement of only two coal-fired power plants between 2015 and 2030 – the two units at its Asheville facility and the 5 units at its Allen facility. The Allen

units are rarely used (operating an average of only 23% of the hours in 2014); therefore their closure represents only a small reduction in Duke Energy's carbon emissions. Duke Energy will continue to operate the majority of their coal plants and emit climate-wrecking CO_2.

The utilities' long range plans proposed adding between 8,578 and 10,928 MW of new natural gas capacity in the Carolinas by 2030. Numerous studies have shown that natural gas may be worse for the climate than coal due to the leakage of methane during various stages of fracking, refining, and transportation, including pipelines.[4] According to the Intergovernmental Panel on Climate Change, methane is 86 times more potent in warming the atmosphere than carbon dioxide over a 20-year period. Despite Duke Energy's PR claims, a path forward that relies heavily on natural gas is not going to reduce climate destruction.

A BETTER PATH FORWARD

Unlike Duke Energy's "build plants, raise rates" business model, the Responsible Energy Future NC WARN proposes is competition driven; the primary goal is to maximize efficiencies and thus minimize costs to ratepayers and curb carbon and other pollution. The most significant differences are outlined below:

- NC WARN's plan forecasts zero growth in usage, an assumption supported by data from the US EIA and the ACEEE, among others – and by actual growth for the past decade.
- Increase energy efficiency and demand-side management programs (DSM) to 24% of energy sales over the 15-year planning horizon. A recently released report by ACEEE shows that utility energy efficiency programs remain the best value for North Carolina's energy dollar.
- Combined Heat and Power (CHP) and microgrids are able to replace 10% of energy demand in the REF plan, while CHP is minimally utilized in Duke Energy's forecasts.
- Renewable wind and solar is very conservatively increased to 7% of energy in the REF plan, compared with the 4% of energy in the Duke Energy plan.
- Wholesale purchases in the REF plan make up 6% of energy sales compared to a negligible percentage in Duke Energy's plan.
- Reliable storage options will allow renewable sources to play a far greater role in our energy future.

The Responsible Energy Future allows for closure of all coal-fired power plants, eliminates the need for new centralized generating plants and, as a result, decreases rates and

pollution. NC WARN's plan would reduce costs to North and South Carolina customers over the 15-year planning period eliminating new construction and volatile out-of-state fuel sources.

Distributed renewable energy

A significant component of the Responsible Energy Future plan is for renewable energy to account for 7% of total electricity sales in North Carolina by 2029. The installed cost of solar has come down 50% in five years, making the resource more cost competitive than ever. And, according the U.S. Department of Energy, the average cost of solar in the U.S. is expected to be equal to the cost of natural gas *fuel alone* by 2019 to 2020.[5] In October of 2014 Deutschebank reported that solar is now cost-competitive with traditional power plants in ten states, and will reach such "grid parity" in all states by 2016 or 2017, and that doesn't take into account all of the externalized costs of burning fossil fuels.[6]

Moving forward, further development of storage technology is poised to bolster the rapid growth of distributed renewable energy such as wind and solar. The nearly 2,000 MW of pumped storage capacity already owned by Duke Energy in the Carolinas allows for much more solar and wind energy to be added to the system without causing supply issues.

Combined heat and power & on-site generation

For the first time, Duke Energy's IRP includes a small amount of combined heat and power (CHP). However, the utility has planned to implement only 160 MW total of this proven and economical technology by 2030. This falls far short of what CHP could contribute to the energy needs the Carolinas.

Up to 10 conventional power plants could be replaced in the Carolinas by the development of CHP systems for commercial, industrial, and institutional customers, as well as publicly-owned facilities that use both heat and electricity.

In the US, CHP represents nearly 10% of total generating capacity, and the Oak Ridge National Lab made the case for scaling up the use of CHP to 20% of US generating capacity by 2030. The limited amount of CHP capacity already in place in the Carolinas is a result of private industry investments – without support from Duke. CHP remains a virtually untapped resource for the future.

WHAT DOES THIS MEAN FOR NORTH CAROLINA?

At a minimum, Duke Energy's business model will cause rates to increase drastically if its IRP is approved. As rates increase under the Duke Energy plan, residential, small business, local

government and other customers will face increasing financial burdens. For many low-income families, this may mean choosing between electricity and food or medicine. Just by eliminating coal plants NC WARN's approach can save North and South Carolina electricity customers an estimated *annual* savings of more than $1.7 billion.

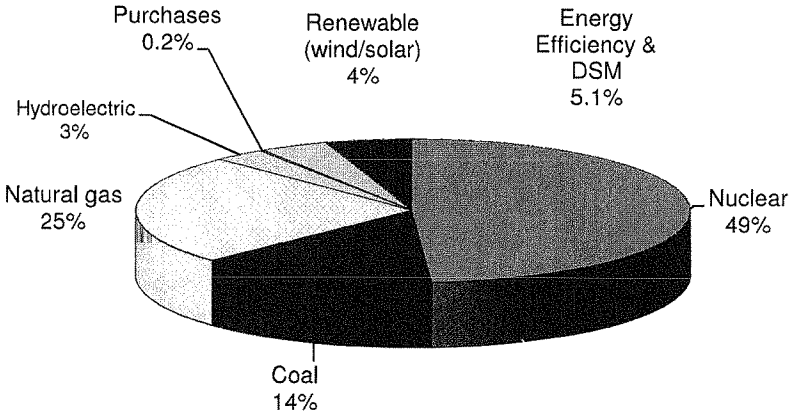
In addition to keeping rates lower, another advantage of the Responsible Energy Future plan is its positive economic benefit for North Carolina. A 2015 study by the NC Sustainable Energy Association showed that there are now 23,000 clean energy jobs in North Carolina, and clean energy has contributed $6.3 billion to the state economy from 2007 to 2014.[7]

North Carolina has the workforce, business infrastructure and public support in position to ramp up the use of renewable energy, energy efficiency and CHP, and move this state forward in the clean energy revolution.

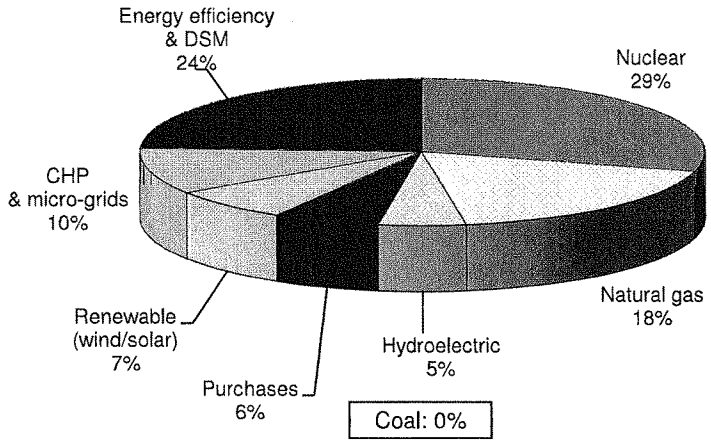
The Responsible Energy Future is a plan that promotes job creation, economic fairness, and a healthier place to live, all while helping to slow climate change.

NC WARN is a member-based nonprofit tackling the accelerating crisis posed by climate change – along with the various risks of nuclear power – by watch-dogging Duke Energy practices and working for a swift North Carolina transition to energy efficiency and clean power generation. In partnership with other citizen groups, NC WARN uses sound scientific research to inform and involve the public in key decisions regarding climate and energy justice.

Duke Energy 2029 Plan
(Energy Sales)



Responsible Energy Future
(Energy Sales)



NOTE: Duke Energy Carolinas and Duke Energy Progress' 2015 IRP Update Reports do not report projections for the combined company, and reports projected resources only in terms of capacity, not energy sales. Therefore, NC WARN is continuing to use its energy sales calculations from its Responsible Energy Future Update from March of 2015, which is available at http://www.ncwarn.org/wp-content/uploads/ResponsibleEnergyFuture-3-3-15.pdf

[1] The NC WARN report, A RESPONSIBLE ENERGY FUTURE FOR NORTH CAROLINA, with the annual updates is available at www.ncwarn.org/responsible-energy-future/ Citations to some of the factual data contained in this update are found in the original report and the annual updates.

[2] The 2015 IRPs for Duke Energy Carolinas and Duke Energy Progress were filed with the NC Utilities Commission on September 1, 2015, in Docket E-100, Sub 141 and are available on the Commission's website, www.ncuc.net Note that approximately 70% of Duke Energy's service area is in North Carolina, while the remaining 30% is in South Carolina.

[3] *Rating the States on Their Risk of Natural Gas Overreliance,* by Union of Concerned Scientists, October 2015; http://www.ucsusa.org/clean-energy/rating-the-states-on-their-risk-of-natural-gas-overreliance#.Vh6VAitd-ay;

Shale and Wall Street: Was the Decline in Natural Gas Prices Orchestrated? By Deborah Rogers, Energy Policy Forum, February 2013; http://shalebubble.org/wall-street/

Natural Gas Infrastructure Implications of Increased Demand from the Electric Power Sector, USDOE, February 2015, http://energy.gov/sites/prod/files/2015/02/f19/DOE%20Report%20Natural%20Gas%20Infrastructure%20V_02-02.pdf;

[4] The most recent and comprehensive article on the impacts of methane and air emissions is Robert Howarth's *Methane emissions and climatic warming risk from hydraulic fracturing and shale gas development: implications for policy*; www.eeb.cornell.edu/howarth/publications/f_EECT-61539-perspectives-on-air-emissions-of-methane-and-climatic-warmin_100815_27470.pdf

[5] *Utility-Scale Solar 2014: An Empirical Analysis of Project Cost, Performance and Pricing Trends in the United States*, by Mark Bolinger and Joachim Seel, September 2015; https://emp.lbl.gov/publications/utility-scale-solar-2014

Lazard's Levelized Cost of Energy Analysis, Version 8.0, September 2014; www.lazard.com/perspective/levelized-cost-of-energy-v8-abstract/

[6] *Solar grid parity in a low oil price era*; Deutsche Bank report; March 10, 2015; www.db.com/cr/en/concrete-deutsche-bank-report-solar-grid-parity-in-a-low-oil-price-era.htm

[7] *Economic and Rate Impact Analysis of Clean Energy Development in North Carolina—2015 Update*; prepared for NC Sustainable Energy Association by RTI International, February 2015; http://c.ymcdn.com/sites/energync.site-ym.com/resource/resmgr/Resources_Page/RTI_2015.pdf

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	))))))	POSITION AND COMMENTS BY NC WARN AND THE CLIMATE TIMES

Pursuant to the Order on Procedure for Accepting Comments of the Parties, filed January 22, 2016, now come NC WARN and The Climate Times, by and through the undersigned attorney, with their statement of position and comments on the application for the certificate of public convenience and necessity ("the certificate") by Duke Energy Progress ("DEP") in this docket.

1. The position of NC WARN and The Climate Times is that the Commission should DENY the application for the certificate for the Asheville project for the following reasons:

a. The expedited process followed by the Commission does not allow it adequate opportunity to review the application or provide fair and reasonable regulation of DEP's activities.

b. Too much relevant information has been withheld from public scrutiny, limiting meaningful public debate.

c. DEP has not demonstrated the need for over 700 MW of new natural gas-fired units in the Asheville area.

d. DEP's rapidly increasing reliance on natural gas-fired generation is potentially costly for DEP ratepayers, with future prices and supply for natural gas highly variable and extremely risky.

e. DEP would become an even greater contributor to climate change due to methane leakage throughout the natural gas production and distribution cycle.[1]

ARGUMENT

2. In their Motion to Intervene and Motion for Evidentiary Hearing, filed December 21, 2015, NC WARN and The Climate Times moved for an evidentiary hearing on the application, questioning the expedited review process for the application. Their position was that the 45-day review period pursuant to the Mountain Energy Act of 2015, Session Law 2015-10, did not begin to run until the Commission determined it had all relevant information before it, and the only way to do so was to hold an evidentiary hearing. The Commission denied the motion on January 15, 2016, stating the General Assembly's "will is controlling" and interpreted that the 45-day review period began when DEP filed the application.[2]

3. The North Carolina Constitution from early times has prohibited monopolies and the granting of exclusive privileges to private corporations, except in consideration of public services. N.C. Const. Art. I, §§ 32 and 34. Article I, § 34, states, "[p]erpetuities and monopolies are contrary to the genius of a free state

[1] Duke Energy is currently the largest emitter of greenhouse gases in the United States. www.peri.umass.edu/greenhouse100

[2] A third alternative is for DEP to waive the 45 days in order to allow a full and open review on its application.

and shall not be allowed. The North Carolina Supreme Court explained the purpose of these provisions as follows:

> Third, the purpose of the constitutional provision was not to prevent "the community" from exercising legislatively authorized powers to operate public enterprises but to prevent "the community" from surrendering its power to another "person or set of persons" by grant of exclusive or separate emoluments or privileges unless they are granted "in consideration of public services." It is not retention of powers but alienation of powers that is prohibited.

Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 655, 386 S.E.2d 200, 212 (N.C. 1989).

4. The N.C. Constitution's prohibition of exclusive emoluments provides an exception to those grants of monopoly power only when the grant is in clearly within the public interest. Article I, § 32 provides: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." As the North Carolina Supreme Court has stated, an exemption that benefits a particular group of persons is not an exclusive emolument or privilege if: "(1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest." *Town of Emerald Isle ex rel. Smith v. State*, 360 S.E.2d 756, 764 (N.C. 1987). This two-part test applies to both "exemptions" and "affirmative benefits." *Blinson v. State*, 651 S.E.2d 268, 278 (N.C. App. 2007).

5. In terms of G.S. 62-23, the Commission is "declared to be an administrative board or agency of the General Assembly." Under this section the Commission is tasked with " assuming the initiative in performing its duties and responsibilities in securing to the people of the State an efficient and economic

system of public utilities." This legislation requires the Commission's active engagement to protect the people of the State where such monopoly privilege has been granted.

6. In exchange for providing DEP with an exclusive utility franchise, the Commission has the authority to "compel [its] operation in accordance with policy of the state as declared in statute." *State ex rel. Utils. Comm'n v. Public Staff - NC Utils. Comm'n*, 123 NC App. 623, 473 S.E.2d 661 (1996). The first declaration of policy in the Public Utilities Act, and the basis on which all other policies rely, is found in G.S. 62-2(a): "It is hereby declared to be the policy of the State of North Carolina: (1) To provide fair regulation of public utilities in the interest of the public."

7. Typically, the Utilities Commission possesses the "authority to supervise and control" public utilities, including the ability to make rules and regulations, set rates, order the construction of improvements, and investigate financial records. G.S. 62-30 – 54. However, the Commission's interpretation of the requirements of the Mountain Energy Act, S.L. 2015-110, has violated this basic principle. In several rulings, the Commission has thwarted efforts to gather the required information or present evidence to determine whether any public interest is advanced by the construction proposal at issue here. Given that demand and cost data has been withheld by DEP; that excess capacity exists in DEP's service territory and throughout the Southeast; that energy efficiency and demand side management ("DSM") have not been considered sufficiently as alternatives; that another producer has intervened with a proposal to meet the demand at avoided cost; and that there is growing public opposition to the project; it cannot be shown

that the proposed Asheville project serves the public interest. There can be no protection of the public interest when there is no public scrutiny.

8. Specifically as it relates to the present matter, the questions the Commission should answer are whether the expedited review period in the Mountain Energy Act allows for "fair regulation" of DEP and whether it is "in the interest of the public." If the answer to either of these questions is negative, the Commission's interpretation of the Mountain Energy Act allows an unconstitutional monopoly to operate.

9. Further, the policy of the State is "to encourage and promote harmony between public utilities, their users and the environment." G.S. 62-2(a)(5). In a highly contested project such as the one *sub judice*, the state policy of finding the congruence between DEP's interests with those of the ratepayers, with a firm regard for environmental protection, has enormous and immediate consequences, especially in the context of whether the Commission is able to make meaningful findings of fact and conclusions of law. An erroneous decision, based on inadequate review, could lock DEP's future into a burdensome, risky, and costly reliance on natural gas-fueled generation by building new plants which are not needed. The least cost objective is thwarted by this inadequate review process.

10. Because of the expedited review of the application and lack of evidentiary hearing, NC WARN and The Climate Times are presenting in part this statement of position and comments in the nature of an offer of proof, showing the scope and quality of the testimony and evidence that would have been introduced as part of an evidentiary hearing. Further relevant evidence would have come

from cross-examination of DEP and Public Staff witnesses at an evidentiary hearing.

11. As part of this statement of position and comments, NC WARN and The Climate Times have attached affidavits from Dr. Robert W. Howarth, an international expert on the role of methane emissions as a driver of global warming; J. David Hughes, expert on natural gas supplies and price volatility; and William E. Powers, professional engineer and expert on power plants, transmission, and alternatives to natural gas-fired generation. EXHIBITS A, B and C. This expert testimony is supported by a whitepaper, DUKE ENERGY'S MOVE TOWARD A FRACKING GAS FUTURE WOULD BE DISASTROUS FOR CLIMATE CHANGE AND FOR THE NORTH CAROLINA ECONOMY, December 10, 2015, prepared by Dr. Harvard Ayers of The Climate Times and Nancy LaPlaca of NC WARN. EXHIBIT D. The whitepaper further documents the potentially devastating problems posed by natural gas-fired generation, including methane's impact on climate change, and the potential for price spikes and natural gas fuel shortages.. The testimony of Mr. Powers is further supported by NC WARN's report, A RESPONSIBLE ENERGY FUTURE FOR NORTH CAROLINA, updated November 2015, (the "NC WARN report") critiquing DEP's 2015 integrated resource plan ("IRP"). EXHIBIT E.

QUESTIONABLE NEED FOR ADDITIONAL NATURAL GAS UNITS

12. The focus of review on the proposed Asheville project should be determining the best strategy to allow prompt closure of the Asheville coal plants without construction of new generating plants. The Asheville project's blanket

reliance on new natural gas generation capacity is imprudent and wasteful. The $1.1 billion costs for the project as presented does not include enough data for the members of NC WARN and The Climate Times, and the public, to have a meaningful debate as to whether a different project mix, such as just one combined cycle plant, or elimination of the diesel generators, or wholesale contracts, or robust renewable energy, DSM, and energy efficiency programs, could meet the area's needs at a reasonable cost.

13. More important, DEP has not demonstrated the need for the three natural gas-fired facilities. On December 16, 2015, DEP filed notice of its intent to file its application for the certificate for a 752 MW natural gas-fueled generation facility near Asheville, consisting of two 280 MW combined cycle units and a 192 MW combustion turbine unit. At the same time, DEP would close its two existing coal plants. On January 15, 2016, DEP filed its application for the certificate, limiting it to the three natural gas-fired units. The application did not include a request for approval of the promised solar facility at the site or for any commitment to energy efficiency or DSM as part of the project, although a small battery project was noted as a potential future possibility. The application did not reference the fate of the diesel-fueled peaking units at the site. As it stands before the Commission, the DEP project would result in 1,116 MW of capacity at the Asheville site – six times the power generated there in 2014 (182 MW).[3] On its face, this is far more than is required in Asheville.

[3] Based on DEP's December 2014 Monthly Fuel Report filed in Docket E-2 Sub 1037, the 379 MW of coal capacity DEP proposes to close operated at an average capacity factor of 46% in 2014. The two existing 185 MW gas/diesel turbines, which will remain in service, operated at an average capacity factor of 2.3% in 2014.

14. In his affidavit, Mr. Powers questions whether it is in the public interest to build up to 752 MW of new natural gas plants, particularly since DEP does not thoroughly examine how much these plants would raise rates over their 30-year expected lifetime, including natural gas pipeline upgrades, compressor stations, and transmission upgrades. EXHIBIT C. Mr. Powers recommends that DEP consider potentially lower-cost, lower-risk distributed generation and energy efficiency as alternatives to new plant construction. Lastly, he addresses load shedding and various grid reliability scenarios to meet grid reliability needs.

15. Also relevant to the issue of need for the facility are the comments submitted by NC WARN with its Motion to Seek Leave to File Comments, filed November 2, 2015, in Docket E-100, Sub 141, on DEP's 2015 IRP. EXHIBIT E. Those comments challenged DEP's forecasts in the growth of demand as well as its overreliance on coal and natural gas over the next 15 year period. Even though the Commission denied NC WARN's motion to consider the report in this year's review of the IRPs, the issues raised by NC WARN are directly relevant to the matter *sub* judice as DEP is relying on its 2015 IRP, as yet unapproved, to justify the proposed Asheville project. In its 2015 IRP, DEP continues to project growth of electricity sales far above the rates supported by actual growth in the past decade, and contrary to the analyses of industry experts such as the Energy Information Administration ("EIA") and American Council for an Energy Efficient Economy ("ACEEE"). DEP's repeated use of exaggerated growth rates calls into question its ability or willingness to accurately assess projected demand across its territory and regionally in Western North Carolina. This flaw is directly relevant to its case for constructing additional natural gas generating capacity.

16. In the application for the Asheville project, DEP inexcusably fails to adequately substantiate its claim that regional winter peak will grow by 17% in the next decade. When asked to provide data and analyses substantiating its claims of high peak growth expectations in Western North Carolina, DEP simply produced a spreadsheet of annual demand growth projections for the years 2016 through 2026. The projections were notably high, with annual growth rates in peak demand reaching as high as 2.4%. When pressed further to provide the analyses and studies that supported the projected growth rates, DEP cited a proprietary model produced by the company ITRON. NC WARN and The Climate Times assert that a model that lacks transparency, is neither dated nor verified, and was commissioned and paid for by DEP as opposed to an independent party is not an acceptable source to rely on in making a determination of need for the project.

17. In his affidavit, paragraph 13, Mr. Powers concludes "the DEP load growth forecast is unsupported and conflicts with the static or declining actual load trend in the Western Carolinas over the last eight years." EXHIBIT C. Mr. Powers, continues and states "[u]se of a realistic load forecast eliminates the stated need for the [project]."

18. Much of the analysis in NC WARN's report highlights specific problems with DEP's reliance on natural gas. EXHIBIT E. The additional 11,000 MW of capacity Duke Energy (both DEP and Duke Energy Carolinas) predicts it will need is almost entirely added through new natural gas plants, with the addition of the two proposed nuclear plants at the Lee Nuclear Station in South Carolina. The no-carbon sensitivity model eliminates the nuclear plants and replaces them MW for MW with natural gas-fired combustion turbines. The cost to ratepayers for the "all

natural gas" plan would be at least $15 billion over the 15-year planning horizon. The proposed Asheville project is just the first of many.

19. Similar to the conclusion reached in NC WARN's report on the IRPs and in line with Mr. Power's opinion, NC WARN and The Climate times are convinced the new natural gas-fired plants are not needed in the Asheville area, in large part due to a glut of generation available in DEP's service territory and across the Southeast, readily available hydropower and merchant combined cycle facilities, and under-utilized renewable energy, combined heat and power ("CHP"), DSM, and energy efficiency. The application actually states the new plant would serve both Carolinas, not just the Asheville area. The proposed project is not about "replacing coal," it is about the construction of new baseload power plants.

20. Based on the conclusions of Mr. Powers in his affidavit, paragraph 14, and the NC WARN report among other sources, NC WARN and The Climate Times maintain there is a better path forward. The Commission should instead seek to replace coal plants with a mixed strategy based on energy choice, energy efficiency, DSM, distributed renewable energy, and CHP and other forms of on-site generation. In its application, DEP has not applied for the ability to add solar at the present site, it has only baldly claimed it will add some solar at some point in the future. Similarly, DEP has maintained it is committed to energy efficiency and DSM options for the Asheville area, but has made no tangible proposals.

21. The two 230 kV transmission lines serving the Asheville area (Enka and Pisgah Forest) can each carry up to 400 MW of power, making large long-term wholesale contracts readily obtainable, either from merchant plants or other utilities in the Southeast. DEP has not maintained there is an deliverability issues

with these lines. Moreover, these lines are routinely used to supply power to the Asheville area; specifically these lines were used to provide power to the Asheville area on the 2014 winter peak, an abnormally high demand of 1183 MW. In the days before the January 2014 polar vortex, Asheville Unit 1 was down, but there was still adequate power available.[4] Without the need for new transmission lines, the present line should be assessed for upgrades.

22. Specifically for the Asheville project, there are other alternative sources of electricity readily available, but not addressed in the application.

a. As noted in the NC WARN, the utilities in the Southeast have considerable excess capacity, much of which is available for purchase. The EIA reports that in the Winter 2014 -2015, SERC East (Carolinas) had an overcapacity of 36% in the base case, and 15% for the high demand/reduced supply case.[5] For the summer of 2015, all of the utilities in the Southeast reported overcapacity of 23 – 36%, far more than is needed.[6] DEP disregards the excess capacity available in the Southeast, and fails to make strategic power purchases to supplement its own generation. Again, the two existing transmission lines have no deliverability issues.

b. Columbia Energy, LLC, an intervenor in this docket, maintains that it could supply 523 MW from its existing natural gas plant in South Carolina at an avoided cost rate. It has a firm natural gas contract and does not need new

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[4] According to data provided by DEP, Asheville Unit 1 experienced an outage from 7:14 PM on January 2, 2014 to 12:18 PM on January 5, and again was offline from 4:57 PM on January 6, 2014 to 6:27 PM the same day. During these outages, temperatures were as low as 9 degrees in the Asheville area, yet power was maintained.

[5] www.eia.gov/todayinenergy/detail.cfm?id=19631

[6] www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/2015_Summer_Reliability_Assessment.pdf

pipelines or the construction of new natural gas-fired plants. DEP (or Duke Energy Carolinas) is required to purchase this power under Federal law.[7] DEP should consider purchasing power from the existing facility to save ratepayers the cost of constructing new plants and pipelines, but has not moved forward to initiate a contract with Columbia Energy.

c. Brookfield Renewable Energy Partners, an international energy firm, owns and operates several hydroelectric plants in western North Carolina and eastern Tennessee, and is able to provide approximately 150 MW of dispatchable power. Our understanding is DEP refused to purchase the output from those facilities and instead that output is being wheeled across DEP transmission lines to the PJM system for sale instead.

d. DEP does not discuss the alternative of "reconductoring" transmission lines using aluminum core steel reinforcement ("ACSR"), which can double the existing line capacity to the Western region. ACSR lines are low-weight and high-strength and thus highly desirable for transmission upgrades. The cost of ACSR is far less than the cost to build a new power plant, and would allow additional power to be imported into DEP-West. DEP does not seem to have investigated the option of increasing the capacity of existing lines for a modest investment. Improving the existing transmission line would likely be more acceptable to the public in the region, as well as provide needed reliability.

NATURAL GAS IS A DISASTROUS LONG TERM STRATEGY

[7] The Columbia facility is a Qualifying Facility ("QF"), as that term is defined in Section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 18 U.S.C.A 824a-3.

23. Natural gas is an extremely risky fuel for the future. Given that natural gas prices, now low because of oversupply and low demand, are expected to be extremely volatile over the next decade, DEP's dependence on natural gas is short-sighted. The natural gas plants could cause rate spikes for all DEP customers due to the extreme price and supply volatility of gas. Like many utilities, DEP is seeking to add gas capacity while natural gas prices are low, but the conditions leading to low prices do not promise that prices will stay low as production declines.

24. In his affidavit, Mr. Hughes describes his analysis of shale plays and presents his conclusion that total U.S. natural gas production will decline because current drilling rates cannot be maintained due to poor economics. EXHIBIT B. As a result, "fuel prices could skyrocket, putting ratepayers at risk of shortages and price spikes." As a result, Mr. Hughes concludes:

> In my expert opinion, the cost of natural gas in the medium and long term will be much higher than today, and higher than the projections of the EIA, which will negatively impact the investments Duke Energy is making in natural gas power plants that are expected to run for 30 or more years, and will result in considerably higher cost for ratepayers than expected.

Affidavit, paragraph 15.

25. Natural gas-fired generation has excessive and unreasonable environmental and social costs, especially in terms of climate change. The use of natural gas for electricity is already speeding global warming due to methane's global warming potential (up to 100 times that of carbon dioxide over the next decade) from large methane leakage throughout the natural gas industry. In his affidavit, Dr. Howarth described several studies he and others have conducted

showing "even small emissions of methane make the global warming consequences of using natural gas worse than coal." EXHIBIT A. He concludes "that natural gas – particularly as it comes increasingly from shale gas – is not a bridge fuel" and "that building new plants to produce electricity from natural gas is a disastrous strategy."

CONCLUSION

26. NC WARN and The Climate Times urge the Commission to DENY the application for the certificate for DEP's proposed construction of natural gas generation. There are simply too many defects in the application, and too little is known about the project, to allow the Commission to make its mandated findings and conclusions. There are a number of reasonable and valid alternatives to the project. DEP must proceed with closure of the existing coal units but DEP's apparent commitment to a natural gas future is costly and risky, and would have a disastrous impact on climate change at the worst possible time.

Respectfully submitted, this the 12th day of February 2016.

/s/ John D. Runkle

John D. Runkle
Attorney at Law
2121 Damascus Church Rd.
Chapel Hill, N.C. 27516
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jrunkle@pricecreek.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing POSITION AND COMMENTS BY NC WARN AND THE CLIMATE TIMES (E-2, Sub 1089) upon each of the parties of record in this proceeding or their attorneys of record by deposit in the U.S. Mail, postage prepaid, or by email transmission.

This is the 12th day of February 2016.

/s/ John D. Runkle

EXHIBIT A

AFFIDAVIT OF ROBERT W. HOWARTH

For NC WARN and The Climate Times

Docket E-2 Sub 1089

February 9, 2016

1. My name is Robert W. Howarth, and I am an Earth system scientist and ecologist who has been a tenured faculty member at Cornell University in Ithaca, New York for the past 30 years. I earned a Ph.D. jointly from MIT and the Woods Hole Oceanographic Institution in 1979. I have studied global change since the 1970s and have published over 200 research papers and have edited or written 7 books. I have served on 12 committees and panels of the US National Academy of Sciences, the U.S. Environmental Protection Agency, and the International Council of Science, including several that addressed global change. I have chaired 4 of these committees and panels. I am an expert on the role of methane emissions as a driver of global warming.

2. I am submitting this affidavit as a witness for interveners NC WARN and The Climate Times.

3. When burned, natural gas emits 60% of the CO_2 that coal emits to produce the same amount of energy. Thus, natural gas has been seen by some, including utilities, as a so-called "bridge fuel" from other fossil fuels to the future when renewable energy dominates our country's electrical energy generation.

4. This concept of natural gas as a bridge fuel was based solely on CO_2 emissions, and ignored emissions of methane, a very potent greenhouse gas that also is contributing significantly to global warming. The latest synthesis report from the Intergovernmental Panel on Climate Change (IPCC, 5th Synthesis) from 2013[1] concluded that current emissions of methane equal the current emissions of CO_2 as a driver of global warming.

5. In 2011, I was the lead author on the very first analysis of the role of methane in the greenhouse gas footprint of natural gas produced from shale formations ("shale gas"), published in the peer-reviewed journal *Climatic Change*[2]

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[1] *Intergovernmental Panel on Climate Change (IPCC) 5th Assessment*: https://www.ipcc.ch/report/ar5/

[2] *Methane and the greenhouse-gas footprint of natural gas from shale formations,* Robert W. Howarth, Renee Santoro, Anthony Ingraffea, March 13, 2011, *Climatic Change*, DOI 10.1007/s10584-011-0061-5: http://www.acsf.cornell.edu/Assets/ACSF/docs/attachments/Howarth-EtAl-2011.pdf

with a follow-up in the prestigious journal *Nature*.[3] We concluded that even small emissions of methane could make the global warming consequences of using natural gas worse than coal. Natural gas is composed overwhelmingly of methane, and some leakage is inevitable.

6. Our 2011 analysis[4] indicated that methane emissions from using natural gas were high enough to make the use of natural gas a poor choice as a "bridge fuel." Rather than mitigating global warming, the use of natural gas might actually aggravate global warming. Our analysis also suggested that shale gas was likely to be worse than conventional natural gas. We called for more study, though, since the publicly available data to support our conclusion were limited.

7. Our study received global attention, and was reported in 1,200 newspapers including the *New York Times*.[5] The scientific community took on our challenge for more study, and many new research projects were launched to better measure methane emissions from both conventional natural gas and shale gas development.

8. Several new studies published in 2013 and 2014, such as those led by Miller et al. from Harvard[6] and Brandt et al. from Stanford,[7] supported our analysis that methane emissions from conventional natural gas are large enough as to make this fuel highly undesirable from the standpoint of global warming.

9. A 2012 study by Shindell (then at NASA and now at Duke University) in the journal *Science*[8] concluded that methane emissions were even more important to control then our 2011 papers had concluded. This new study, now endorsed by the United Nations, showed that the temperature of the Earth would warm to dangerous levels of 1.5° C within 15 years and 2° C within 35 years unless global

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[3] *Natural gas: should fracking stop?* Robert W. Howarth, Anthony Ingraffea and Terry Engelder, September 15, 2011, Nature 477, 271–275, doi:10.1038/477271a: http://www.nature.com/nature/journal/v477/n7364/full/477271a.html?WT.ec_id=NATURE-20110915

[4] See footnote 2.

[5] *Methane Losses Stir Debate on Natural Gas,* Tom Zeller Jr., New York Times, April 12, 2011: http://green.blogs.nytimes.com/2011/04/12/fugitive-methane-stirs-debate-on-natural-gas/. *Studies Say Natural Gas Has Its Own Environmental Problems,* Tom Zeller, New York Times, April 11, 2012: http://www.nytimes.com/2011/04/12/business/energy-environment/12gas.html

[6] *U.S. methane emissions exceed government estimates*
Collaborative study indicates fossil fuel extraction, animal husbandry major contributors, Caroline Perry, SEAS Communications, November 25, 2013:
http://news.harvard.edu/gazette/story/2013/11/u-s-methane-emissions-far-exceed-government-estimates/

[7] *America's natural gas system is leaky and in need of a fix, new study finds,* Stanford Report, February 13, 2014,
http://news.stanford.edu/news/2014/february/methane-leaky-gas-021314.html

[8] *Simultaneously Mitigating Near-Term Climate Change and Improving Human Health and Food Security,* Drew Shindell et al, *Science*, January 13, 2012:
http://science.sciencemag.org/content/335/6065/183.abstract?sid=397ac687-9144-4bec-9e96-6a3de6e25dd3

emissions of methane were curtailed. Simply reducing CO_2 emissions would have no effect on this time scale.

10. In 2014, Schneising and colleagues published a peer-reviewed paper based on satellite imagery across the surface of the Earth between 2002 and 2012.[9] They concluded that methane emissions had risen globally over this time period, aggravating global warming. They further concluded that shale gas and oil development in the United States since 2008 had greatly increased global fluxes of methane to the atmosphere and may well be the major driver of the increased concentrations observed by satellite.

11. By early 2015, many studies by academic scientists and US government scientists in the National Oceanic and Atmospheric Administration published in peer-reviewed publications had concluded that methane emissions from the natural gas industry were high.[10]

12. In 2015, the engineer who holds the patent on the instrument approved by the US Environmental Protection Agency to measure methane emissions (Touche Howard) published two peer-reviewed papers concluding that his instrument had been systematically mis-used in a way that had led to under-estimation of methane emissions from the natural gas industry in some highly publicized studies, and quite likely by many studies previously relied upon by the US EPA.[11]

13. The current status of our understanding of how methane emissions affect the greenhouse gas footprint of natural gas is summarized in a peer-reviewed article I published in October 2015 in the journal *Energy & Emissions Control Technologies*,[12] based on over a dozen new peer-reviewed studies published since 2012. Considering the complete lifecycle assessment from production at the well through to delivery and use by the final consumer, conventional natural gas emits approximately 3.8% of the natural gas produced to the atmosphere as methane, and shale gas emits substantially more, probably 10% plus or minus 5%.

14. To compare methane emissions and CO_2 emissions requires a specified time frame. Historically, most analyses used a 100-year time frame, but the

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[9] Schneising, O., Burrows, J. P., Dickerson, R. R., Buchwitz, M., Reuter, M. and Bovensmann, H. (2014), *Remote sensing of fugitive methane emissions from oil and gas production in North American tight geologic formations.* Earth's Future, 2: 548–558. doi:10.1002/2014EF000265: http://onlinelibrary.wiley.com/doi/10.1002/2014EF000265/abstract

[10] National Oceanic & Atmospheric Administration, *Trends in Atmospheric Methane,* accessed 2/9/2016: http://www.esrl.noaa.gov/gmd/ccgg/trends_ch4/

[11] *Methane Leaks May Greatly Exceed Estimates, Report Says*, John Schwartz, August 4, 2015: http://www.nytimes.com/2015/08/05/science/methane-leaks-may-greatly-exceed-estimates-report-says.html

[12] *Methane emissions and climatic warming risk from hydraulic fracturing and shale gas development: implications for policy*, R.W. Howarth, July 1, 2015: https://www.dovepress.com/methane-emissions-and-climatic-warming-risk-from-hydraulic-fracturing--peer-reviewed-article-EECT

Intergovernmental Panel on Climate Change in their 2013 5th assessment report called this arbitrary, and stated that the comparison should be based on time frames more appropriate for the concern being considered. Since the Earth will warm to 1.5 degrees above the pre-industrial baseline within the next 15 years and to 2 degrees within 35 years unless methane emissions are reduced, a 20-year time frame for comparing methane and CO_2 emissions is far more appropriate than a 100-year time frame.

15. At a 20-year time frame for comparison, the Intergovernmental Panel on Climate Change concluded that methane is 86 times more potent than CO_2 as a greenhouse gas.

16. Using the best available data for estimates on methane emissions and the 20-year time frame for comparing methane and CO_2 as greenhouse gases, my recent peer-reviewed paper concluded that both conventional natural gas and shale gas have larger greenhouse gas footprints than coal, even though the CO_2 emissions from burning coal are greater. The total greenhouse gas footprint for conventional natural gas is approximately 1.2 times greater than that for coal. For shale gas, the greenhouse gas footprint is approximately 2.7 times greater than that for coal.

17. Shale gas production now contributes approximately 40% of the total production of natural gas in the United States. Therefore, the average natural gas used in the country (40% from shale gas and 60% from conventional sources) has a greenhouse gas footprint that is 1.8 times greater than that for coal. The U.S. Department of Energy predicts that the percentage of gas production coming from shale gas will increase in coming years, which will increase the greenhouse gas footprint for average natural gas compared to coal.[13]

18. When natural gas is used to generate electricity, the efficiency with which the electricity is generated from the heat released as a fuel is burned must also be considered. Most coal burning plants have efficiencies of 30% to 37%, although higher efficiencies are possible, according to several published studies. Natural gas plants have efficiencies that range from 28% to 58%.[14]

19. Using the information from point #17 and the average efficiencies of 33.5% for coal plants and 43% for natural gas plants, the greenhouse gas footprint for producing electricity per MWh from natural gas (including 40-50% of it coming from shale gas) is 1.4-fold greater than that produced from coal. That is, for every 100 g CO_2 equivalents of emission from using coal, the natural gas plant would produce 140 g CO_2 equivalents.

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[13] See *The Growth of U.S. Natural Gas: An Uncertain Outlook for U.S. and World Supply*, For 2015 EIA Energy Conference, June 15, 2015, Washington, D.C., by John Staub, Team Lead, Exploration and Production Analysis
http://www.eia.gov/conference/2015/pdf/presentations/staub.pdf

[14] See EIA webpage on power plant efficiency: https://www.eia.gov/tools/faqs/faq.cfm?id=107&t=3

20. Based on the above numbers, the Duke Energy proposal to generate 560 MW of electricity from natural gas will produce twice as much in greenhouse gas emissions as the Asheville 376MW coal plant that is proposed to be replaced. That is, each of the planned two, 280 MW natural gas plants individually will produce greenhouse gases equal to the single, old 376 MW coal plant.

21. One clear conclusion is that natural gas – particularly as it comes increasingly from shale gas – is not a bridge fuel. When emissions of methane and CO2 are compared over appropriate time scales, natural gas is an even worse fuel choice than is coal from the standpoint of global warming.

22. It is also critical to re-state and emphasize the point made in #9 above. It is far more important to reduce methane emissions than carbon dioxide emissions over the coming decade or two, if we are to avert extremely dangerous levels of global warming within the next 15 to 35 years. This means that building new plants to produce electricity from natural gas is a disastrous strategy.

23. Several recent studies, including two peer-reviewed papers co-authored by me, show that it is entirely feasible to replace electricity generation from fossil fuels with renewable electricity on the time scale of the next 20 years. It is essential that society do so if we are to reduce the chances of catastrophic damage from global warming.

AFFIDAVIT

Town of Ulysses, Tompkins County, State of New York

I, Robert Howarth, appearing before the undersigned notary affirm the contents of the following statement are true to the best of my knowledge, based on my professional judgement and experience with such matters.

Robert Howarth

Signature

Sworn to (or affirmed) and subscribed before me this the 10th day of Febuary, 2016.

CARISSA M. PARLATO
Notary Public, State of New York
No. 01PA6303992
Qualified in Tompkins County
Commission Expires May 19, 2018

Carissa M Parlato

Official Signature of Notary

Carissa Parlato, Notary Public

Notary's printed or typed name

My commission expires: 5/19/18

EXHIBIT B

AFFIDAVIT OF J. DAVID HUGHES

FOR NC WARN and The Climate Times

Docket E-2 Sub 1089

February 9, 2016

1. My name is J. David Hughes, and I am a geoscientist who has studied energy resources for four decades, including 32 years with the Geological Survey of Canada as a scientist and research manager. I coordinated a publication assessing Canada's unconventional natural gas potential as Team Leader for the Canadian Gas Potential Committee. I have also studied U.S. shale gas extensively and published comprehensive reports on future shale gas production potential. My work has been widely cited in the press, including *The Economist, Forbes,*[1] *Bloomberg,*[2] *The Los Angeles Times,*[3] *The New York Times*[4] and *The Atlantic,*[5] and has been featured in *Canadian Business,*[6] *Walrus*[7] and elsewhere.

2. I am submitting this affidavit as a witness for interveners NC WARN and The Climate Times.

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[1] *Does Anyone Really Know How Long the Shale Boom Will Last?* Tom Zeller, Jr., January 5, 2015: http://www.forbes.com/sites/tomzeller/2015/01/05/does-anyone-really-know-how-long-the-shale-gas-boom-will-last/

[2] *Is the Shale Boom Going Bust?* Bloomberg View, Tom Zeller, April 22, 2014: http://www.bloombergview.com/articles/2014-04-22/is-the-u-s-shale-boom-going-bust .

[3] *'Fracking' the Monterey Shale: boon or boondoggle?* Alex Prud'homme, December 29, 2013: http://www.latimes.com/opinion/op-ed/la-oe-prudhomme-fracking-california-20131222-story.html, and *U.S. Officials cut estimate of recoverable Monterey Shale Oil by 96%,* Louis Sahagun, May 20, 2014: http://www.latimes.com/business/la-fi-oil-20140521-story.html

[4] *Studies Say Natural Gas Has Its Own Environmental Problems,* Tom Zeller, Jr., April 11, 2011: http://www.nytimes.com/2011/04/12/business/energy-environment/12gas.html

[5] *Yes, Unconventional Fuels Are That Big a Deal,* by Charles C. Mann, May 7, 2013: http://www.theatlantic.com/technology/archive/2013/05/yes-unconventional-fossil-fuels-are-that-big-of-a-deal/275616/

[6] *B.C. LNG industry will increase fracking-caused earthquakes: expert,* Laura Cane, August 30, 2015: http://www.canadianbusiness.com/business-news/b-c-lng-industry-will-increase-fracking-caused-earthquakes-expert/

[7] *An Inconvenient Talk: David Hughes Guide to the End of the Fossil Fuel Age,* Chris Turner, June 2009: http://thewalrus.ca/an-inconvenient-talk/

3. Future shale gas production estimates must be carefully reviewed, as 50% of U.S. natural gas production is now shale gas.[8] "Shale" gas is produced by hydraulic fracturing ("fracking"), in conjunction with horizontal drilling, a technique that cracks the source rock to release hydrocarbons.

4. My analysis of shale plays accounting for 88% of shale gas and 82% of shale oil shows that estimates of future production of natural gas from shale plays are likely overstated, given the high decline rates observed and the concentration of high quality wells in relatively small sweet spots within plays, putting ratepayers at risk of natural gas shortages and price spikes. The average shale gas well declines 75-85% over three years, and some 30-45% of a play's production must be replaced each year by more drilling. Drilling outside of sweet spots, as they are exhausted, will require more wells to maintain a given level of production and require higher prices.

5. Seventy-eight percent of U.S. shale gas comes from only six plays, with several currently in decline. The Haynesville in Louisiana and East Texas was the biggest shale play in 2012, and is now down 50% from its January 2012 peak.[9] The largest U.S. shale play, the Marcellus, peaked in June 2015, and is now down 3.4% from peak. Since Duke Energy's gas supply is expected to be supplied by the Gulf coast and Appalachian regions, production declines should send up a red flag.

6. Per my analysis on shale gas well productivity, *Drilling Deeper* (2014) and *Shale Gas Reality Check* (2015), I believe the U.S. Department of Energy's Energy Information Administration's (EIA) projections for shale gas production from major plays through 2040 were far too optimistic by at least 50%.

7. My estimates show that the EIA's 2015 projection of U.S. shale gas production is even more optimistic than the 2014 report by 9%.[10]

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[8] *It's Frack, Baby, Frack as Conventional Gas Drilling Declines*, Mason Inman, June 23, 2014 http://www.scientificamerican.com/article/it-s-frack-baby-frack-as-conventional-gas-drilling-declines-infographic/

[9] *EIA Natural Gas Weekly from February 3, 2016*, http://www.eia.gov/naturalgas/weekly/

[10] From *Shale Gas Reality Check*, 2015: http://www.postcarbon.org/wp-content/uploads/2015/07/Hughes_Shale-Gas-Reality-Check_Summer-2015.pdf
"The EIA's Annual Energy Outlook 2015 is even more optimistic than the AEO2014, which we showed in *Drilling Deeper* suffered from a great deal of questionable optimism. The AEO2015 reference case projection of total shale gas production from 2014 through 2040 is 9%, or 36 tcf, greater than AEO2014. Cumulative production from the major plays in AEO2015, which account for 80% of this production, is 50% higher than my "Most Likely" case in *Drilling Deeper*, and the projected production rate in 2040 is 170% greater. In AEO2015, the EIA is counting much more on unnamed plays or ones—like the Utica Shale—that aren't as yet producing very much shale gas."

8. Many companies are losing money on shale plays, and with interest rates increasing, the dollar value of shale assets being 'written down' is increasing.[11] There is evidence that shale gas plays are cash flow negative for many companies, and maintaining the drilling treadmill necessary to offset steep declines requires ever-more investment capital.[12]

9. My analysis[13] was recently proven correct in California's Monterey shale, where reserves were recently decreased by a stunning 96%. In 2011, the EIA estimated that the Monterey Shale in California contained two-thirds of the shale oil resources in the U.S. After reviewing the data, I concluded that the EIA's estimate was vastly overstated. In early 2014, the EIA quietly downgraded its estimate from 13.7 billion to 600 million barrels.[14] In October 2015 the U.S. Geological Survey (U.S.G.S.) released a report further downgrading resources, so that EIA's initial estimates were reduced by a startling 99%, thus agreeing with myself and others.

10. I am not the only expert disputing the EIA's numbers. Mr. Art Berman has also sounded the alarm about overly optimistic production rates and reserves for many years.[15]

11. In order to maintain the current level of shale gas production, the U.S. will need to drill many thousands of wells each year, and this number will escalate as the sweet spots become saturated with wells and drilling moves into lower productivity parts of plays. This will require higher prices.[16] Drilling rates have already fallen below what is

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[11] *BHP Billiton writes down $7.2bn of shale assets,* January 15, 2016, BBC News: http://www.bbc.com/news/business-35320918

[12] *Gas bubble leaking, about to burst,* Richard Heinberg, October 22, 2012: http://www.postcarbon.org/gas-bubble-leaking-about-to-burst/

[13] *Drilling California: A Reality Check on the Monterey Shale,* J. David Hughes, December 2, 2013: http://www.postcarbon.org/publications/drilling-california/

[14] *U.S. Officials Cut Estimate of Recoverable Monterey Shale Oil by 96%,* Louis Sahagun, May 20, 2014: http://www.latimes.com/business/la-fi-oil-20140521-story.html

[15] *Arthur Berman Interview: Why Today's Shale Era is the Retirement Party for Oil Production,* Chris Martenson, February 12, 2015: http://www.resilience.org/stories/2015-02-12/arthur-berman-interview-why-today-s-shale-era-is-the-retirement-party-for-oil-production
Shale, the Last Oil and Gas Train: Interview with Arthur Berman, James Stafford, www.oilprice.com, March 5, 2014: http://oilprice.com/Interviews/Shale-the-Last-Oil-and-Gas-Train-Interview-with-Arthur-Berman.html

[16] *Shale Skeptics Take on Pickens as Gas Fuels Policies,* Edward Klump, Bloomberg, July 15, 2013: http://www.bloomberg.com/news/articles/2013-07-14/shale-skeptics-take-on-pickens-as-gas-fuels-policies *Energy: A Reality Check on the Shale Revolution,* J. David Hughes, Nature, 494, pages 307-308, February 21, 2013: http://www.nature.com/nature/journal/v494/n7437/full/494307a.html?WT.ec_id=NATURE-20130221

required to maintain production and U.S. shale gas production is declining from its peak in July 2015.[17]

12. If natural gas production declines, as is currently the case, and drilling rates cannot be maintained due to poor economics, fuel prices could skyrocket, putting ratepayers at risk of shortages and price spikes.[18] Shale gas (and oil) industries are unsustainable in the longer term unless prices rise considerably, as the best parts of shale plays are exhausted and drilling moves into lower quality geology, requiring ever increasing drilling rates and capital inputs.

13. Long term price expectations are extremely important in estimating the overall lifetime cost of the proposed gas plants. Price versus production forecasts of the EIA are unrealistic in the long term, given the nature of shale gas plays and the fact that the best portions are being drilled now.

14. DEP refused to respond to NC WARN Data Request 1-8, which asked what DEP's price projections for natural gas (low, medium and high) would be over the plant's 30 year life. This information should be readily available, as it will significantly affect the plant's overall economics.

15. In my expert opinion, the cost of natural gas in the medium and long term will be much higher than today, and higher than the projections of the EIA, which will negatively impact the investments Duke Energy is making in natural gas power plants that are expected to run for 30 or more years, and will result in considerably higher costs for ratepayers than expected.

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[17] *EIA Natural Gas Weekly*, February 3, 2016, http://www.eia.gov/naturalgas/weekly/

[18] During 2014, the Northeastern U.S. experienced price spikes for natural gas as the "polar vortex" – a long-lasting blast of Arctic air – drove heating demand off the charts, see *5 charts that explain U.S. electricity prices*, Gavin Bade, March 23, 2015: http://www.utilitydive.com/news/5-charts-that-explain-us-electricity-prices/378054/

AFFIDAVIT

Town of Ulysses, Tompkins County, State of New York

I, Robert Howarth, appearing before the undersigned notary affirm the contents of the following statement are true to the best of my knowledge, based on my professional judgement and experience with such matters.

Signature

Sworn to (or affirmed) and subscribed before me this the 10th day of Febuary, 2016.

CARISSA M. PARLATO
Notary Public, State of New York
No. 01PA6303992
Qualified in Tompkins County
Commission Expires May 19, 2018

Official Signature of Notary

Carissa Parlato, Notary Public
Notary's printed or typed name

My commission expires: 5/19/18

EXHIBIT C

AFFIDAVIT OF William E. Powers

For NC WARN and The Climate Times

Docket E-2 Sub 1089

February 5, 2016

1. My name is William E. Powers, P.E., and I am principal of Powers Engineering, 4452 Park Blvd., Suite 209, San Diego, CA 92116. I am a consulting energy and environmental engineer with over 30 years of experience in the fields of power plant operations and environmental engineering. I have worked on the permitting of numerous peaking gas turbine, micro-turbine, and engine cogeneration plants, and am involved in siting of distributed solar photo- voltaic (PV) projects. I began my career converting Navy and Marine Corps shore installation projects from oil firing to domestic waste, including wood waste, municipal solid waste, and coal, in response to concerns over the availability of imported oil following the Arab oil embargo in the 1970's.

2. I authored "*San Diego Smart Energy 2020*" (2007) and "*(San Francisco) Bay Area Smart Energy 2020*" (2012),[1] and have written articles on the strategic cost and reliability advantages of local solar over large-scale, remote, transmission-dependent renewable resources. I have a B.S. in mechanical engineering from Duke University, an M.P.H. in environmental sciences from UNC – Chapel Hill, and am a registered professional engineer in California. My complete resume is included as Attachment A.

3. I am submitting this affidavit as a witness for interveners NC WARN and The Climate Times. I reviewed DEP's publicly available application and exhibits as a basis for these comments.

4. As a regulated monopoly utility with a guaranteed rate of return of ~10%, DEP generates revenue primarily from DEP-owned central-station power plants and transmission lines. DEP does not generate revenue from third-party owned distributed generation, energy efficiency, or renewable energy. DEP generates no revenue from wholesale purchased power.

5. The purpose of this affidavit is to demonstrate my conclusions that:

[1] *San Francisco Bay Area Clean Energy Roadmap Would Slash Emissions, Push Zero Net Energy Buildings*, April 5, 2012: http://www.renewablecommunities.org/2012/04/healthy-energy-independence-roadmap.html

a. DEP's application is inadequate, with insufficient critical analysis, and thus does not provide an adequate basis for the North Carolina Utilities Commission (NCUC) to make a prudent decision on whether to authorize approximately 750 MW of new natural gas plants;[2]
b. Building up to 750 MW of new natural gas power plants does not appear to be in the public interest;
c. Lack of load growth makes the project unnecessary and unjustifiable. In addition, distributed generation, demand response, energy efficiency, combined heat and power, purchased power and solar are cost-effective alternatives to displace coal and gas generation in Duke Energy Progress Western (DEP-West) North Carolina over time. DEP has not made a compelling factual case that an additional 560 MW (two units) natural gas combined cycle (NGCC) plant online in 2019, plus 186 MW of combustion turbines [CTs], online in 2023, are needed.
d. DEP provides no comparative cost information to support its planned phase-out of wholesale market power purchases (2015 IRP, pp. 49-50) in favor of new DEP-owned generation and associated natural gas pipeline and transmission line upgrades/additions.
e. DEP provides no comparative cost information to support the WCMP as justifiable to avoid costs associated with three fuel oil combustion turbine units that would be required in the absence of the WCMP (2015 IRP, p. 14), or to support why "engagement in a unique opportunity to partner with the local gas distribution company to bring cost-effective natural gas supply to the western Carolinas" makes economic sense relative to alternatives.

a. DEP'S APPLICATION IS INADEQUATE AND THUS DOES NOT PROVIDE SUFFICIENT INFORMATION SO THAT THE NORTH CAROLINA UTILITIES COMMISSION (NCUC) CAN MAKE A PRUDENT, WELL-INFORMED DECISION

6. The NCUC Public Staff will not make its findings available until February 22, 2016, this providing only a week for parties, concerned citizens, ratepayers and others to review the Public Staff's findings. This shortened time frame provides no time to review the Public Staff's recommendations and provide data the

[2] Under N.C. Gen. Stat. 62-110.1, a certificate for construction of a generating facility, or Certificate of Public Convenience and Necessity (CPCN) shall not be permitted without showing that the plant is needed and in the public's interest, i.e. "to achieve maximum efficiencies for the benefit of the people of North Carolina" per N.C. Gen. Stat. 62-110.1(c). Although I am not an attorney, I have participated in many CPCN application proceedings, and am familiar with the difference between an adequate v. inadequate application.

Public Staff may not currently have in reviewing a 30-year, $1.1 billion investment.

7. DEP's application for the Asheville gas-fired units is based on its most recent Integrated Resource Plan (IRP). No evidentiary hearings were held by the NCUC to vet the accuracy of the information contained in the IRP. Evidentiary hearings would have allowed independent experts and other parties to verify the accuracy of the application. Complete information is essential to making an informed decision regarding whether the proposed investment is prudent and in the public interest.

8. Similarly, DEP's application in this case does not provide enough information on the need for the project. While DEP asserts that it needs the power in order to comply with NERC reliability standards, there is insufficient information provided by DEP to determine whether DEP's assertion is valid.

Lack of information on cost to construct

9. Following are areas of insufficient information provided by DEP that, in my professional opinion, must be remedied:
    a. There is no break-out of costs of the proposed 560 MW natural gas combined cycle unit, 186 MW combustion turbine, and associated natural gas delivery and electric transmission infrastructure projects, only the total projected cost of $1.1 billion;
    b. The power plant is to be constructed on a reclaimed coal ash pit in a constrained area surrounded by mountains no information is provided on how the reclaimed coal ash pit will be stabilized to support power plant infrastructure.
    c. DEP states the natural gas combined cycle (NGCC) plant output will be limited by transmission constraints, but provides no information on how substantially this will affect output;[3]
    d. DEP projects an annual peak load growth of nearly 17% to occur in Western North Carolina over the next 10 years.[4] Yet the trend is an actual decline in summer peak load between 2007 and 2014, and an up-and-down trend in winter peak load over the same time period.[5] The 2014 winter peak was likely driven by a single extreme and short duration

[3] See DEP's answer to NC WARN Data Request 1-19: "The output is constrained by the site elevation and the transmission capacity. This also drives the $/kW costs higher," included as Attachment B.
[4] See DEP's answer to NC WARN Data Request 1-3, included as Attachment B.
[5] 21-dec-15 DEP response to NC WARN Data Request 1-2. Summer peak: 2007, 849 MW; 2012, 856 MW; 2014, 790 MW. Winter peak: 2007, 935 MW; 2010, 1,060 MW; 2013, 915 MW; 2014, 1,163 MW.

weather event that is not indicative of a relentlessly rising winter peak trend. There is no basis, based on actual WNC summer and winter peak loads over the last eight years, to assume any summer or winter peak load growth over the next ten years. The DEP projection that growth will increase and accelerate over the years – from 0.9% in 2017 to as high as 2.1% in 2021, and 2.4% in 2025, is unsupported by facts and divorced from the reality of static or declining actual peak loads.[6]

e. DEP has not provided basic information about the power plant's natural gas fuel supply, such as necessary upgrades to existing pipelines and compressor stations (including cost and number), the parasitic load to run the compressor stations, and other questions included in NC WARN's Data Request 1-13.[7]

f. Finally, DEP's response to NC Warn Data Request 1-30 states that it does not want to provide transmission line maps. Since the issue of available transmission capacity to import power into the WNC region is critical to determining the legitimacy of the stated need for the project, sufficient information about current transmission capacity and redundancy needs to be provided.

Lack of information on need for DEP to own and operate WCMP capacity

10. DEP has provided no support for its contention that DEP must own and operate the WCMP CC plant due to its "critical function" in lieu of relying on wholesale market power purchases to meet the resource need.

Lack of information on environmental impacts

11. No information is provided by DEP on how much water withdrawals will increase from the French Broad River to provide makeup water to the WCMP CC plant cooling tower.

<u>b. BUILDING UP TO 750 TOTAL MW OF NEW NATURAL GAS POWER PLANTS DOES NOT APPEAR TO BE IN THE PUBLIC INTEREST</u>

[6] See DEP's answer to NC WARN Data Request 1-3: DEP has reported publicly that it expects demand in the Western North Carolina region to grow 15% in the next decade, included as Attachment B.
[7] See DEP's answer to NC WARN Data Request 1-13, including as Attachment B.

12. The applicant, DEP, has the burden of proof to show the plant is in the public interest. DEP does not provide sufficient information to determine how much this plant would raise rates in its 30-year expected lifetime, nor how much the cost of additional infrastructure including natural gas pipeline upgrades, compressor stations, and transmission upgrades would impact rates.

c. POTENTIALLY LOWER-COST, LOWER-RISK DISTRIBUTED GENERATION (AND ENERGY EFFICIENCY) ALTERNATIVES EXIST, BUT HAVE NOT BEEN ADEQUATELY EVALUATED

13. In my professional opinion, the DEP load growth forecast is unsupported and conflicts with the static or declining actual peak load trend in the Western Carolinas over the last eight years. Use of a realistic load forecast eliminates the stated needed for the WCMP. Aside from the lack of need for the project, there are alternatives of comparable or less cost to DEP's proposed 750 MW of natural gas power plant(s).

14. Distributed generation, demand response (DR), energy efficiency (EE), combined heat and power (CHP), purchased power and solar should be relied upon to displace fossil fuel generation in the Duke Energy Progress Western (DEP-West) North Carolina region over the next 10-15 years.
    a. Clean energy resources provide environmental and public health benefits, which DEP does not take into account in advancing the WCMP on economic criteria alone.
    b. DR is an effective, low cost alternative to reducing peak demand. A recent decision (late January 2016) by the U.S. Supreme Court validates the use of DR as a supply resource in wholesale power markets.[9] DEP should expand use of low-cost DR in WNC to further reduce summer and winter peak electricity use.
    c. Approximately 60% of the heat in North Carolina is provided by inefficient electric heating systems.[10] A methodical transition away from electric space heating should be the priority to reduce the winter peak load at the source, not investing in new combined cycle generation primarily to meet inefficient electric space heating load.

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[9] *Supreme Court Upholds FERC Order 745, affirming federal role in demand response*, by Gavin Bade, UtilityDive, 1/25/16: http://www.utilitydive.com/news/supreme-court-upholds-ferc-order-745-affirming-federal-role-in-demand-resp/412668/

[10] See http://www.eia.gov/state/print.cfm?sid=NC, EIA's page for North Carolina, under heading Energy Source Used for Home Heating (share of households), listed as 61.4% electricity, 24.6% natural gas, 3.7% fuel oil, and 7.5% Liquefied Petroleum Gases.

15. New generation projects are not the only means available, nor the lowest cost, to assure grid reliability in the Western Carolinas. Reliability standards provide mechanisms for addressing low probability events that do not require adding additional generation or transmission capacity.
    a. NERC allows planned and controlled load shedding (also known as "demand response") to meet low probability, multiple elements out-of-service Category C contingency events. This is a reasonable no-cost default alternative, acceptable to NERC and SERC for very low probability events that may never happen, as opposed to a $1.1 billion investment in gas turbines, gas pipeline(s), and transmission system upgrades.
    b. NERC and SERC also permit the consideration of probability in assessing whether a specific grid reliability scenario involving multiple contingencies, such as the simultaneous loss of two 230 kV line segments in the Asheville area, must be mitigated according to a generic deterministic reliability standard. To the extent that DEP is advancing the WCMP as the reliability solution to a specific low probability contingency event in the Asheville area, there may be a low- or no-cost administrative solution via SERC that would eliminate this grid reliability justification for the WCMP.

16. Please note the Petition to Intervene of Columbia Energy, LLC, filed in this docket on February 2, 2016, (and granted by the Commission on 2/4/16) asserting that Columbia has an existing 523 MW NGCC located in Gaston, South Carolina. Columbia states that it is ready, willing and able to provide this 523 MW of capacity and energy to DEP annually at DEP's avoided cost for energy and capacity. Columbia states that it holds firm pipeline transportation contracts to access natural gas on existing pipelines. Columbia also states that the power would be provided at lower cost than DEP's estimated cost.

William E. Powers

California All-Purpose Acknowledgment

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document, to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document

State of California
County of San Diego

On Feb. 5th, 2016, before me, Elyce Marie Martinez, Notary Public, personally appeared William E. Powers.
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity (ies) and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct

WITNESS my hand and official seal.

Elyce Marie Martinez
Signature of Notary Public

OFFICIAL SEAL
ELYCE MARIE MARTINEZ
NOTARY PUBLIC-CALIFORNIA
COMM. NO. 1995401
SAN DIEGO COUNTY
MY COMM. EXP. OCT. 26, 2016

OPTIONAL

Description of Attached Document

Title or Type of Document Affidavit of William E. Powers
Document Date: 2/5/2016 Number of Pages (including this one) _____
Additional Information _____

Capacity(ies) Claimed by Signer

- ☐ Individual
- ☐ Corporate Officer- Title(s) _____
- ☐ Partner: __ Limited __ General
- ☐ Attorney-in-Fact
- ☐ Trustee
- ☐ Guardian or Conservator
- ☐ Other

Signer is representing: _____

Right Thumbprint of Signer 1

Right Thumbprint of Signer 2

OFFICIAL COPY Feb 12 2016

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 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 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 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 H

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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

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[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

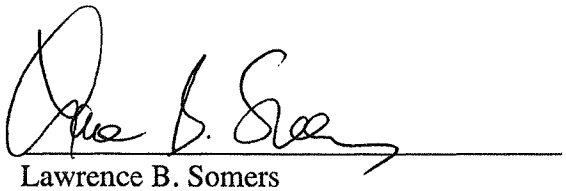
[15] Approximately half of these estimated sunk development costs may need to be written off if the project were to be delayed.

[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

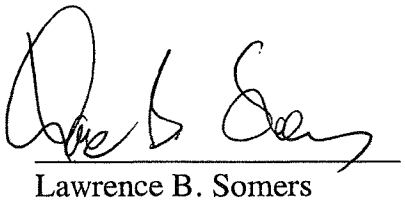

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EXHIBIT I

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)

EXHIBIT K

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	))))))	NOTICE OF APPEAL AND EXCEPTIONS BY NC WARN AND THE CLIMATE TIMES

NOW COME NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-90 and Rule 18 of the North Carolina Rules of Appellate Procedure, and gives Notice of Appeal to the North Carolina Court of Appeals from the North Carolina Utilities Commission's ("Commission") Order Granting Application in Part, With Conditions, and Denying Application in Part issued on March 28, 2016 ("CPCN Order") and the Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) issued on May 10, 2016 ("Bond Order").

As set forth below, the Commission in its CPCN Order grants a certificate of public convenience and necessity (the "certificate") to Duke Energy Progress, LLC ("DEP") for its proposed natural gas-fired electric generation facility in Buncombe County (the "facility"). Contrary to North Carolina law, the CPCN Order fails to meet the standards for the issuance of a certificate, i.e., the project is both fair and reasonable, and the facility is in the public convenience and is necessary. The decision to issue the certificate was not based on a fair process

or a complete record. Moreover, the state statute, the Mountain Energy Act of 2015, Session Law 2015-110, under which the Commission granted the certificate, is unconstitutional on its face and as applied by the Commission.

As also set forth below, the Commission in its Bond Order required that NC WARN and The Climate Times post a $10 million bond or undertaking as a condition of appealing the CPCN Order. Contrary to North Carolina law, the Bond Order was not supported by record evidence or adequate findings of fact, and the Bond Order is unconstitutional as applied.

On May 19, 2016, NC WARN and The Climate Times filed with the Court of Appeals a Petition for Writ of Certiorari and Petition for Writ of Supersedeas as to the Bond Order. Pending review by the Court of Appeals, and in an effort to ensure that all appellate deadlines are met, NC WARN and The Climate Times file without bond the present Notice of Appeal and Exceptions as to the Bond Order and the CPCN Order.

EXCEPTION NO. 1 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 8 and 43-44 of the CPCN Order, and supporting findings of fact, pages 29 and 39-43, based on an unfair process resulting in an incomplete record. As a result, these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light

of the entire record; are arbitrary and capricious; and are not in the public interest.

In making its conclusions and findings, the Commission relied on a "paper record" based on an arbitrarily-limited opportunity for filing comments based on its interpretation of the Mountain Energy Act of 2015, Session Law 2015-110, that the decision had to be rendered within 45 days of the filing of the application. As a result, the Commission did not follow its normal hearing process of allowing intervention, modified discovery, the prefiling of expert testimony, an evidentiary hearing with cross examination and rebuttal witnesses, and submittal of proposed decisions and briefs. A single public hearing was held only 6 days after the application was filed. As a result, the record upon which the certificate was granted was incomplete and due process was violated.

As applied by the Commission, the Mountain Energy Act of 2015 was additionally in violation of North Carolina constitutional and statutory requirements prohibiting monopolies unless they are fairly regulated. N.C. Const. art. I, § 34.

EXCEPTION NO. 2 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 8 and 43-44 of the CPCN Order, and supporting findings of fact, pages 29 and 39-43, by following the provisions of the Mountain Energy Act of 2015, Session Law 2015-110, which is unconstitutional on its face in that it grants a private emolument to a public utility that is essentially unregulated due to the Mountain Energy Act of

2015. As a result, the grounds upon which the Commission determined these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The Mountain Energy Act of 2015 grants a single company, DEP, an exclusive emolument, i.e., an unreasonably expedited review period, in violation of the North Carolina Constitution. N.C. Const. art. I, § 32.

EXCEPTION NO. 3 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 7 and 43-44 of the CPCN Order, and supporting findings of fact, pages 35 and 37-38, regarding the devastating impacts of the methane vented and leaked from the fuel infrastructure from fracking gas wellhead to burn point, on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The Commission was required to support its conclusions of law with competent findings of fact. It has not done so regarding the climate impacts from methane venting and leakage. There are no facts or evidence in the entire record

supporting the Commission's conclusion, while there are dispositive statements by experts through affidavit that the proposed plants will have an adverse impact on the climate.

EXCEPTION NO. 4 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 7, 43-44 of the CPCN Order, and supporting findings of fact, pages 31-35, regarding the economic risks associated with the project's reliance on natural gas, on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The Commission was required to support its conclusions of law with competent findings of fact. It has not done so regarding the economic risks associated with fracking gas availability and price increases over the life of the facility. There are no facts or evidence in the entire record supporting the Commission's conclusion, while there are dispositive statements by experts through affidavit that the reliance on fracking gas is an unreasonable risk. In the CPCN Order, the Commission ignores the unrefuted testimony of experts on the risks of reliance on natural gas as the fuel source for its proposed generating plants because of the future reduced availability of natural gas and the predicted

price increases. This will result in unfair and unreasonable rate hikes for consumers from escalating fuel costs and stranded assets.

EXCEPTION NO. 5 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 7 and 43-44 of the CPCN Order, and supporting findings of fact, pages 29-37, regarding the need for the project on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The Commission was required to support its conclusions of law with competent findings of fact. It has not done so regarding the need for the project as it ignored evidence that the increased capacity is both unnecessary and cost ineffective. Part of the record was affidavit testimony from experts that the need for the project had not been adequately proved, yet the Commission failed to make findings of fact refuting this evidence.

EXCEPTION NO. 6 (as to the Bond Order):

The Commission erred in making its Conclusions of Law, page 7 of the Bond Order, and supporting findings of fact, pages 5-7, regarding the need for a bond or undertaking on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate

constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The relevant statute, N.C. Gen. Stat. § 62-82(b), requires a finding that an appeal will result in a delay in construction. No such evidence was presented to the Commission, and the Commission failed to make such a finding of fact.

EXCEPTION NO. 7 (as to the Bond Order):

The Commission erred in making its Conclusions of Law, page 7 of the Bond Order, and supporting findings of fact, pages 5-7, regarding the bond or undertaking amount of $10 million on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

No evidence was submitted to the Commission in support of any bond amount whatsoever. Only conclusory, hypothetical damage amounts were provided by DEP for the Commission's consideration without supporting evidence. Further, the Commission did not make findings of fact, and was not presented with evidence, as to why $10 million was the appropriate amount for the bond or undertaking.

EXCEPTION NO. 8 (as to the Bond Order):

The Commission erred in making its Conclusions of Law, page 7 of the Bond Order, and supporting findings of fact, pages 5-7, regarding bond or undertaking amount of $10 million on the grounds that this bond was beyond the Commission's statutory authority and jurisdiction; violates constitutional provisions; is affected by errors of law; is unsupported by competent, material and substantial evidence in light of the entire record; is arbitrary and capricious; and is not in the public interest.

The required $10 million bond or undertaking is tantamount to preventing any appeal of the Commission's CPCN Order and thereby blocks access to the courts and due process for litigants in certificate of public convenience and necessity cases. For these reasons and others, the Bond Order violates N.C. Const. art. I §§ 18, 19; U.S. Const. amends. I, XIV.

CONCLUSION

For the reasons set forth above, the CPCN Order and Bond Order are arbitrary and capricious; affected by errors of law; unsupported by competent, material, and substantial evidence in light of the entire record; violate constitutional provisions; beyond the Commission's statutory power and jurisdiction; and are not in the public interest.

Respectfully submitted, this the 27th day of May, 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 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 27th day of May, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: _____
Matthew D. Quinn

EXHIBIT L

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May 31, 2016

VIA ELECTRONIC FILING

Gail L. Mount
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

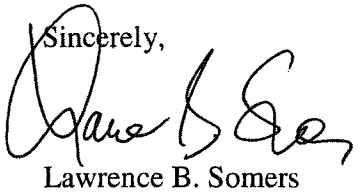
RE: Duke Energy Progress, LLC's Motion to Dismiss Appeal of NC WARN and The Climate Times
Docket No. E-2, Sub 1089

Dear Ms. Mount:

I enclose Duke Energy Progress, LLC's Motion to Dismiss Appeal 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

Enclosure

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 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	)	DUKE ENERGY PROGRESS' MOTION TO DISMISS APPEAL OF NC WARN AND THE CLIMATE TIMES

NOW COMES Duke Energy Progress, LLC, ("DEP" or "the Company") pursuant to N.C. Gen. Stat. §62-82(b), N.C. Gen. Stat. §62-90, North Carolina Rule of Appellate Procedure 25(a), and the North Carolina Utilities Commission's April 27, 2016 *Procedural Order on Bond* and hereby moves to dismiss the Notice of Appeal and Exceptions By NC WARN and The Climate Times (collectively, "Appellants"), filed on May 27, 2016 ("Notice of Appeal"). In support of its Motion, the Company states as follows:

1. On March 28, 2016, the Commission issued its *Order Granting Application in Part, with Conditions, and Denying Application in Part* ("CPCN Order"), holding 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.

2. On April 25, 2016, along with a Motion to Set Bond, Appellants filed a Motion for an Extension of Time to File Notice of Appeal and Exceptions. The Commission granted the motion, extending the period to file notice of appeal until May 27, 2016.

3. On May 10, 2016, the Commission issued its *Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)*("Appeal Bond Order"), which required Appellants to file an executed undertaking or bond on or before May 27, 2016, and prior to filing their Notice of Appeal.

4. On May 19, 2016, Appellants filed a Petition for a Writ of Certiorari, a Petition for a Writ of Supersedeas, and a Motion for Temporary Stay with the North Carolina Court of Appeals, seeking review of and temporary relief from the Commission's Appeal Bond Order. The Court of Appeals denied Appellants' Motion for a Temporary Stay on May 24, 2016.

5. On May 27, 2016, Appellants filed their Notice of Appeal; however, they expressly noted they did so without filing the undertaking or appeal bond required by N.C. Gen. Stat. §62-82(b) and the Appeal Bond Order.[1]

ARGUMENT

Appellants failed to timely file the prerequisite undertaking or appeal bond required by N.C. Gen. Stat. §62-82(b) and the Appeal Bond Order and their appeal should be dismissed as a matter of law. 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 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*

[1] Notice of Appeal, at p. 2.

> *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.*

(emphasis added). Likewise, the Commission's Appeal Bond Order required Appellants to file an executed undertaking or bond prior to filing their Notice of Appeal. In pertinent part, the Appeal Bond Order provided as follows:

> [Appellants] 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.

Appellants sought a temporary stay of the Appeal Bond Order from the Court of Appeals, which was denied. Accordingly, because of their failure to timely take action to perfect their appeal by filing the required undertaking or bond, Appellants' Notice of Appeal should be dismissed pursuant to North Carolina Rule of Appellate Procedure 25(a). Rule 25(a) provides, in pertinent part, as follows,

> *If* after giving notice of appeal from any court, commission, or commissioner *the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed.* Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court. . . . motions made under this rule to a commission may be heard and determined by the chair of the commission.

(emphasis added). Because Appellant's notice of appeal has not yet been filed in the Court of Appeals (as the appeal has not yet been docketed), DEP's motion to dismiss is

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Progress, LLC's Motion to Dismiss Appeal 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 31st day of May, 2016

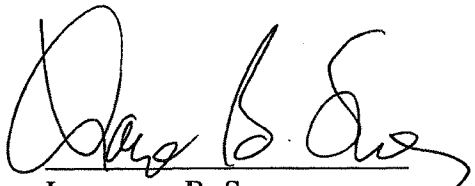

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EXHIBIT M

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' RESPONSE TO MOTION TO DISMISS APPEAL

NOW COME NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-90 and Rule 25 of the North Carolina Rules of Appellate Procedure, and serve the following Response to Duke Energy Progress LLC's ("DEP") Motion to Dismiss Appeal. In support of this Response, NC WARN and The Climate Times state as follows:

BACKGROUND

1. On March 28, 2016, the N.C. Utilities Commission ("Commission") entered an Order Granting Application in Part, with Conditions, and Denying Application in Part ("CPCN Order").

2. Appeals from orders granting certificates of public convenience and necessity are generally subject to the bond requirements described in N.C. Gen. Stat. § 62-82(b). Thus, on April 25, 2016, NC WARN and The Climate Times filed a Motion to Set Bond. To allow time for the Commission's ruling on the Motion to Set Bond, NC WARN and The Climate Times simultaneously filed a Motion for Extension of Time to

File Notice of Appeal and Exceptions, and the Commission extended the deadline for appeals to May 27, 2016.

3. 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 NC WARN and The Climate Times with an opportunity to file a Reply. Consistent with this Procedural Order, DEP filed a Response on May 2, 2016, and NC WARN and The Climate Times filed a Reply on May 5, 2016.

4. In its Response, DEP refused to state that an appeal would result in delays in the initiation of construction. *DEP's Response* ¶ 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.

5. Among other things, NC WARN and The Climate Times' Reply of May 5 called the Commission's attention to the fact that DEP failed to substantiate any of its alleged damages estimates. *Reply* ¶¶ 5-6. The 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 NC WARN and The Climate Times, could ever post a $50 million bond. *Id.* ¶¶ 11-12. Finally, the Reply emphasized that NC WARN and The Climate Times are not seeking an injunction or stay of the Commission's CPCN Order. *Id.* ¶ 3.

6. On May 10, 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Bond Order"). 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. However, it goes without saying that the Petitioners cannot afford a $10,000,000.00 bond, and cannot honestly sign an undertaking representing the ability to pay $10,000,000.00 in damages. Thus, the Commission's Bond Order is tantamount to dismissing any appeal of the CPCN Order.

7. As described herein, NC WARN and The Climate Times respectfully argue that the Bond Order was erroneous and should be reversed. Since the erroneous Bond Order is the obstacle to appealing the CPCN Order, NC WARN and The Climate Times should not be barred by the bond statute from pursuing an appeal of the CPCN Order.

8. There is no case law or rule describing whether the correct action is to file a notice of appeal from the Bond Order or, alternatively, a petition for writ of certiorari with the N.C. Court of Appeals. In an effort to be certain that all rules are complied with, on May 19, 2015, NC WARN and The Climate Times filed a Petition for Writ of Certiorari and Petition for Writ of Supersedeas with the N.C. Court of Appeals. The Petition for Writ of Certiorari asked the court of appeals to overturn the Bond Order, and the Petition for Writ of Supersedeas asked the court of appeals to stay enforcement of the Bond Order so that an appeal of the CPCN Order can proceed until such point as the court of appeals determines whether the Bond Order is appropriate. Because the court of appeals has not ruled upon these petitions, and in a further effort to ensure that all appellate rules are followed, on May 27, 2016, NC WARN and The Climate Times filed

a Notice of Appeal and Exceptions with the Commission concerning the CPCN Order and Bond Order.

9. On May 31, 2016, DEP filed a Motion to Dismiss the Notice of Appeal and Exceptions of NC WARN and The Climate Times. For the following reasons, the Motion to Dismiss should be denied.

ARGUMENT

10. DEP's Motion to Dismiss is premised upon the Bond Order, yet the Bond Order is presently the subject of a strong appellate challenge. If DEP's Motion to Dismiss is granted, it is quite realistic that the N.C. Court of Appeals reverses the Bond Order yet NC WARN and The Climate Times will have no recourse to challenge the CPCN Order because their appeal will have already been dismissed. Hence, NC WARN and The Climate Times respectfully request that judgement on the Motion to Dismiss be withheld until the N.C. Court of Appeals issues a ruling on the pending Petitions for Writ of Certiorari and Supersedeas. The remainder of this Response is dedicated to demonstrating the legitimacy of the challenge to the Bond Order.

11. 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).

12. 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."

13. 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. *DEP's Response* ¶ 10. Further, the Bond Order did not find that the appeal will cause a delay in beginning construction. The Bond Order'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." *Bond Order* 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, NC WARN and The Climate Times are not requesting a stay, and therefore it is highly unlikely that DEP will delay anything as a result of the appeal. Accordingly, there should be no bond requirement.

14. Undersigned counsel is aware of no cases interpreting the bond statute, N.C. Gen. Stat. § 62-82(b), at issue presently. However, the N.C. Court of Appeals has

reversed bond requirements in other contexts where the bond was not supported by evidence. One example is *Currituck Assocs. Res. P'ship v. Hollowell*, 170 N.C. App. 399, 612 S.E.2d 386 (2005). In that case, 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.* The court of appeals 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, the court of appeals reversed the trial court and remanded for further bond proceedings. *Id.* at 404, 612 S.E.2d at 389.

15. 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." *Response* ¶ 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.

16. 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.

17. These are just a few examples. 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.

18. Further, the 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 Bond Order is not supported by competent record evidence.

19. It follows that the Bond Order is defective. Yet it is the Bond Order that is the basis for DEP's Motion to Dismiss. NC WARN and The Climate Times should not be barred from pursuing an appeal based on a defective Bond Order. Instead of dismissing this appeal, NC WARN and The Climate Times respectfully request that the Commission wait for the N.C. Court of Appeals to reach a decision on the Petitions for Writ of Certiorari and Supersedeas.

20. Even if the Commission sees fit to dismiss the appeal of the CPCN Order for failure to post a bond, the appeal of the Bond Order should not be dismissed. In relevant part, the bond 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 . . . . 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.

N.C. Gen. Stat. § 62-82(b). Thus, the requirement to post a bond arises for a "party or parties opposing, and appealing from, an order of the Commission which awards a certificate" of public convenience and necessity. *Id.* The appeal of the Bond Order is not itself a challenge to the CPCN Order and is therefore not subject to the requirement of a bond. Hence, the bond statute cannot justify DEP's attempt to have the Notice of Appeal and Exceptions from the Bond Order dismissed.

CONCLUSION

For the reasons set forth above, NC WARN and The Climate Times respectfully request that DEP's Motion to Dismiss Appeal be denied or, in the alternative, a ruling on the Motion to Dismiss Appeal should be withheld until the N.C. Court of Appeals issues its decision on the Petitions for Writ of Certiorari and Supersedeas.

Respectfully submitted, this the 3 day of June, 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 NC WARN AND THE CLIMATE TIMES' RESPONSE TO MOTION TO DISMISS APPEAL 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 3 day of June, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: _____
Matthew D. Quinn

EXHIBIT N

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 HEARING

BY THE CHAIRMAN: 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 Duke Energy Progress, LLC (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. The Commission established an expedited procedure to rule upon NC WARN's motion as the timing of NC WARN's motion left only 32 days for an order and compliance before NC WARN's Notice of Appeal was due.[1] On May 2, 2016, DEP filed a Verified Response to Motion to Set Bond of NC WARN and the Climate Times, and on May 5, 2016, NC WARN filed a Reply.

On May 10, 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) (Bond Order), requiring NC WARN to file the prerequisite undertaking or bond in the sum of $10 million prior to the filing of its Notice of Appeal and established a procedure for subsequent proceedings to review and potentially modify the pre-notice of appeal bond or undertaking.

On May 19, 2016, NC WARN filed a Petition for Writ of Certiorari to review the Bond Order and a Petition for Writ of Supersedeas to stay the execution and enforcement of the Bond Order. On June 7, 2016, the North Carolina Court of Appeals issued an order allowing the petition for writ of certiorari for the limited purpose of vacating and remanding the Bond Order entered on May 10, 2016, and requiring the Commission on remand to set bond, in its discretion, in an amount that is in accordance with G.S. 62-82(b) and

[1] On May 27, 2016, NC WARN filed notice of appeal to the Commission's March 28, 2016 Order on DEP's request for a Certificate of Public Convenience and Necessity. NC WARN filed no bond or undertaking with its Notice as required by G.S. 62-82(b).

based upon competent evidence. The Court of Appeals dismissed the petition for writ of supersedeas as moot.

The Chairman finds good cause to schedule a hearing to take evidence on the amount of bond or undertaking to be set by the Commission pursuant to G.S. 62-82(b).

IT IS THEREFORE, SO ORDERED as follows:

1. That an evidentiary hearing for the purpose of receiving competent evidence on the issue of the amount of bond or undertaking to be set by the Commission pursuant to G.S. 62-82(b) is scheduled for Friday, June 17, 2016, beginning at 9:30 a.m. in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina;

2. That DEP's verified response filed on May 2, 2016, shall constitute pre-filed direct testimony. DEP shall sponsor a witness or witnesses appropriately qualified to provide the proper foundation to adopt the verified response and be subject to cross-examination on it.

3. That DEP shall be allowed to augment said pre-filed testimony through live testimony from the stand as well as DEP may prepare written revisions to the verified response dated May 2, 2016, which shall be filed on or before June 16, 2016.

4. Any DEP witness testimony shall be subject to cross-examination at the hearing by NC WARN.

5. NC WARN shall sponsor a witness or witnesses with respect to any factual issues NC WARN wishes to raise responsive to DEP's evidence or to the June 7, 2016 order of the North Carolina Court of Appeals, subject to cross-examination, at the hearing on June 17, 2016. In addition, NC WARN should be prepared to address its willingness and/or ability to execute an undertaking or post a bond as required by G.S. 62-82(b).

6. DEP and NC WARN shall be permitted and should be prepared to make arguments at the hearing as to their positions as to how the Commission should comply with the Court's June 6, 2016 order.

ISSUED BY ORDER OF THE COMMISSION.

This the 8th day of June, 2016.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Chief Clerk

EXHIBIT O

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	))))))	RESPONSE TO ORDER BY NC WARN AND THE CLIMATE TIMES

NOW COME NC WARN and The Climate Times ("TCT"), by and through the undersigned attorney, with a response to the Commission's Order setting Hearing, filed June 8, 2016.

1. By providing Duke Energy another opportunity to provide substantive testimony the Commission is abusing its discretion. In holding an expedited and hybrid hearing of oral arguments and new witnesses, the Commission is simply allowing Duke Energy yet another attempt to get its position right. In its Order, filed June 7, 2016, the Court of Appeals gave the Commission the opportunity to set a bond and "in its discretion, set bond in an amount that is in accordance with N.C. Gen. Stat. 62-82(b) and based upon competent evidence." The Court did not allow the Commission to reopen the record in order base the bond amount on competent evidence.

2. There is no competent evidence in the record on "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)." G.S. 62-82(b). Without unduly repeating previous arguments, the rough guesses in Duke Energy's March 2 response, albeit verified, do not raise to the level of providing competent evidence. Duke Energy also provided no competent evidence that the beginning of construction of the facility would definitively be delayed, a necessary finding for the Commission to make in setting a bond or undertaking. Therefore, the Commission should find based on the evidence presently before it that no bond is required.

3. In the event that the Commission does reopen the record to new evidence and testimony, NC WARN and TCT do not see how they can meaningfully review new testimony and prepare to cross-examine Duke Energy's witness (or witnesses) by June 17, 2016, when the Order provides Duke Energy the opportunity to supplement its May 2, 2016 Response on June 16, the day before the evidentiary hearing the next morning. Experts who may be able to assist NC WARN and TCT in the review of Duke Energy's new testimony are not available on such short notice, nor could such an expert, even if available, provide coherent testimony under cross-examination in response to evidence submitted provided by Duke Energy only a few hours before.

4. NC WARN and TCT understand the Commission's position that it was required by the Mountain Energy Act, S.L. 2015-110, to expedite the review of the certificate *sub judice*. However, setting a bond under pursuant to G.S. 62-82(b) is a matter of first impression and is, for that matter, the only statutorily

required bond without a request for a stay of an agency decision in North Carolina law. As such, the Commission should ensure the process is deliberate and provides NC WARN and TCT the opportunity to participate in a fair and meaningful manner.

THEREFORE, NC WARN and TCT pray the Commission reconsider its Order and not allow Duke Energy to provide additional testimony and witnesses,

OR IN THE ALTERNATIVE,

If the Commission allows additional testimony, it provides NC WARN and TCT at least ten days following Duke Energy's deadline to submit additional testimony to review and provide witnesses to respond to the testimony prior to an evidentiary hearing.

Respectfully submitted, this the 13th day of June 2016.

/s/ John D. Runkle

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing RESPONSE TO ORDER BY NC WARN AND THE CLIMATE TIMES (E-2, Sub 1089) upon each of the parties of record in this proceeding or their attorneys of record by deposit in the U.S. Mail, postage prepaid, or by email transmission.

This is the 13th day of June 2016.

/s/ John D. Runkle

EXHIBIT P

PLACE: Dobbs Building
Raleigh, North Carolina
DATE: June 17, 2016
DOCKET NO.: E-2, Sub 1089
TIME IN SESSION: 9:30 A.M. TO 12:34 P.M.
BEFORE: Chairman Edward S. Finley, Jr., Presiding
Commissioner Bryan E. Beatty
Commissioner ToNola D. Brown-Bland
Commissioner Don M. Bailey
Commissioner Jerry C. Dockham
Commissioner James G. Patterson
Commissioner Lyons Gray

IN THE MATTER OF:

Duke Energy Progress, LLC

Application for a Certificate of Public Convenience and Necessity to Construct a 752 Megawatt Natural Gas-Fueled Electric Generating Facility in Buncombe County near the City of Asheville

VOLUME 2

A P P E A R A N C E S:

FOR DUKE ENERGY PROGRESS, LLC:

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P R O C E E D I N G S

CHAIRMAN FINLEY: Good morning. Let's come to order and go on the record. My name is Edward Finley, and with me this morning are Commissioners Bryan E. Beatty, ToNola D. Brown-Bland, Don Bailey, Jerry C. Dockham, James G. Patterson and Lyons Gray.

The Commission now calls for hearing on the issue of Setting and Undertaking or Bond pursuant to G.S. 62-82(b), in Docket Number E-2, Sub 1089, the Application of Duke Energy Progress, LLC, for a Certificate of Public Convenience and Necessity to Construct an Electric Generating Facility in Buncombe County, North Carolina.

On March 28, 2016, the Commission issued an order in the above-captioned docket which, among other things, granted Duke Energy Progress a Certificate of Public Convenience and Necessity to construct two 280-megawatt combined cycle natural gas-fired electric generating units in Buncombe County.

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 in the amount of $250 and requesting an oral argument or evidentiary hearing on the bond requirement.

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

On May 2, 2016, Duke Energy Progress filed a Verified Response to Motion to Set Bond. In summary, Duke Energy Progress indicated that the Commission's CPCN Order properly found that the construction of the two 280-megawatt combined cycle units was necessary to reliably meet the needs of Duke Energy Progress' customers and provide for the early retirement of 379-megawatt Asheville Coal Units 1 and 2, and that the approximate cost of the project was $1 billion. Duke Energy Progress indicated that it had not decided if it would delay the beginning of the construction in response to a potential appeal, but if appeal delays occur, the reasonably estimated increase costs are approximately $100 million in potential coal unit environmental controls and approximately $140 million in potential increased combine cycle construction costs. Duke Energy Progress requested that the Commission set a bond in the minimum amount of $50 million.

On May 5, 2016, NC WARN filed a Verified Reply

to Duke Energy Progress' Response to Motion to Set Bond. In summary, NC WARN argued that Duke Energy Progress' response was an attempt to bully NC WARN away from an appeal. NC WARN argued that Duke Energy Progress has the burden to quantify and substantiate the amount of the bond needed to secure against damages from appellate-related delays in the beginning of construction of the facility. NC WARN stated that Duke Energy Progress provided unsubstantiated and extravagant estimates of the potential damages. NC WARN indicated that Duke Energy Progress' assertions of potential damage are not sufficiently documented and that Duke Energy Progress provided no evidence regarding the 2.5 percent annual cost escalation and did not provide an explanation or breakout of its $50 million estimate.

On May 10, 2016, the Commission issued its Order Setting Undertaking or Bond pursuant to G.S. 62-82(b). The Commission required NC WARN to file an executed undertaking in the sum of $10 million or a bond in the sum of $10 million prior to filing Notice of Appeal. The Commission's order stated that should Duke Energy Progress indicate by September 1, 2016, that it would not delay beginning of construction due to appeal, it would entertain a motion by NC WARN to eliminate the

bond or undertaking requirement. If not, it would schedule a hearing.

On May 19, 2016, NC WARN filed in the Court of Appeals a Petition for Writ of Certiorari, Petition for Writ of Supersedeas, a Motion for Temporary Stay of the Commission's May 10, 2016 Order Setting Undertaking or Bond.

On May 24, 2016, the Court of Appeals denied NC WARN's Motion to Temporary Stay.

On May 27, 2016, NC WARN filed a Notice of Appeal and Exceptions in Docket Number E-2, Sub 1089, without filing the undertaking or appealed bond.

On May 31, 2016, the Court of Appeals -- in the Court of Appeals Duke Energy Progress filed a Response to Petition for Writ of Certiorari, Petition for Writ of Supersedeas.

On May 31, 2016, Duke Energy Progress filed a Motion to Dismiss the appeal for NC WARN's failure to file the required undertaking or appealed bond.

On June 3, 2016, NC WARN filed a Response opposing the dismissal.

On June 7, 2016, the Court of Appeals allowed NC WARN's Petition for Certiorari for the limited purpose of vacating or remanding the Commission's Order Setting

Bond. The Court of Appeals stated that on remand, the Commission shall set, in its discretion, an amount in accordance with G.S. 62-82(b) and based upon competent evidence.

On June 8, 2016, the Commission issued an Order Setting Hearing, providing Duke Energy Progress and NC WARN an evidentiary hearing on the issue of setting undertaking or bond pursuant to G.S. 62-82(b).

In compliance with the State Ethics Act, I'll remind all the members of the Commission of their duty to avoid conflicts of interest, and inquire whether any member of the Commission has a known conflict of interest with regard to this matter this morning?

(No response.)

CHAIRMAN FINLEY: There appear to be no conflicts, so we'll proceed. I now call upon counsel for the parties to announce their appearances, beginning with NC WARN.

MR. RUNKLE: May it please the honorable Commission, my name is John Runkle, representing NC WARN and The Climate Times.

MR. SOMERS: Good morning, Mr. Chairman, members of the Commission. I'm Bo Somers, Deputy General Counsel on behalf of Duke Energy Progress.

CHAIRMAN FINLEY: All right, Mr. Runkle. I understand that you, on behalf of your clients, have filed a response to the Commission's order indicating that we have committed -- that we are abusing our discretion by holding this hearing. I'll hear you on that -- your support of that position.

MR. RUNKLE: Thank you, sir. Part of -- part of our response has been taken care of because Duke Energy did not file any additional testimony yesterday evening. That was our very much concern, that --

CHAIRMAN FINLEY: What I want to hear from you right now about is your argument that we are abusing our discretion by holding this hearing and taking evidence. That's what I want you to address. The first part of your -- the first part of your response, please.

MR. RUNKLE: The abuse of discretion was giving Duke Energy eight days to have testimony by any number of witnesses, and giving us eight hours to prepare a response and having an expert review -- review the testimony and be able to have a witness here today. Since Duke Energy did not put any testimony in yesterday, no additional witnesses to be called and just going to rest on their initial Verified Response --

(To Mr. Watson) Thank you. (Microphone

moved.)

MR. RUNKLE: -- I mean, that was -- that was our concern. That's why we filed on Monday. If Duke was going to put in a lot of witnesses, we needed the opportunity to review that testimony and be able to respond to it in a meaningful manner.

CHAIRMAN FINLEY: And what you say on paragraph 1 is, "Providing Duke Energy another opportunity to provide substantive testimony, the Commission is abusing its discretion. In holding an expedited and hybrid hearing of oral arguments and new witnesses, the Commission is simply allowing Duke Energy yet another attempt to get its position right." The Order filed June 7, 2016, the Court of Appeals gave the Commission the opportunity to set a bond and, in its discretion, set bond in the amount in accordance with the statute based on competent evidence. "The Court did not allow the Commission to reopen the record in order to base the bond amount on competent evidence." Now, is that still your position today or is it not?

MR. RUNKLE: Yes, sir. That's our position, that looking at the Court of Appeals' Order from June 7th, and you -- you read from the -- our Response, but it's taken directly from the Order. You know, this is

sort of a, you know, how many times are we going to allow Duke Energy to do over? I mean, they had a presentation. There was a public hearing. There were opportunities for them. They were able to have a Verified Response to the Motion Requesting to Set a Bond. We can just keep on playing this out. How many times do -- does Duke Energy be able to try to put on competent evidence? I mean, everything that's been put in so far has been very speculative. How many times are we going to be able to do this?

CHAIRMAN FINLEY: All right. Then I take it that you still stand by what you said in paragraph 1, although I sense a bit of equivocation there. I'm prepared to rule on that part of your response.

The assertion is that by allowing Duke Energy Progress to offer substantive testimony, the Commission is abusing its discretion. In response to NC WARN's May 19, 2016 Petition for Writ of Certiorari, the Court issued an Order on June 17, (sic) 2016 vacating and remanding the Commission's May 10, 2016 Order on Bond so that the Commission, in its discretion, should set a bond in accordance with 62-82(b) that's based on competent evidence.

In its May 19 petition, NC WARN cited Currituck

Associates Residential Partnership versus Hollowell, 170 N.C. App. 399, 612 S.E.2d 386 (2005) opinion. In that case, the Court remanded a Superior Court Bond Order, quote, "for a new determination of the proper bond amount based on competent evidence," end quote. That Court cited Iverson versus TM1, Inc. 82, NC App. 161, a 1985 case, quote, "If the parties desire to present new evidence, the trial court should consider that evidence," end quote. Reading Hollowell, it is clear that the Court anticipated the taking of additional evidence. The Order appeal from Hollowell was based on an affidavit based on information and belief. The Court determined that it should have been based on personal knowledge. Based on the Court's January 7, 2016 order, the Court of Appeals -- that's not right -- June 7, 2006 Order on Hollowell and Iverson, NC WARN's response -- request to prohibit NC WARN from providing additional testimony of witnesses is denied.

Anything else? Any other preliminary matters we have to address?

(No response.)

CHAIRMAN FINLEY: All right. Duke?

MR. SOMERS: Mr. Chairman, would you like for us to go first on the amount of bond?

CHAIRMAN FINLEY: Yes, sir.

MR. SOMERS: Okay. I would call --

CHAIRMAN FINLEY: Anything else -- you can take it in whatever -- if that order doesn't suit you, let me know and we can talk about it.

MR. SOMERS: Well, I believe we're here on NC WARN's Motion to Set the Bond. Since they filed the motion and we responded to it, I would normally anticipate that they would have the burden of proof and go first, but we're happy to go first if that is the Commission's preference.

CHAIRMAN FINLEY: Why don't you go first and see if you present evidence that you would like.

MR. SOMERS: Thank you, Mr. Chairman. We would call Mr. Mark Landseidel.

MARK LANDSEIDEL; Being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. SOMERS:

Q Would you please state your name for the record.

A My full name is Mark Eugene Landseidel.

Q What is your business address?

A 400 South Tryon, Charlotte, North Carolina.

Q And who do you work for?

A I work for Duke Energy.

Q What is your position with Duke Energy?

A I'm currently Director Project Development in our Project Management and Construction Department, where I'm responsible for development of new gas-fired generation projects.

Q And specifically, what is your role as it relates to the Western Carolinas Modernization Project or the Asheville combined cycle project that is the subject of this docket?

A I've had responsibility for the full development of the project to the state and onward into the construction which we anticipate to begin in October.

Q And did you file the Verification to the Company's CPCN Application that was filed in this docket?

A Yes, I did.

Q And did you also file the Verification to the Company's May 2nd, 2016 Response to the Motion to Set Bond filed by NC WARN and The Climate Times?

A Yes, I did.

Q All right.

MR. SOMERS: Mr. Chairman, based on the Commission's Order, my understanding is that Duke Energy Progress' May 2nd response, as verified by Mr.

Landseidel, be treated as prefiled direct testimony. Is my understanding correct?

CHAIRMAN FINLEY: Yes, sir.

MR. SOMERS: All right. I would ask that that -- to the extent it's not in the record, I would ask that that testimony be admitted as if the questions and answers were given orally from the stand.

CHAIRMAN FINLEY: That pleading, as so verified by the witness, is received into evidence.

MR. SOMERS: Thank you.

(Whereupon, Duke Energy Progress' Verified Responses to Motion to Set Bond of NC WARN and The Climate Times, accepted into the record as prefiled testimony, was copied into the record as if given orally from the stand.)

17

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1089

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	)	DUKE ENERGY PROGRESS' VERIFIED RESPONSE TO MOTION TO SET BOND OF NC WARN AND THE CLIMATE 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.

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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

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

My Commission expires: 7-30-17

CONTINUED DIRECT EXAMINATION BY MR. SOMERS:

Q Mr. Landseidel, before we get into your Verified Response or testimony, would you describe for the Commission, please, your work experience at Duke?

A Yes. I've worked for Duke Energy for 34 years, approximately 25 of those years in major project development and construction, working across a number of types of projects, from retrofits of existing power plants, to new hydro, to new solar farms, new wind farms, new gas-fired generation projects and gas transmission pipelines. All total, during that time I've probably been responsible for 200 projects, capital projects, ranging in size from as small as $1 million to as large as $1.5 billion, a total cost of those projects probably in the range of $8 billion. Of those projects, around 20 are new generation projects, gas, wind, hydro, solar, and of that 20, 8 are gas-fired generation projects.

Q And were all those 200 major projects that you've worked on in your career at Duke located in North Carolina?

A No. I've worked on projects in North Carolina, South Carolina, Florida, Indiana, Texas, Pennsylvania and Kansas in the United States, and as well in three countries overseas, Argentina, Indonesia and Australia.

Q Mr. Landseidel, in your career at Duke, what experience do you have with establishing construction cost estimates?

A For all of those listed projects, I've been primarily responsible for developing the cost estimates for approvals and for implementing those projects.

Q Likewise, for their projects -- those projects in your 34-year career, how many of them were you involved in negotiating the contracts with the suppliers or contractors that were working on those projects for Duke Energy?

A I would say for most of them, not all.

Q So most of the 200 projects you had some role in the contract development and negotiation; is that correct?

A Correct.

Q All right. How about specifically with the Asheville combined cycle projects that we're here to talk about specifically today? What role did you have in the development or negotiation of the contracts for the construction of that project?

A Specific to contracting?

Q Yes, sir.

A The major equipment supply for the project, the

gas turbines, steam turbines and boilers, as well as the engineering procurement construction contract, earthworks contract, all the contracts required to put in place to build the project.

Q Okay. Now, do you have in front of you the May 2nd, 2016 Response that you verified and that has been admitted as your testimony in this case?

A Yes, I do.

Q All right. Would you look at -- well, it's not numbered, but if you turn to the back of that document, after page 11 which is a page with my signature on it, do you see a page that has Verification at the top?

A Yes.

Q Is that your signature notarized on that page?

A It is.

Q And when you signed the Verification, did you understand that you were signing a statement, as notarized, that you knew the content of this filing and that the same was true and correct to the best of your knowledge, information and belief?

A Yes, absolutely.

Q When you signed this on May the 2nd, 2016, did you provide the numbers that are reflected in this document as to estimated increased construction costs due

to a potential delay of the CPCN due to an appeal?

A Yes.

Q Did you guess at those numbers?

A No. They were based on contracts, estimates, previous experience I've had with construction delays. We can get into more details.

Q Were those numbers extravagant?

A No, I don't believe so. I believe they're reasonable, given the circumstances of this potential delay.

Q The numbers, as reflected in your Verified Response and now testimony, did you pull those numbers out of a, quote, "regulatory hat," unquote?

A Oh, of course not. They're based on, as I said, contracts, estimates, information from various parts of our company.

Q Did you put any number in this document that you verified and are now testifying to under oath in an effort to, quote, "bully," unquote, NC WARN or The Climate Times into not filing an appeal in this case?

A No. Absolutely not.

Q All right. Have you reviewed all 11 pages of this Verified Response that's now in evidence as your testimony?

A Yes, I have.

Q Do you have any changes or corrections to any of the numbers that were calculated and reflected in there that relate to increased construction costs due to an appeal-related delay?

A No changes to the numbers identified.

Q Okay. Do you have anything to augment any other part of that testimony from as it was filed on May the 2nd, 2016?

A At this time, we'd like to change the proposed bond amount from the 50 million to the full amount of the projected delay cost of 240 million.

Q Okay. How about Duke Energy's position on a delay in beginning construction related to an appeal?

A At the time the Company, we made this filing, we hadn't had time to consider the risks associated with construction delay in the event of an appeal. At this time, though, the Company has considered those risks. We consider it to be an important decision, one that has potential risk impact to our customers whom we're obligated to provide clean, affordable, reliable electricity, as well as potential impacts to our shareholders. As such, the Company's not in a position to proceed with the $1 billion project, starting

construction, if there's an appeal pending. To say it another way, in October if there's an appeal pending, we will delay construction.

Q Do you have any other augmentation to your prefiled testimony?

A I do not.

Q All right. If I could ask you to turn, please, to page 4 of your prefiled testimony. Again, this is the May 2nd Response. Let me know when you're at page 4, and specifically on that page paragraph number 6.

A Okay. Just a moment. Okay.

Q Now, based on that paragraph or your understanding of this matter, do you understand that NC WARN has requested that this Commission set their --

MR. SOMERS: And I'll refer to -- instead of saying NC WARN and The Climate Times every time, I'm just going to say NC WARN to refer collectively. That's okay, John?

MR. RUNKLE: Yes. That's fair enough.

MR. SOMERS: Okay.

Q So you understand that NC WARN has asked this Commission to set their appeal bond at a nominal amount of $250. Is that your understanding?

A Yes. That's my understanding.

Q In your professional judgment -- for a $1 billion capital investment for the actual combined cycle project, in your professional judgment is $250 a sufficient amount to secure against any increased cost in construction due to an appeal-related delay?

A It's completely inadequate. The amount is way too low.

Q All right. Let's talk in detail about the estimated construction cost increases that you provided in your prefiled testimony. And if you would, let's start first with paragraph 12 on page 7. Just let me know when you're there.

A All right.

Q Okay. So in this section of your testimony, you discuss the timing deadlines in the Mountain Energy Act. Would you please describe for the Commission how the various timing deadlines under the Mountain Energy Act affect any potential construction delays or any resulting damages in the form of increased cost from a delay in beginning construction of the project?

A If construction were to be delayed, in my opinion we'd be unable to meet the deadline for having the combined cycle project in commercial operation, demonstrating reliable energy delivery in time to support

retirement of the coal units January 31st, 2020.

Q All right. What are the -- would you please describe which deadlines under the Coal Ash Management Act that were extended by the Mountain Energy Act?

A The key one would be removal of ash from the site, and it extended those deadlines and allowed us to defer some environmental controls and other work to the benefit of the Western Carolinas Modernization Project.

Q Okay. And on those environmental controls and related work, did you calculate those costs in your prefiled testimony?

A Yes.

Q Okay. And look at -- if you would, look at paragraph number 13, which is at the bottom of page 7 and continues on to page 8.

A Okay.

Q Anything in that paragraph change between May 2nd and today?

A No.

Q All right. Would you please describe what the approximately 100 million in additional environmental controls are that would be incurred by Duke Energy Progress as a result of an appeal-related delay in beginning construction of the project?

A The three primary projects that make up the $100 million, the first one would be we'd have to modify a wastewater treatment system at the plant, primarily the flue gas desulphurization wastewater. The estimated cost of that project is approximately $25 million.

The second project would be to convert the fly ash collection system from wet to a dry system, and we estimate that cost to be approximately $50 million.

The third project would be to convert the bottom ash collection system from wet to dry, and that project is estimated at approximately $25 million, total $100 million in environmental projects that would otherwise be deferred if we could comply with the Mountain Energy Act.

Q So you just testified to the breakdown of that approximately $100 million in additional environmental controls. Where do those numbers come from?

A Our environmental engineering group put these estimates together, and it's based on having done these projects on a number of our units across the fleet, so their experience in that, looking at the scope of this specific project and what they believe to be a reasonable cost estimate for implementing these controls.

Q All right. Thank you. Let's turn next to

paragraph 14. Now, in this -- in this paragraph you talk about where Duke was, where Duke Energy Progress was as of May 2nd as it relates to finalizing contracts with the major equipment suppliers, correct?

A That is correct.

Q All right. So would you please update the Commission on where the Company is in terms of these contracts as of today's date?

A Sure. Subsequent to the May 2nd filing, we have now given full release to the three major equipment suppliers, one for the two gas turbines, one for the two steam turbines and one for the two boilers, or in combined cycle we call them heat recovery steam generators or HRSGs, so they've been fully released and they were released on May 31st. That was the latest possible date under the contract we could release them and them still be able to meet the delivery-to-site requirements to support the schedule deadlines in the Mountain Energy Act.

Q So what was the date that those suppliers were given the notice to proceed?

A May 31st, 2016.

Q And you may have described this, but I want to make sure it's clear. In laymen's terms, not all of us

negotiate multi-million dollar contracts for a living like you do, but would you explain, please, what giving a contractor or a supplier full notice to proceed means?

A Sure. So they're fully released now to complete their engineering, award subcontracts for major materials, reserve shop space in their manufacturing plants or subcontractor plants. They're out there making major commitments at this time in order to support delivery. Typical lead times for turbines and boilers are in the 18-to-21-month time frame, and for them to get fully released now allows them that time to get them to the site to support our schedule.

Q And you mentioned that that notice was given on May 31st of 2016, correct?

A Correct.

Q Why not June 1st?

A May 31st is a date certain in the contracts, the latest possible date we can issue full notice to where they're still required and agreed they'll deliver the units to the site for the -- to meet the schedule.

Q All right. And you mentioned, I believe, earlier, but what is the total estimated cost, and I'll caution you that details of the cost for the project were filed under seal as confidential information in this

docket, but what is a publicly available estimate of the construction cost for the total project?

A Around a billion dollars.

Q All right. That's a pretty large project, isn't it?

A It's very large, a lot of money.

Q I believe you testified earlier that in your 34 years you've worked on some 200 large construction projects for Duke Energy; is that correct?

A Yeah. Some being -- a million I wouldn't consider being really large, but it depends on the scale -- but up to 1.5 billion.

Q You might not consider a million dollars large, but most people would, wouldn't they?

A Yes.

Q Okay. Now, any of those approximately 200 large projects, as you've defined them, did any of them involve construction delays?

A Certainly.

Q How many?

A I would guess maybe 20 percent.

(Emergency alarm sounds with announcement.)

MR. SOMERS: Mr. Chairman, should we go off the record and take a recess due to the emergency alarm?

CHAIRMAN FINLEY: Yes. The Commission will take a recess until the emergency is over and we can come back in.

(Recess taken from 10:00 a.m. to 10:16 a.m.)

CHAIRMAN FINLEY: Let's come back on the record.

MR. SOMERS: Thank you, Mr. Chairman.

CONTINUED DIRECT EXAMINATION BY MR. SOMERS:

Q Mr. Landseidel, before we were interrupted by the fire alarm, I believe that your response to my last question was that approximately 20 percent of the major construction projects you have worked on in your career involved some form of construction delay; is that correct?

A Yeah. Sounds about right. One in five projects are typical in the industry.

Q So is that a -- is a construction delay an uncommon occurrence?

A No. It's very common. There's lots of causes.

Q What are some of the causes?

A Equipment could be late delivered to the site, a permit could get delayed, a contractor may not perform or a supplier, could have bad weather, could have labor disputes, contract disputes. There's a number of issues

that could cause a delay in construction.

Q Have you ever had a construction project delayed because of an appeal, a court appeal?

A No, not in my experience.

Q Regardless for the reason of the construction delay, are construction delays something that sophisticated parties negotiate in contracts for such large construction projects?

A As best you can. And you develop a contract, you try to outline things like cancellation or termination, exit provisions, how you might deal with a significant project delay, but ultimately it comes down to the situation of the parties involved and negotiating, if you need to, a different result.

Q So have you ever been involved in a major construction project that had a delay where you had to estimate damages due to delay or be involved in a dispute related to what those costs were or who was responsible for them?

A Yes, I have.

Q How many times, roughly?

A Where it got to a dispute level, maybe eight or 10 times.

Q All right. In your prefiled testimony, the May

2nd response, you discuss when construction is scheduled to commence, correct?

A Yes.

Q And when is that?

A October of this year.

Q All right. And what's going to happen in October?

A October of this year we would -- the 1982 ash basin or the new plant is going to be built, will be -- all the ash will have been excavated and clean and we'll begin breach of the dam and filling of the basin with compacted fill up to a level that will support construction of the new combined cycle plant.

Q All right. So in your prefiled testimony, you noted several additional elements of damages due to a delay in construction of the project; is that correct?

A Yes, it is.

Q Looking at the bottom of page 8, you estimated that if the Company delays commencement of construction beginning in October of 2016, that a delay would result in major equipment contracts' cancellation costs of approximately $40 million. Is that your testimony?

A It is.

Q Nothing's changed about that number --

significant piece of it, also, the consultants. And at that stage, that would be about 1 percent of the total project cost, which is quite reasonable for a project like this.

Q All right. And how many of that $8 million has been incurred to date?

A Through May, approximately $5 million.

Q Okay. And in your prefiled response and testimony, you noted in the footnote, footnote 15 on page -- the bottom of page 9, approximately half of those estimated sunk development costs may need to be written off if the project were to be delayed. Would you explain what you mean by that?

A Yeah. My estimate would be is that if we were to delay the project for two years, we would have to rework a significant amount of this development effort, rebid equipment, rebid construction, rework our schedule, our cost estimate. A lot of the work we've done to date would effectively be wasted and we'd have to do it over again or rework. So I'd estimate, in my experience, about half of that would be considered rework.

Q Okay. You mentioned earlier that onsite construction is scheduled to commence in October of this year, correct?

A Correct.

Q When was -- why is October the magic date to begin construction?

A Well, you back up from the Mountain Energy Act requirements for having the plant in service to when you need to order major equipment, as we discussed, and begin construction. So if we can begin construction in October, that will give us time to get the site built up to where we can start major foundations in, say, the third quarter of 2017 and so forth to build the project on schedule. It's not an arbitrary date. It's required to make the schedule.

Q And when was that October 2016 commencement date established?

A I guess it was late last year, November, December.

Q Okay. Through now to the next item of construction-related delay damage that you mention in your testimony, the May 2nd Response, again, on page 9 you note that -- first of all, you talk about if the project were delayed by two years pending completion of the appellate process. Why did you use two years?

A Well, I'm not a lawyer, but in discussions with Mr. Somers, an understanding of the appellate process

could be -- could take two years, maybe more, maybe less, determined that two years was a reasonable allowance for a delay for a potential appeal.

Q All right. You testified in that prefiled response that there would be increased project costs of $50 million, assuming a 2.5 percent annual cost escalation rate during that two-year period. Do you see that?

A I do.

Q Is that number still accurate and true --

A Yes.

Q -- to the best of your knowledge?

A Correct.

Q Are you sure?

A Yes.

Q All right. Would you please explain how you calculated that $50 million figure?

A Simply the arithmetic, the approximate billion dollars of the project escalated at two and a half percent for two years was an additional $50 million. The two and a half percent rate was based upon our Integrated Resource Planning Group who routinely looks at historical data for labor and material cost increases, and then two and a half percent is roughly the 20-year average, and

that's what we use for resource planning, and I think it's reviewed by the -- by this Commission's Staff from time to time. So two and a half percent is a reasonable estimate for escalation of the cost to the plant, that if we build it two years later, the labor and materials are going to be more expensive than if we did it today.

Q And have you -- do you have personal experience with delays and escalation rates and whether projected escalation rates turn out to, in fact, be accurate after the fact?

A Well, oftentimes it could be -- it could be different. In this case for equipment -- equipment, materials and labor for power plants, there's potential that there could be higher escalation rates going forward.

Q Okay. The next item you discussed in the Verified Response, your prefiled testimony, was that Duke Energy Progress will be obligated to pay Public Service Company approximately $45 million in estimated fixed firm transportation service costs during a two-year delay, even though the plant would not be in operation. Do you see that?

A Yes.

Q Is that number still accurate?

A It is.

Q Would you explain to the Commission how you determined that $45 million cost increase?

A Yes. Duke Energy Progress entered into a gas transportation contract with PSNC. That contract has been approved by this Commission. And in that contract, Duke Energy is required to pay for transportation on a monthly basis whether it's used or not, and if the project was delayed for two years, there would be a two-year period where we'd be paying for this gas transportation and not actually bringing gas into the plant, obviously. And if you use the contract volume and the contract estimated rates, that's how you get to the number of $45 million.

Q All right. And was that contract filed by PSNC with this Commission and approved?

A Yes, it was.

Q All right. Why wouldn't Duke just cancel the contract with PSNC if there's going to be a two-year or however long appeal delay?

A It's an alternative. We thought about it. We've estimated that if we were to cancel it in October for delayed construction, there would be a cancellation payment to PSNC in the neighborhood of $17 million, but

the real problem is, is that if we build a gas -- if we go back to them later and want the gas pumped later and they haven't done it coincident with their existing project, the incremental cost is much higher. When we were developing this project and looking at the benefits of doing it now, the estimated transportation rate was more than double what the current rate is in this contract, which would equate to roughly $25 million a year for the life of the plant, ultimately, if it's built, so at this time we think a more prudent step would be to incur those -- those transportation costs and keep that -- keep that contract in place.

Q So if I'm understanding your testimony, you're saying if Duke cancelled the contract with PSNC, it would be a $17 million, per the contract, cancellation fee, plus an approximately $25 million increase in the gas contract rate for the life of the plant?

A That's right, for the life of the contract.

Q $25 million per year more.

A Correct.

Q Why didn't you choose that bigger number?

A I don't think that would be the best -- in the best interest of our customers at this time.

Q All these numbers that you submitted on May 2nd

and have testified to here today under oath, do you believe they're reasonable?

A I do.

Q Are they on the high side?

A I don't think so. I think ultimately it's hard to estimate a construction delay. There are a lot of factors. But based on these and the diligence we put behind these, I think the total delay costs we've estimated are reasonable. Could be more; could be less.

Q Throughout your testimony, and as noted in footnote 16 at the bottom of page 9 of that prefiled testimony and the May 2nd response, it notes that certain cost estimates were filed confidentially under seal with the Commission in this proceeding, correct?

A Yes.

Q And so you've used, in your terms, round numbers in your cost estimates for damages in the form of increased construction costs from a delay in beginning construction due to the appeal; is that right?

A Correct.

Q Are those round numbers intended to inflate the numbers for any reason?

A No, absolutely not.

Q What is your best estimate using your 34 years

of experience, your engineering professional judgment, as to what the increased cost in construction would be due to a delay in beginning construction caused by an appeal for this project?

A For delay in construction of two years, my best estimate is a total of $240 million.

MR. SOMERS: Thank you. I have no further questions. He's available for cross.

CHAIRMAN FINLEY: Redirect, I mean, cross examination, Mr. Runkle.

CROSS EXAMINATION BY MR. RUNKLE:

Q Good morning, Mr. Landseidel.

A Good morning.

Q My name is John Runkle. I represent NC WARN and The Climate Times. And we're talking about a potential bond that we have to put up to be able to appeal this. Is that your understanding?

A Yes, it is.

Q Okay. Now, I was a little -- I didn't quite understand what was going to happen on October 1st. You said that's when construction is scheduled to commence?

A That's correct.

Q And you said that the coal ash basins will be cleaned up by then?

A The 1982 basin is planned to be fully excavated of ash at that point and clean and ready for backfill to begin.

Q Okay. Who has to sign off on whether the coal ash basin is properly excavated and suitable for construction?

A I'm not an expert in this area, but I think it's the DEQ.

Q Have you gone to DEQ for their ruling on whether that coal ash basin is to be excavated and properly cleaned up?

A There have been ongoing discussions with DEQ about how we would determine whether or not it's clean and their approval. Those discussions continue today.

Q And what's the deadline the Company has to clean up the coal ash basins at the Asheville site?

A In total, the Mountain Energy Act extended the removal of all ash from site to -- I don't know if I remember the date exact -- I think it's 2022 or '23.

Q Would you accept, subject to check, that it's August 1st, 2022?

A Yes.

Q Now, will the other -- will the other coal ash basin have to be cleaned up at the Asheville site?

A Yes, it will.

Q Is that -- is there any part of the construction that's contingent on the second coal ash basin being cleaned up?

A Not for this plant, no.

Q Not for what, now?

A Not for the combined cycle plant, no.

Q Okay. So that would ongoing construction. Now, and under the -- the Coal Ash Management Act, you have to clean that up anyway, right?

A That's correct.

Q Yeah. And that's been modified by the Mountain Energy Act to allow you -- instead of 2019, it allow you to clean it up to 2022.

A That's my understanding.

Q Okay. What happens if DEQ comes out on September 30th and says that the coal ash basin is not cleaned up to adequate standard?

MR. SOMERS: Objection. Calls for speculation.

CHAIRMAN FINLEY: You may answer if you can. If you can't, you can't.

A I don't know how to answer the question. I think it's an unlikely event.

Q Let me rephrase it to be maybe a little more

clear on that. Will there be a construction delay if DEQ does not sign off on the cleanup of the 1982 coal ash basin?

A Potentially, yes.

Q Now, looking at other permits, you had listed possible delays to construction causes, permits, equipment, and you named a list of them in response to a question. Now, in the permits itself, there need to be air quality permits for the -- the natural gas plants; is that correct?

A That's correct, yes.

Q What's the timetable for obtaining those permits?

A The air permit application was filed some time ago, and we expect, in our discussions with the Western North Carolina Regional Authority, the final permit would be issued in September of this year.

Q Are there things that you -- are there parts of construction that you cannot do until you have an air quality permit?

A I think the definition has been around permanent installation. Concrete foundations typically would be that type of --

Q And those are the things that you can do or

cannot do?

A Those are things we cannot do until we have the air permit.

Q Now, if -- well, if NC WARN would go ahead and challenge the air quality permit and cause a delay in -- in doing those kind of construction activities, that would -- that could be a construction delay, could it not?

MR. SOMERS: Objection. Calls for speculation. We'll stipulate NC WARN will do anything to try to delay this project.

MR. RUNKLE: I won't accept that stipulation.

CHAIRMAN FINLEY: Well, to the extent that you are able to say what would happen if the air permit is not granted, what would it do to delay the project, you're entitled to answer that question.

A Our schedule calls to begin foundations, an activity that would require a permit, in November of 2017, so I believe there's adequate time to receive the air permit.

Q Now, you also testified that there were a number of, you know, operations and environmental controls that had to be added because of the CAMA; is that correct?

A You're speaking to the environmental controls --

Q Yes.

A -- that are required for the coal plant? Yeah. Without the Mountain Energy Act, if we don't meet those dates, we'd have to implement those environmental controls on the coal units.

Q And because of the Mountain Energy Act, instead of 2019, you can do that to 2022?

A I believe that's correct. Again, it's not my area of expertise.

Q Now, would you accept, subject to check, that the Coal Ash Management Act was ratified on September 20, 2014?

A I -- I don't know. The Mountain Energy Act?

Q No. The Coal Ash Management Act itself.

A I'm not familiar with the details of the CAMA legislation, so I'm not -- I couldn't verify that date.

Q Well, assume, subject to check, it was ratified on August 20 of 2014 and actually became law on September 20th, 2014. The point is, are you aware when the Mountain Energy Act itself was passed?

A I don't recall the date.

Q Would you accept, subject to check, it was June

15, 2015?

A That sounds right.

Q Now, there was another part of the Coal Ash Management Act --

MR. SOMERS: I'm sorry. What date did you say for the Mountain Energy Act?

MR. RUNKLE: I read June 15th, 2015.

MR. SOMERS: Okay. Thank you.

Q And are you aware that another -- that the -- parts of the Coal Ash Management Act were subject to litigation?

A I'm not aware of that.

Q Okay. Are you aware that another Coal Ash Management Act was recently passed by the General Assembly this session?

A I recall that, but I don't have any details around it.

Q Are you aware that that bill was vetoed by the governor?

A No.

Q Now, in looking at potential construction delays, do you have to look at the actual rules and regulations that you have to follow to be able to construct a facility?

MR. SOMERS: Objection. Vague. What rules and regulations are you talking about?

MR. RUNKLE: Just in general, just rules and regulations.

Q You have to follow the rules before -- as part of your construction. If you're required to get a permit, you have to get that permit; is that correct?

A Yes.

Q All right. In your testimony you talk about $100 million worth of additional environmental controls under the Mountain Energy Act, is that correct, if there's a two-year delay?

A Caused by not being able to meet the deadlines in the Mountain Energy Act if we delay construction.

Q Could Duke Energy go to the Legislature and get a Mountain Energy Act Number 2?

A I don't know. That's not what I do.

Q Could Duke Energy go to the Department of Environmental Quality and ask for an extension of requirements for these environmental controls?

A I suppose we could ask, but it would be speculation on whether or not they would agree to any changes.

Q In your -- in your testimony you talk about a

contract with the Public Service Company for firm gas transportation service costs?

A Yes.

Q Did Duke Energy just buy Piedmont Natural Gas Company?

A That acquisition hasn't closed, but it's in progress.

Q Would Duke Energy go to Piedmont Natural Gas to get firm gas transportation service costs? I guess --

A I'm sorry. In what context?

Q I guess instead of going to Public Service Company, you would go to Piedmont.

A No. I don't believe we would.

Q Okay. And why wouldn't you go to Piedmont?

A They don't have -- they don't have assets up into that region like PSNC does or is planning to build.

Q Fair enough. And looking at, you know, the overall construction plan, when do you expect the natural gas plants to come online?

A In service beginning in November of 2019, and demonstrate a reliable in January to support ceasing operation of the coal units.

Q And that's January 20th --

A January --

Q -- January 2020.

A January 31st, 2020, yes.

Q Okay. Thanks.

MR. RUNKLE: You know, I have no further questions of the witness.

CHAIRMAN FINLEY: Redirect?

MR. SOMERS: Just a couple, Mr. Chairman. Thank you.

REDIRECT EXAMINATION BY MR. SOMERS:

Q Mr. Landseidel, you were asked by Mr. Runkle about some hypothetical, speculative potential delays related to receipt of air permits or appeals by NC WARN of any air permits. Do you recall those questions?

A Yes.

MR. RUNKLE: Mr. Chairman, I'm going to object to the hypothetical, speculative nature -- we asked questions -- if counsel is characterizing as hypothetical and speculative.

Q Well, are there any --

MR. SOMERS: I'm sorry, Mr. Chairman. Do you want to rule on that?

CHAIRMAN FINLEY: Well, rephrase if you don't mind.

Q Are there any appeals pending by NC WARN of any

air or any other environmental permit today?

A I'm sorry. I don't -- I'm not aware of that.

Q Have any air permits been issued by DEQ for this project?

A For the combined cycle project? No.

Q Yes, sir.

A No.

Q No. So has NC WARN appealed any of those?

A Not to my knowledge.

Q Mr. Runkle also asked you about potential legislative changes. Do you recall that question?

A Yes.

Q Do you know about any legislative changes that are pending to the Mountain Energy Act today?

A No, I don't. That's not what I do.

Q What's the only reason for a delay, that you personally are aware of, for this project?

A The only reason at this point is whether or not there's an appeal pending.

MR. SOMERS: Thank you. No further questions.

CHAIRMAN FINLEY: Commission -- questions by the Commission? Commissioner Beatty?

EXAMINATION BY COMMISSIONER BEATTY:

Q Good morning. As I understood your testimony,

you said that the Company is not in a position to proceed if there is an appeal pending in October of this year; is that right?

A That's correct.

Q At what point would you make a decision to start delaying construction -- would it be this month, next month, September -- if there is still an appeal pending?

A It would be likely in October.

Q So you would wait until October to make that decision?

A Yes, but we wouldn't start the construction in that case.

Q Okay. Would the fact that an appeal is pending now delay anything that would increase the cost?

A At this moment there's a little bit too much uncertainty for us to do anything different at this time.

COMMISSIONER BEATTY: Thank you, sir.

THE WITNESS: You're welcome.

EXAMINATION BY CHAIRMAN FINLEY:

Q Mr. Landseidel, I'm looking at the filing that is your testimony in this case on page 9 where you have up at the top the $50 million number.

A Yes.

Q And that's calculated over 24 months?

A Correct.

Q I know that you're prognosticating in the future, but would that be --if that were the damage, would that be incurred pro rata over the 24 months or more on one month than another month?

A The majority of the cost are in the equipment and the engineering construction contracts, so it would be at the time those contracts were placed in a delayed scenario that we incur those additional costs or know that they're -- they're there.

Q So they're going to be incurred more in the front end than the back end? Is that what I'm hearing you say?

A That's correct.

Q All right. You know, my math is not very good, but if you divided the $50 million by 24 months, that, in my calculations, comes out to $2,083,000 per month if you just looked at one month at a time. Does that sound right to you?

A Looks like it.

Q Now, at the bottom of the page there on page 9, you indicate that this information that supplies the backup from the round numbers that you give have been

before the Commission already; is that right?

A Yes. Specifically, the cost of the combined cycle plant.

Q That was in your application for the CPCN?

A Yes.

Q And that was filed with the Commission in January of 2015 (sic)?

A Yes. That's correct.

CHAIRMAN FINLEY: All right. I believe that's all I have. Questions on the Commission's questions?

MR. SOMERS: If I could just make one clarification. I believe the CPCN application was filed in January of 2016.

CHAIRMAN FINLEY: 2016. Excuse me for that.

THE WITNESS: I'm sorry.

EXAMINATION BY COMMISSIONER BAILEY:

Q Good morning, Mr. Landseidel.

A Good morning.

Q If for whatever reason you had to go after the environmental equipment for the existing coal ash, I mean, the coal plants that you have now, how long would those permits take? Do we have -- does Duke have any history on how long those applications or permits would take to be received by DEQ if you had to go after the

$100 million worth of environmental equipment?

A That would be part of -- if we do decide to delay the project in October if this appeal is pending, we would immediately begin engineering, construction permitting to support getting those projects in service by the required dates.

COMMISSIONER BAILEY: Thank you, sir.

CHAIRMAN FINLEY: Other questions by the Commission? Any questions on these last questions by the Commission?

MR. SOMERS: No, thank you.

MR. RUNKLE: If I may just have one, Your Honor.

CHAIRMAN FINLEY: Sure.

MR. RUNKLE: I'm going to pass.

CHAIRMAN FINLEY: All right, Mr. Runkle. The witnesses for evidence that you have?

MR. RUNKLE: I have none, Your Honor.

CHAIRMAN FINLEY: All right.

MR. SOMERS: Is Mr. Landseidel excused, Mr. Chairman?

CHAIRMAN FINLEY: Without objection, you are excused, and thank you for coming.

THE WITNESS: Thank you, Mr. Chairman,

Commissioners.

(Witness excused.)

CHAIRMAN FINLEY: All right. So where are we? Let's talk a little bit about where we are in this case. I think I heard for the first time today Duke Energy Progress say that based on the pendency of this appeal and the events that have transpired with the Court of Appeals and so forth, that your intent is, based on the fact that this appeal is pending, that you want to delay the beginning of the construction of the plant?

MR. SOMERS: I think, generally speaking, I agree with your characterization, Mr. Chairman. If I may, I'm not sure there is an appeal pending. I think there's a technical issue. The statute plainly provides that NC WARN has to post a bond or undertaking, as approved by this Commission, prior to filing Notice of Appeal. Clearly, they did not do that. They acknowledge as much in their filing. So I would not agree legally that there is an appeal pending today.

However, as Mr. Landseidel explained, it is the Company's intention, if there is an appeal pending and it's a valid appeal and a bond has been posted or an undertaking has been signed to perfect that appeal, the Company will not begin construction in October.

CHAIRMAN FINLEY: All right. Let's assume that the Commission establishes a bond or an undertaking after this hearing, whatever the number, and let's assume for the moment that it was a sufficient number that NC WARN can meet it by filing the bond or filing an undertaking, Duke Energy Progress over here has said that it really doesn't make any difference because the Notice of Appeal was due May 27th, no appeal bond was -- or undertaking was filed then. Mr. Runkle, where do we stand if we issue an order and it's one with which you can comply?

MR. RUNKLE: If it's one that we can comply?

CHAIRMAN FINLEY: If it's one with which you can comply.

MR. RUNKLE: Well, that's -- I mean, $250 million, no one could comply with that.

CHAIRMAN FINLEY: Well, now hypothetically --

MR. RUNKLE: Yeah.

CHAIRMAN FINLEY: -- if we establish a number --

MR. RUNKLE: Right.

CHAIRMAN FINLEY: -- that you can meet, you can file an undertaking or file the bond and meet it, it will be after this hearing --

MR. RUNKLE: Right.

CHAIRMAN FINLEY: -- and an order will come in after this hearing, but the Notice of Appeal was due May the 27th to file your Notice of Appeal. That was the last time we could extend --

MR. RUNKLE: Right.

CHAIRMAN FINLEY: -- the time for filing the Notice of Appeal under the statute, 62-90. So what happens --

MR. RUNKLE: Well, with the -- well --

CHAIRMAN FINLEY: -- with you?

MR. RUNKLE: I mean, if you file and establish a bond, we still have the opportunity to go to the Court of Appeals with the -- similar to the motions that we filed before if the -- if the bond is, you know, we think is improper or too much, we certainly can go to the Court of Appeals and let them rule on that specific issue. You know, before they ruled on whether there was credible evidence to support the bond. You know, the testimony today appeared to be -- you know, Duke had the opportunity. They put on, you know, much more complete testimony. We didn't have the opportunity to see that testimony till this morning. We certainly haven't had our potential experts to review that testimony. So going back to your first question, is this an abuse of process?

Yes. I mean, we feel that, you know, given the very -- the much more detailed explanation of the witness' augmentation of his -- of his May 2nd verified statement, that's a -- that's a much different thing than it was. There was two paragraphs we had this morning. Now there's probably, you know, 30, 40 pages of transcript on -- so, I mean, our option would be to go back to the Court of Appeals and challenge your decision if it's --

CHAIRMAN FINLEY: Well, hold on a minute. You're not -- you're missing my question. Let's assume hypothetically that we set the bond for $250. This what you've asked us to set it with as a result of this hearing.

MR. RUNKLE: Right.

CHAIRMAN FINLEY: The Notice of Appeal was due on file May 27th of this year. It wasn't -- the bond was not filed. Where are we, because you filed your Notice of Appeal and no bond was filed with it, and it was -- and if we approve one for $250, it's going to be in June at the latest. So how do you comply with the statute? That's my question.

MR. RUNKLE: Yeah. Well, I think that by filing with the Court of Appeals, our objections to the establishment of a bond for $10 million, that keeps the

bond amount open, and make the case to the Court of Appeals that we could not afford that kind of bond. If you do $250, you know, I could probably raise the cash this morning for that. But I don't think that that gets in the way of going to the appeal. Now, we may have to argue that between the parties at the Court of Appeals of whether we met all the requirements. Our position is that we've set forth our position all along clearly to the Court of Appeals and have met whatever requirements were in the statute.

CHAIRMAN FINLEY: Mr. Runkle, I don't want to put words in your mouth, but what I'm hearing you say is that if we set the bond for $250 hypothetically --

MR. RUNKLE: Yeah.

CHAIRMAN FINLEY: -- then you would go to the Court of Appeals and, I assume, ask that that bond requirement relate back nunc pro tunc to May 27 and so that your appeal would be viable there; is that right?

MR. RUNKLE: Yes, sir.

CHAIRMAN FINLEY: What do you say to that, Mr. Somers?

MR. SOMERS: I apologize, Mr. Chairman. I was preparing another argument and I missed your question.

CHAIRMAN FINLEY: All right.

MR. SOMERS: Would you please repeat that?

CHAIRMAN FINLEY: All right. I asked Mr. Runkle if we set the bond hypothetically for $250 after this hearing and it's something that he can meet, $250, it will be done in June, and the Notice of Appeal was filed on May the 27th without the bond which the statute requires. I think you alluded to this earlier. As I understood the argument that Mr. Runkle is making, he would say that he would go to the Court of Appeals because the Court of Appeals granted the Writ of Certiorari and we have this hearing, that the fact that the bond was set at $250, it would relate back to May the 27th, 2016, and that he could proceed with his appeal. And my question to you is what is your response to that?

MR. SOMERS: Thank you, Mr. Chairman. Obviously, you're asking me about several potentially complicated legal processes. I will -- in my obligation to be candid with the Commission, I will give you my best answer, recognizing that if I had more time to research and think about it, my answer may -- I may supplement that.

My answer would be, first of all, I will not argue to you at this moment why a $250 bond order from this Commission has no legitimate basis in my legal

opinion. So first of all, if a bond were hypothetically set in an amount of that nominal nature, Duke Energy Progress would likely pursue remedies at the Court of Appeals to ensure that in that hypothetical situation, that such a bond was appropriate.

Having said that respectfully, if NC WARN -- Duke Energy Progress has a pending motion to dismiss their appeal which has not been ruled on by the Commission. It is my legal argument to you that they were required to post a bond or undertaking prior to filing the Notice of Appeal. They failed to do so. Therefore, their appeal should be dismissed. And while I cannot fully forecast what arguments we might make to the Court of Appeals at that time, that will likely be one of them.

CHAIRMAN FINLEY: All right. Mr. Runkle, you know, you have accused Duke of bullying you and pulling up numbers out of the air, and you didn't like the $50 million. Where did the $250 come from?

MR. RUNKLE: That's a minimal bond. I mean, either looking at potential bonds, that was what you regularly pay to the Court of Appeals. It's a de minimis bond. That's a number that several of the courts give there -- through the clerks put up.

CHAIRMAN FINLEY: So what, if anything, does it have to do with the potential damages that Duke Energy Progress might suffer if this project gets delayed because of the pendency of the appeal?

MR. RUNKLE: Well, it -- it's -- if the statute requires a bond to be established --

CHAIRMAN FINLEY: Well, do you maintain that the statute does not require a bond?

MR. RUNKLE: No, no, no.

CHAIRMAN FINLEY: Okay.

MR. RUNKLE: No. Don't get me wrong. If the bond requires -- the statute requires a bond and -- for potential delays of construction.

CHAIRMAN FINLEY: All right.

MR. RUNKLE: We're not asking to stay the proceeding. We're not asking them to stop the construction. That's their decision. And this is all new territory, sir. I mean, this is -- this is the only statute that requires a bond up front before you -- without staying the project. This is a -- we've done a fair amount of research on this and, you know, it's the only time that you have to put up a -- what could be a substantial bond to appeal a government decision. And, you know, routinely if a permit is issued, you want to

stay the permit, you may have to put up a bond. If you don't stay the permit, the company can go ahead and, you know, begin its construction or do whatever it needs to under that permit.

So, yeah, this has not been the cleanest process because it is -- it is, you know, new territory, you know, starting with -- well, I mean, starting with the 45-day review period and going through of trying to get to the substance of it. It seems to me that a billion dollar, you know, plant is the very thing that we would want the Court of Appeals to review the legality of it. And so if a bond is needed to get there, a de minimis bond probably makes as much sense as anything else.

CHAIRMAN FINLEY: Mr. Runkle, in your argument a moment ago you said that this information that the witness has provided today to substantiate the filing that was before the Commission before the Court of Appeals, that that was all new. Now, what I heard was that the information that he recited today has already been before the Commission and it has been in the Company's application. Is that right or is that wrong, Mr. Somers?

MR. SOMERS: Clearly, the confidential cost

estimate for the combined cycle portion of the project is in the record under seal. The contracts themselves have not been filed with the Commission. They were provided in discovery to the Public Staff. If I brought them here today, they are binders that would cover this entire table. NC WARN has not reviewed them because if I may remind the Commission, we offered NC WARN the opportunity to file our standard confidentiality agreement and they refused to do so, so they've not seen the contracts. As Mr. Landseidel mentioned, the contract cancellation provisions that he testified to were based upon the provisions of those confidential contracts, so they are not in the record. If the Commission would like, we would be happy to file as late-filed exhibits those contracts, again, happy to do so, but they are quite voluminous. As an alternative, I do have copies of the cancellation schedules from the three contracts that are one-page each that are confidential, one page from each of those contracts. If the Commission would like, we'd be happy to offer those into evidence confidentially under seal.

CHAIRMAN FINLEY: All right. Just a minute. Earlier in the proceeding the Public Staff and other parties engaged in discovery of Duke Energy Progress,

right?

MR. SOMERS: Yes, sir.

CHAIRMAN FINLEY: And they signed confidentiality agreements. Were those contracts made available to those parties in the earlier part of the proceeding, if you recall?

MR. SOMERS: They were. To my -- the best of my memory is the Public Staff was the only party who actually asked for and came to review them. But other parties signed confidentiality agreements; they just didn't ask to come to review the contracts.

CHAIRMAN FINLEY: But they would have been available to NC WARN if NC WARN asked for them and if NC WARN had been willing to sign the confidentiality agreement?

MR. SOMERS: Absolutely.

CHAIRMAN FINLEY: And now so what I'm hearing, Mr. Runkle, is that although you say that all this information is new, other parties asked for it and got it because they signed confidentiality agreements, but it sounds like you could have gotten it earlier, but you didn't ask for it. What is your response to that?

MR. RUNKLE: Yes, sir.

CHAIRMAN FINLEY: Okay.

MR. SOMERS: If I may. I don't mean to belabor this, and I'll ask John to correct this. My memory is we answered at least three sets of data requests from NC WARN. Many of them we objected to on the grounds of confidentiality, and that resulted in NC WARN filing a Motion to Compel, which I recall was denied by this Commission. Sitting here today, I do not recall if NC WARN asked for copies of the contracts. I do recall that we objected to several of their data requests on the grounds of confidentiality. That was resolved by the Commission. Just to be clear, I don't remember if you asked for the contracts or not. Had you signed the confidentiality agreement, we would have made them available.

MR. RUNKLE: Yeah. We did not request the contracts.

CHAIRMAN FINLEY: Commissioner Brown-Bland has a question.

COMMISSIONER BROWN-BLAND: I just had a follow-up question for Mr. Runkle. Mr. Runkle, if I understood you correctly, you indicated that the detail that was added this morning through the witness was new and that somehow that had prevented NC WARN from -- and The Climate Times from going out and having its experts to

take a look or -- and therefore being able to do satisfactory cross. However, in normal motions practice, it appears to me that since May 2nd you knew, in round numbers anyway, what Duke would now be coming and trying to support. What reason -- why is it that you could not have had experts to look at whether these numbers appeared to be reasonable or correct or whatever the case may be?

MR. RUNKLE: When I -- when I made the -- when I made the statement earlier, I was looking at the top of page 8, $100 million in additional environmental controls, and that was broken down, again, in approximate numbers, 25, 50 and 25 million. I mean, that's a -- that's a detail that wasn't in there, and certainly the, you know, the additional testimony about the dollar figures and certainly, you know, the 5 million cost to date, those kind of things, I don't know if those are appropriate numbers or not. And I can't tell you whether, you know, having somebody in hand, you know, two weeks ago would have made a difference. I mean, we got a -- we got a notice last week that this hearing was going to come up. Up until I checked my email at 11:59 last night to see if there was -- that Duke was going to file testimony with additional witnesses, we just did not know

what -- how this hearing was going to go this morning.

COMMISSIONER BROWN-BLAND: And do you think you were somehow hampered from using a construction expert of your own who had -- who had past history and involvement with this kind of gas plant construction?

MR. RUNKLE: I would think so. I mean, that's -- I mean, that's -- if we'd had, you know, the -- certainly knowing what the witness was going to say today and that was the only witness, that's a different thing than if -- than if Duke would have filed for 15 witnesses last night, so we just -- it's hard to have a witness prepared to respond to something that we don't know what it is. And --

COMMISSIONER BROWN-BLAND: But I believe your comment went specifically to what we have now heard this morning, and I guess my question is, that much you had some knowledge of -- of the generality of the testimony, and so --

MR. RUNKLE: Yes. Certainly, we had some knowledge of the testimony in paragraphs 13 and 14 where it talks about potential cost. The big difference of the testimony this morning was Duke's statement that it was -- that it would delay -- delay construction while the appeal went on. I mean, that's -- to me, that's the --

that's a major difference in what they said on May 2nd and what they said this morning.

COMMISSIONER BROWN-BLAND: And you believe you would have had to have known that to have your own construction expert talk about a review, what you had, and -- and be able to give some assistance in your side of the matter about delay cost?

MR. RUNKLE: Yeah. And looking at all the potential, you know, causes for delay that were, you know, testified about this morning and the different costs, it would have been very helpful to have an expert, and I --

COMMISSIONER BROWN-BLAND: But I guess my question is what stopped you from having that since or doing or -- or going out to get yours since May 2nd when this initial information was filed?

MR. RUNKLE: I'd have to ask my clients that. I mean, I just -- I can't answer that question at this point.

COMMISSIONER BROWN-BLAND: All right. Thank you.

CHAIRMAN FINLEY: To your knowledge, Mr. Runkle, has your client gone out to see if they could obtain the services of an expert to come in here and

testify this morning?

MR. RUNKLE: May I have a minute?

(Off-the-record discussion.)

MR. RUNKLE: To answer your question, my clients have not consulted an engineer or a construction expert for the hearing today. The verified complaint was filed on May 2nd. We had a very short timeline to respond to that, and our response to that was verified, questioning the -- the basis for those numbers. And then the Commission issued their -- the order on the -- under bond or undertaking and, you know, we had from May 2nd, but then it went to the Court of Appeals, and this week we had from -- just a couple of days, and we're expecting a different outcome of the hearing today in terms of more filing, more details.

CHAIRMAN FINLEY: Well, Mr. Runkle, the time to get things done in order for you to post a bond by May the 27th, 2016, in order to perfect your appeal was compressed in part because you waited until April the 25th to ask for the bond to be set, and you didn't leave us much time at all to do these things. And so, sure, it was a compressed schedule because that had to be the case in order for us to get an order out to tell you what the bond was and so you could go out and undertake steps to

do it. If you had --

MR. RUNKLE: Right.

CHAIRMAN FINLEY: -- come in here weeks earlier and given us more time, we would have given you more time to do this. I think, you know, the facts are as the facts are.

Let me ask you this, you can't pay -- you represented that you can't pay the $50 million, you can't pay the $10 million that the Commission said in its earlier order. What efforts, if any, did you make to try to comply with the $10 million request?

MR. RUNKLE: Your Honor, I'm right on the edge of testifying at this point and -- and I'm a little uncomfortable about it. My clients went to their funding sources to see if that kind of money was available, and I mean, looking at the -- both the groups' budgets, I wasn't aware of The Climate Times' budget. Looking at NC WARN budget of what is available, $10 million was an amount that the groups could not put up.

CHAIRMAN FINLEY: I'm really not familiar with The Climate Times. Can you tell me a little bit about The Climate Times and what -- just in general terms what their resources might be?

MR. RUNKLE: I think Dr. Ayers, Harvard Ayers,

testified at the meeting up in Asheville, the public meeting. He is a professor emeritus at Appalachian State. He is doing interviews on people and climate. They have a couple -- maybe a staff person or two, and a -- and a fairly active board, fairly small. I don't think their budget is very big.

CHAIRMAN FINLEY: So The Climate Times is Mr. Ayers?

MR. RUNKLE: Pretty much.

CHAIRMAN FINLEY: You know, Mr. Runkle, if we -- I don't -- I don't think -- I think if -- $250 is -- I think that's out of the question. I'm sorry. What could you -- what could you comply with?

MR. RUNKLE: I think we would have to respond to whatever you set as a reasonable bond based on credible evidence. I mean, that -- that seems to me -- you know, if we say, well, we can do, you know -- you know, $10,000 or 100,000 or, you know, 10 million or a 100 million, I mean, I think your position at this point is to set a bond based on credible energy -- credible evidence, and we just have to respond to that whether we can put it up or not.

CHAIRMAN FINLEY: Well, you know, we heard evidence that was verified from Duke Energy, and they cut

it down to $50 million, and we cut it down to $10 million. We did that to make it a more reasonable number for you to come up with, and then we said, look, all you've got to do is post that and then we'll wait until September to see what Duke Energy does, and if they say they're not going to delay, you get your money back.

MR. RUNKLE: Yeah.

CHAIRMAN FINLEY: And then you fussed at the Court of Appeals and said we pulled that number out of midair. I haven't heard any numbers anywhere close to $10 million, so what can you post?

MR. RUNKLE: Well, I mean, it's -- I think it's a different question today than it was yesterday.

CHAIRMAN FINLEY: All right.

MR. RUNKLE: The question yesterday was how much could we post. The question today is they have stated flat out that they will -- if we go ahead and appeal, they're not going to start construction. That's a much different decision than it was yesterday.

CHAIRMAN FINLEY: That's true. Well, let's get -- hypothetically again, let's assume that they hadn't said that, and I want to -- I want to ask you about your legal theory here. You have said in your pleadings a number of times that it's incumbent upon Duke Energy

Progress in order to determine the amount of the bond that should be set, that they need to come in and tell whether or not they intend to delay. Was that a correct recitation of your position?

MR. RUNKLE: That's certainly part of it, yes.

CHAIRMAN FINLEY: Well, point me to what the statute -- the language in the statute that supports that argument, please. We don't have any courts interpreting the statute, but we've got the language in the statute itself, so point me to some language in the statute that -- that says that the utility is going to build a $1 billion plant at the -- before you file the Notice of Appeal, it's got to come in and explain to you whether or not they will delay the beginning of the construction before they know what the grounds for the appeal are.

MR. RUNKLE: Well, if they say that we're going to go ahead with the project October 1st no matter what the appeal is, then there's no delay for the -- there's no delay in construction.

CHAIRMAN FINLEY: Yeah, but my question is point me to the language of the statute that says it's the obligation of the utility that's going to build a major generating plant, a $1 billion plant in this case, that says that they've got to come in and tell you

whether or not they will delay, based on your appeal, before you have to file your Notice of Appeal. Now, just point me to the language of the statute that says that, please, if you can.

MR. RUNKLE: I think you need to repeat that for me, sir. I don't want to be dense about this, but looking at G.S. 62 --

CHAIRMAN FINLEY: All right. I'll repeat it -- I'll repeat it a third time.

MR. RUNKLE: All right.

CHAIRMAN FINLEY: As I understand it, it's NC WARN's position that based on 62-82(b) --

MR. RUNKLE: Uh-huh.

CHAIRMAN FINLEY: -- it is incumbent upon the party to whom the Commission has granted a Certificate of Public Convenience and Necessity for a major plant, in this case $1 billion, to come in and explain to the Commission whether or not it will delay the beginning of construction as a result of a potential appeal before they know what the appeal is. I understand that to be NC WARN's position, and what I'm asking you to do is to point me to anything in the statute that supports that contention.

MR. RUNKLE: Well, I mean, my reading of

62-82(b) that -- is for damages, if any. If they're saying that they're -- they're going to go ahead with construction, they've made the business decision to go ahead with that, that there will be no damages based -- for delay of construction. And that to me is a much different thing than saying, well, there may be a damage here or damage there; we don't know.

CHAIRMAN FINLEY: All right. What do you say to that? Can you answer that question from Duke Energy Progress' position?

MR. SOMERS: I'll turn to the language of the statute, Mr. Chairman. And if I may, there's a lot of things I'd like to respond to at the appropriate time, but to try to answer your question, there's nothing in my read of General Statute 62-82(b) that requires the Company to state at this time whether they will delay or not. If I may, again, emphasize, the statute is unequivocal. For NC WARN to appeal the CPCN order that was issued back in March, they have to post a bond or undertaking as approved by this Commission. They still haven't done it. They started the process to set the bond over two months ago, and because of the Court of Appeals order, which I would respectfully say has added a great deal of uncertainty, and in the Company's mind,

respectfully, the Court of Appeals order is inconsistent with their other order denying the Motion for Temporary Stay. So for the Company to evaluate the risk at this point, there is too great of a risk and uncertainty about this appellate process, which we haven't even gotten started with, and here we are three months after the CPCN order was started. And this is a CPCN for a $1 billion plant that this Commission has determined, after a thorough process, is required in a public convenience and necessity.

But the Court of Appeals process, in taking Mr. Runkle at his word earlier, likely a Supreme Court challenge process could take months or years, and the Company, again, I would -- I would argue to you nothing in the statue requires the Company to say they will delay, but because of the uncertainty about the appeals process, the Company has made that difficult decision. We believe that is the only reasonable and prudent decision that we can make on behalf of our customers and our shareholders, given all the uncertainty and delays from an appeal for a $1 billion project.

CHAIRMAN FINLEY: That's very interesting, and I appreciate that information, but my question -- I'll ask it a fourth time. As I understand NC WARN/The

Climate Times' position, it is that before they had to post a bond, before they had to file Notice of Appeal with exceptions, it was incumbent upon, in this case, Duke Energy Progress to come in and represent to the Commission whether or not you would delay the beginning of the construction of this project. And I asked Mr. Runkle where he could point to in the statute that imposed that requirement on the party building the plant, and I'm asking you if in your opinion the statute makes that requirement that NC WARN says is there.

MR. SOMERS: I'm sorry. I tried to answer that question. No. I don't think it's in the statute at all. But if I -- could I elaborate on that answer, please?

The way the statute is set up, within the 30-day period, or in this case NC WARN got an additional 30 days extension of time, so in that 60-day period they're required to file a Notice of Appeal, but only after they have posted the bond or undertaking as set by this Commission. I don't see how Duke Energy or any company can evaluate the entire merits of an appeal that hasn't been filed, much less hasn't been briefed, and that is, I would submit to you respectfully, what is reflected in the May 2nd filing when we informed the Commission in Mr. Landseidel's Verified Response that it was difficult to

understand, there was -- or excuse me -- it was difficult to assess a potential appeal that had not been filed, much less briefed, at that point in time to make a decision as to whether or not the Company should delay the beginning of construction.

Having said all that, given all that has transpired since that time, and in particular the Court of Appeals' order vacating this Commission's order, which while on Duke's behalf I would not agree that a $10 million bond was adequate to protect our customers as the statute requires, setting that aside, I thought the Commission's order clearly demonstrated what they based that appeal bond amount on, but for whatever reason the Court of Appeals, and I can't read a lot into a two-sentence order from the Court of Appeals, they vacated that order and sent it back to receive competent evidence, which we've tried to present today.

And at the right time, I would like to be heard on what process we're going to have for competent evidence to hear from NC WARN.

CHAIRMAN FINLEY: Go right ahead.

MR. SOMERS: I heard Mr. Runkle argue in response, I believe, Mr. Chairman, to either a question from you or from perhaps Commissioner Brown-Bland or

both, that they were somehow hampered in being prepared for this hearing today. And I'm baffled by that argument, and let me explain why.

Duke Energy Progress filed its response on May the 2nd. We're sitting here today June 17th, a month and a half later. NC WARN has known clearly what Duke Energy Progress forecasted to be the reasonable amount of damages, as determined by a construction delay caused by the appeal, since May the 2nd. They presented no witness at all. And to argue that they couldn't find an expert in that time is simply not credible.

Now, whether they tried to do that or not, I notice Mr. Runkle's response to you was he limited it to an engineering expert or construction expert. They didn't explain to you whether they sought and consulted with other types of experts, so that's an open question in my mind. But the fact remains they had the opportunity to present whatever witness they wanted, and they refused or have chosen not to do so.

They also had the opportunity to cross examine Mr. Landseidel, and it was fairly limited today, and I think that's an acknowledgement that Mr. Landseidel's testimony is credible. And it's the exact same testimony as was filed in the verified response on May the 2nd.

Now, again, he augmented it, as the Commission's order allowed, to explain in greater detail how he arrived at those projected damages, but the amounts have not changed at all. So NC WARN has had more than adequate time to prepare, and if they chose not to ask Mr. Landseidel more questions or if they've chosen not to present a witness, that's their own fault.

What I would like to know is in the Commission's Order, NC WARN was required, they shall sponsor a witness or witnesses with respect to any factual issues NC WARN wishes to raise responsive to DEP's evidence or to the June 7, 2016 Order of the Court of Appeals, subject to cross examination at this hearing here today. They've presented no witness, so they are not availing themselves of the opportunity to put whatever evidence in front of this Commission they would like to. So I will argue to you there is no evidence in the record other than the $240 million damages that Mr. Landseidel has testified to, and that is what the Commission should base its appeal bond on, obviously subject to the Commission's obligation and authority to determine the credibility of Mr. Landseidel's testimony.

I note that the reply that NC WARN filed on May the 5th, 2016, was verified by James Warren, the

Executive Director of NC WARN who is sitting right behind Mr. Runkle, and I'd like to call him to the stand and ask him some questions about NC WARN's position, any factual issues they have as to what the bond -- in what amount it should be set. He's sitting here. He can answer questions from the Commission, from Mr. Runkle, and certainly be subject to cross examination from me.

CHAIRMAN FINLEY: All right. Mr. Warren, you're present in the hearing room, and the Chair has the ability to call witnesses who are present in the hearing room based on the Rules of Evidence, so come up to the stand and be sworn, please.

MR. WARREN: I will affirm, please.

CHAIRMAN FINLEY: All right.

JAMES WARREN: Being first duly affirmed,

Testified as follows:

MR. RUNKLE: Your Honor, I would object to the testimony, just Mr. Warren is not prepared, did not come to this proceeding prepared to testify. Even -- I mean, it's just -- this process from the beginning has been haphazard. It's all been new testi--- it's been new procedures as we go along. This morning certainly is along that track.

CHAIRMAN FINLEY: Your objection is noted. Mr.

Somers, do you have questions?

CROSS EXAMINATION BY MR. SOMERS:

Q Would you please state your name for the record?

A My name is Jim Warren.

Q What's your address, please, sir?

A Business address P.O. Box 61051, Durham.

Q And what is your position with NC WARN?

A Executive director.

Q And what is -- what are your responsibilities as executive director?

A Well, they're fairly broad. I'm responsible for the daily operations, the financial stability, the ongoing activities of the organization over now a 23-year period.

Q And so I'm not very familiar with the organization structure at NC WARN. Are you essentially the highest ranking official for NC WARN?

A Technically, the chair of the board is the highest ranking official.

Q Okay. Who is the chairman of the NC WARN board?

A Ryan Thompson.

Q Okay. Are there other members of the NC WARN

board?

A Yes, sir.

Q Who are they?

A Beth Henry, George Friday, and I am also a member of the board.

Q Okay. How many employees -- are you an employee of NC WARN?

A Yes.

Q Okay. How many other employees does NC WARN have in addition to yourself?

A Right now I think we have nine or 10 others.

Q Okay. And do you have with you NC WARN and The Climate Times' Verified Reply to Duke Energy Progress' Response to Motion to Set Bond that was filed with this Commission on or about May the 5th, 2016?

A I don't have it in front of me, but I'm familiar with it.

Q Okay. And you signed the Verification to that filing; is that correct?

A Yes.

Q And in it you stated that, "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." Is that correct?

A Yes, sir.

Q All right. And in that filing you argued that the Commission should set an appeal bond in a nominal amount which you calculated as $250; is that correct?

A Yes, sir.

Q How did you calculate $250?

A I would agree with Mr. Runkle's earlier characterization. It's obviously a nominal amount. In fact, we do not believe a bond should be required at all. It is a unique type of situation, as John explained earlier, and we do not believe that a bond should be required, especially in a situation where we have had a truncated process with no evidentiary hearing, with no ability for us to provide witness testimony or to cross examine Duke Energy. We believe this, among all sorts of proceedings that have transpired before this Commission over the years, this among all of those should not be involving a bond that would block our way toward trying to get finally an open discussion about the issues involved in this -- in this case. It's a $1 billion power plant. It's exactly the wrong type of project to be fast tracked and to have critics prevented from

providing legitimate, nationally prominent witnesses and to have their opinions be fully considered and to have our ability to cross examine Duke Energy's witnesses. So we do not believe a bond should be required at all.

Q How many power plants have you built?

(Pause.)

Q I'm sorry. Did you hear my question?

A I guess I should answer that. I've been responsible for a number of solar energy installations, but I haven't built power plants. You know that.

Q I get to ask the questions. I'd just appreciate an answer, okay?

A Sure.

Q How many large construction projects in the range of 1 million to 1.5 million have you been involved in?

A A number of them years ago. I was in the construction industry.

Q And yet have you -- I realize you're not a lawyer, and I'm not going to ask you for a legal conclusion, but as verifying NC WARN's reply that you've testified to, did you read the statute on the appeal bond?

A Yes, sir.

Q And you understand that it requires a bond to post the -- it requires a party appealing a CPCN order to post a bond or an undertaking prior to filing their appeal?

A My understanding was that it requires the party to go to this Commission to discuss the bond. My -- whether that requires this Commission to post a bond, I did not quite understand it that way, but I do understand that it -- that the Commission has broad discretion to set that bond at any amount, nominal or otherwise, that it would choose to, and that's why we asked this Commission, again, for the reasons I said earlier, that this is an important project, not just because of cost, but because of future risk to customers and because of the extreme climate impacts of this project at exactly the worst possible time for planetary global warming, that we believe that -- that we need a full airing of the issues involved in this case. And we have been prevented from making that case so far, and it is, I think, an injustice to the people of this state and beyond.

MR. SOMERS: Mr. Chairman, I would move to strike his response after the response to my actual question, which is you've read the statute and you understand a bond is required prior to filing a Notice of

Appeal.

CHAIRMAN FINLEY: Well, we'll --

MR. SOMERS: It's nonresponsive.

CHAIRMAN FINLEY: Well, I agree it's not responsive. We'll allow it, but we -- but we're not a jury trial here, and we'll take it for what it's worth.

MR. SOMERS: Thank you.

THE WITNESS: Pardon me. I couldn't -- I couldn't hear. How did you respond to his...

CHAIRMAN FINLEY: I overruled his objection, Mr. Warren.

Q Mr. Warren, in your Verified Response from May the 5th, you stated that DEP's response is an attempt to bully NC WARN and The Climate Times. You've been -- so you've been present here in the hearing room this entire morning, aside from the fire alarm break; is that correct?

A Yes, sir.

Q And you heard Mr. Landseidel testify?

A Yes, sir.

Q Do you believe he's a bully?

A He's not the one we referred to. No. I -- but, no, I don't believe he's a bully.

Q And you have no reason to criticize the

detailed cost estimates that he's testified to in this case, do you?

A Given that -- I would say I do have reason to because given that this morning was the first time we had access to the specifics of what he would provide and what you planned to provide, then yes, I do believe we have cause. And by the way, related to this broader discussion of what you put in binders full of contracts and who had access to them months ago, that's not the issue that we're dealing with here today. The issue we're dealing with is what evidence was going to be presented to support a $10 million bond in specificity, and we were denied an opportunity to understand that and we got instead this -- what might be described as a shell game that John's up until late at night trying to find out if you all are actually posting something. If you hadn't planned to post something, testimony, you could have alerted us and we could have at least known that we might be fielding what your witness would say during the proceeding instead of having to guess and then try to listen to new numbers that have been ascribed to this particular situation at this time. That's not a fair process.

Q So your testimony under oath is that you didn't

know what those numbers were when Duke filed them on May the 2nd?

A No. I don't think that's what I said. We saw what the broad numbers were, but we argued, and the Court agreed with us, that there was not detail to support any of that. And as John testified, there's this whole other really odd area regarding the handling of coal ash at that site, and I think I understood from what you confirmed earlier that -- the detail of those numbers wouldn't have been available to us even if we had signed a confidentiality agreement.

MR. SOMERS: Mr. Chairman, I'm going to, again, move to strike as nonresponsive.

CHAIRMAN FINLEY: Well, that's -- we won't -- we won't issue an order to strike, but let's try to leave the answers to -- responsive to the questions, Mr. Warren.

MR. SOMERS: May I approach the witness?

CHAIRMAN FINLEY: Mr. Runkle can follow up and ask questions after he's asked. Go ahead.

MR. SOMERS: May I approach the witness?

CHAIRMAN FINLEY: Yes, you may.

Q Mr. Warren, I have handed you what I will ask to be marked as DEP Cross Exhibit Number 1.

CHAIRMAN FINLEY: It shall be so marked.

(Whereupon, DEP Cross Examination Exhibit Number 1 was marked for identification.)

Q And you recognize this document, don't you, Mr. Warren?

A Yes, sir.

Q And this is a press release issued by NC WARN on May 19, 2016; is that correct?

A Yes, sir.

Q Did you write this?

A I think I did.

Q All right. So you were --

A With -- probably with help to make it a little better.

Q Okay. Who helped you?

A I don't recall specifically. It's usually among two or three different members of our staff, possibly others.

Q And who are they?

A It would usually be associate or Assistant Director Rita Leadem. It would be our paralegal and researcher Anna Henry. It could have been Sally Robertson. Sometimes other people might look at them.

Q Are any of those people here in the courtroom today?

A Anna Henry is here, paralegal.

Q Okay. And she's -- you said --

A But, again, I don't recall specifically, somebody else might, who might have reviewed and done some editing on this. I -- believe me, I take full responsibility for it.

Q Fair enough. Thank you for that. If you would, look at the second paragraph --

A Okay.

Q -- of your May 19 news release.

A Yes, sir.

Q And it says, quote, "That unprecedented bond action is yet another example of Commissioners shielding Duke - and themselves, in this case - from scrutiny of Duke executives' business model." Is that correct?

A I wrote it, yes, sir.

Q Okay. And that was in response to the Commission's Appeal Bond Order setting the $10 million bond.

A Yes, sir.

Q And it's your testimony that the Commission is shielding Duke and themselves in this matter?

A I believe that's what has happened here. I -- I do. And I can elaborate on that if you'd like or explain why I believe that.

Q Okay. Look down at the bottom of that page. There's a paragraph that reads, I'll quote, "Even more amazing is that the Commissioners went along with the prohibitive bond approach, calling for a $10 million bond even while providing no rationale for the bond amount," unquote. You wrote that?

A Yes, sir.

Q Did you read the Commission's Order --

A Yes, sir.

Q -- that explained how they --

A Yes, sir.

Q -- the rationale for that bond?

A Yes, sir.

Q And yet you say --

A I found it to be weak. I found it to be related -- I mean, they admitted that they hadn't done this before. I'm sympathetic to that. It was new ground. But I -- I believe there was no rationale. I also was the one that wrote that they pulled it out of their regulatory hat.

Q Okay. Let me ask you to look at the next

sentence. In fact -- quote, "In fact, neither Duke nor the Commission cited a shred of evidence to support those giant..." -- "giant numbers - either of which would prevent any critic from taking the case to court," unquote. You wrote that?

A Yes, sir.

Q And it's your -- it's your testimony that there was no evidence, despite hearing Mr. Landseidel testify today, that he verified Duke's response? It's still your belief there was no evidence to support the Commission's Bond Order?

A It's a belief that was supported by the North Carolina Court of Appeals.

MR. SOMERS: Just a minute, Mr. Chairman. I'm marking these exhibits. May I approach?

CHAIRMAN FINLEY: Yes.

Q All right. Mr. Warren, have you had a chance to look at what I'll ask to be marked as DEP Cross Examination Exhibit Number 2?

A Yes, sir.

CHAIRMAN FINLEY: It shall be so marked.

(Whereupon, DEP Cross Examination Exhibit Number 2 was marked for identification.)

Q This appears to me to be a Facebook post from NC WARN. Do you recognize that?

A Yes, sir.

Q And did you write this?

A I believe this was probably excerpted from other things that I did write or was reworked. No. I think I did write most of what I see as text there.

Q Okay. And you --

A Not specifically on the Facebook post, but it was transferred there.

Q Okay. And you had -- before my -- before I showed you this exhibit, you had just talked about the Court of Appeals order, correct?

A (Nods head affirmatively.)

Q Is that -- can you answer?

A Yes, sir.

Q Okay. You can nod your head to me, but the court reporter --

A Okay.

Q -- can't pick it up --

A Sure.

Q -- all right? So the Court of Appeals order that you reference is what is referred to in this Facebook post; is that correct?

A Yes, sir.

Q All right. And you -- you or NC WARN said in this post, "This is an important" --

MR. RUNKLE: Excuse me. Excuse me, counsel.

Q -- "incremental victory and embarrassment to the Commission."

MR. RUNKLE: Excuse me, counsel.

CHAIRMAN FINLEY: Let him finish. Let him finish. Start over -- start over again.

MR. RUNKLE: I have an objection to this line of questioning.

CHAIRMAN FINLEY: Well, let him finish the question, and then I'll hear your objection. Repeat your question, Mr. Somers.

MR. SOMERS: Thank you.

Q Mr. Warren, I was asking you, in this Facebook post discussing the Court of Appeals opinion in this matter, you said, quote, "This is an important incremental victory and embarrassment to the Commission," unquote, correct?

A Yes, sir.

CHAIRMAN FINLEY: All right, Mr. Runkle. Your objection?

MR. RUNKLE: I would object to this line of

questioning. It's totally not relevant to any matter before us. It's -- it's rehashing what NC WARN's position may or may not have been in a Court of Appeals case and what kind of Facebook pages they were putting on. It's just totally not relevant.

CHAIRMAN FINLEY: Well, I think, you know, Mr. Runkle, I think it is a bit relevant to the credibility of the party NC WARN and Climate Change (sic) before this Commission in matters such as this. We'll allow the questioning, but we'll take it for what it's worth in any order the Commission might issue.

MR. RUNKLE: Thank you.

Q So you disagree with the Commission's orders to date in this case on the appeal bond issue, correct?

A I disagree with the orders and the process. I think that we all could have done a lot better with -- with the whole -- this whole mess that's happened over the last few months, yes, sir.

Q And in your words the Commission has asked in an -- acted in an embarrassing manner?

A I believe so. I believe it -- that, again, the entire process all the way back to the Legislature is not one that is befitting the state of North Carolina, yes, sir.

Q You were aware that as part of this Western Carolinas Modernization Project that from your partic--- let me start over.

You were present for the -- were you present at the public hearing in Asheville on this project that the Commission held back in February, I believe?

A No, I think not.

Q Okay. But you were present here in the hearing room for the oral argument that the Commission held on the CPCN application that's what's led us to get to where we are today --

A Yes, sir.

Q -- is that right?

A Yes, sir.

Q All right. And so you're aware that Duke Energy Progress, as part of this project that's subject to your purported appeal, has worked with the Asheville community to develop energy efficiency, demand response, renewable programs to help transition that community in western North Carolina to a smarter, cleaner energy future; is that correct?

A I don't think I would characterize it that way. I think that smacks a little too much of public relations language, and so I don't think I would characterize it

that way.

Q But you -- certainly, you would agree that a central point to that effort is retiring the Asheville coal units, correct?

A Absolutely, and we agree with that, yes.

Q But you understand that by pursuing this appeal, NC WARN is going to require those coal units to run in perpetuity?

A Well, I don't believe that is necessarily the case at all and, in fact, I will repeat that perpetuity sort of flies in the face of the fact that the capacities used at those plants are quite low in recent years, especially, so we believe the coal plants can and should be retired. There is plenty of generation throughout that region and the capability of bringing it in and out of Asheville to accommodate the people of that area without having to build new giant gas units.

Q You would agree that the people of Asheville, western North Carolina, the entire state of North Carolina, deserve better than that, don't they?

A Deserve -- excuse me?

Q Better than NC WARN's efforts to keep that coal plant running.

A You have just made a statement that is not my

statement. We are -- again, we are insisting that the coal plants should be retired. We have never said that those plants should be kept running, so let's be clear about that.

Q You --

A If you are implying that it's a package deal and what you all call in Orwellian language a modernization project is -- means that if you don't get the whole thing, the coal units have to run for perpetuity. Again, I don't agree with that characterization. In fact, I believe -- to restate, I believe you should close the coal units and use the glut of regional supply that's available, including from Columbia Energy outside the direct region, that you refused to even consider for and get rid of the coal units and not try to build a billion-dollar power plant that you don't need.

Q So it's your testimony here before the Commission today that if Duke Energy delays the new combined cycle gas plant, they can still shut down the coal units and reliably serve western North Carolina?

A Absolutely. And, in fact, that was the -- the case that we brought -- we worked with a technical expert from the West Coast to argue that, and that's the part of

the tragedy of this entire process, that we weren't even allowed to make that case before this Commission. And I would add that everything we learned during the course of this case, limited as it was, given our limited access to information that Duke Energy chose to withhold instead of openly making its case, everything we learned confirmed and amplified our belief that you could build the -- you could move forward without building new generation at that site. And that's part of the tragedy of this entire proceeding, that that argument wasn't allowed to be made to these good people and that we were not allowed to cross examine your technical experts on the stand around that very issue. It comes down to very fairly straightforward math about whether there's enough generation in the region and whether there are enough wires that you can get it in and out of that area. We were demanding let's have that argument, let's have that debate in a proper proceeding. Duke Energy did everything they could to prevent that from happening because I believe Duke Energy could not afford to have a vetting of that basic math.

MR. SOMERS: Again, Mr. Chairman, I'm going to move to strike that as non---

THE WITNESS: You asked the question.

MR. SOMERS: It was nonresponsive to my question.

CHAIRMAN FINLEY: I won't -- I won't strike it, but we're not before the jury, and I'll take it for what it's worth.

THE WITNESS: Pardon me. I could not hear. Did you strike it or not strike it?

CHAIRMAN FINLEY: I did not.

THE WITNESS: Thank you.

Q You testified under oath just now that Duke Energy withheld information?

A Yes, sir.

Q What -- all right. Never mind.

MR. SOMERS: May I approach?

CHAIRMAN FINLEY: Yes, sir.

THE WITNESS: Getting a lot of web hits from you, Bo. Appreciate that.

Q All right, Mr. Warren. I'll now ask you about what I'll -- I've handed to you and I'll ask to be marked as DEP Cross Examination Exhibit Number 3.

MR. SOMERS: Mr. Chairman, has that been marked as such?

CHAIRMAN FINLEY: It shall be so marked.

(Whereupon, DEP Cross Examination

Exhibit Number 3 was marked for identification.)

Q Again, Mr. Warren -- sorry, that sounds a lot like WARN. I'm trying to keep --

A Don't I know it?

Q Yeah. So Duke Energy Progress Cross Examination Exhibit 3 is a press release from NC WARN dated June 7th, 2016; is that correct?

A Yes, sir.

Q Did you also write this press release?

A I think I did.

Q Okay. If you would look at the third paragraph, in this paragraph you're talking about the Court of Appeals decision, correct?

A Yeah.

Q And the headline is "Appeals Court Deals Blow to Duke Energy and Regulators of Power Plant Fight."

A Yes, sir.

Q Okay. The third paragraph says that, quote, "The court essentially ordered the Commission to conduct a proper proceeding over the bond issue instead of pulling" a multi-million -- excuse me -- "instead of pulling multi-million dollar amounts out of its regulatory hat while not even requiring Duke to provide

any evidence - or to even state - that our appeal would delay construction of the $1.1 billion project." Did you write that?

A Yes, sir.

Q Is it your testimony today that we're not in a proper proceeding?

A I think this is a new type of proceeding. I would assume that this is an appropriate proceeding. I don't agree with the process that -- and the timing that led to it.

Q Okay. If you would look at the next sentence that you wrote. Quote, "If the Commission blows the issue again, the court could decide to accept the appeal without a bond - which would be entirely appropriate," unquote. Did you write that?

A Yes, sir, and I agree with it.

Q What did you mean if the Commission blows -- "If the Commission blows the issue again..."?

A Well, the Commission made the order for the bond that the court struck down or remanded because there was not appropriate and sufficient evidence provided by Duke Energy or the Commission to justify a $10 million bond. And it's my understanding that the court could decide to -- to hear the appeal without a bond, which is

what we believe should be the case anyway, again, to try to finally get on the table some of the content of the issue in this important case.

MR. SOMERS: Thank you, Mr. Warren. I have no further questions.

CHAIRMAN FINLEY: Mr. Runkle, do you have questions of Mr. Warren?

EXAMINATION BY MR. RUNKLE:

Q Looking at the DEP Cross Exhibits, I guess all of them, 1, 2 and 3, do you routinely write press releases about activities that happen in North Carolina?

A Yes, sir.

Q And you don't intend these to be legal briefs, do you?

A No.

Q You're trying -- what is the purpose of these press releases?

A To inform the news media, reporters and editors, and the public about events that are involved with our work.

Q And this is -- and you send these out. This is your understanding of what the Court of Appeals meant and what actions the Commission meant, those kinds of things?

A Right.

MR. RUNKLE: I have no further questions.

CHAIRMAN FINLEY: Questions from the Commission? Commissioner Patterson?

EXAMINATION BY COMMISSIONER PATTERSON:

Q From a number of your answers, you seem to be suggesting that the Commission can ignore the Legislature; is that your opinion?

A No, sir.

Q Okay.

A But I -- I think what you're referring to is a matter that we do believe that the Commission has quite a lot of discretion, and you had quite a lot of discretion in this particular case, the CPCN case, and that you could have used it to -- for -- to create a more open and constructive process than you chose to do.

Q But we did have some legislation that told us what to do. Are you familiar with that?

A I -- yes, sir, but that legislation was fairly broad, and it was -- it did leave you a situation to craft new ground and to create the rules as you went. And I'm sympathetic to that, but, again, you had discretion, and in particular you had a situation where you could have chosen to do what other agencies do, which is what we asked you to do, which was to stop the clock

until all credible evidence was into the -- the case and in front of you, and then restart the clock after you'd had a chance to deal with that. The legislation did not prohibit you all from doing that.

Q I have one more question.

A Okay.

Q Mr. Runkle said that you went to your funders about this bond and they would not -- they wouldn't fund it. Who are those funders?

MR. RUNKLE: I would -- I would object to -- we could file that under confidentiality agreements, but I don't think that's proper to put out into open session.

THE WITNESS: I'd like -- I can address --

COMMISSIONER PATTERSON: You brought it up.

THE WITNESS: I could address the first part of the question there.

A This is a matter we consulted and discussed internally and with attorneys and with some funders generally. I did not ask any funder. I think what you -- your question was not the same as what Mr. Runkle described. I did not ask any funder to put up the kind of money here because I did not agree with the -- the prospect of us having to put down an amount of bond, and I especially didn't agree with it, given my understanding

that this Commission would be the same arbiter who would end up potentially taking some of that money and giving it to Duke Energy if Duke claimed that there was a damage that -- that needed to be done. So -- but, again, our main position was we do not believe that we should be barred access to the courthouse to appeal your decision based on a bond that you try to set yourself.

Q I'll ask the question one more time.

A Okay.

Q Who are those funders?

A I don't specifically recall any of the particular people that I talked to and, frankly, I would not feel that it was appropriate for me to reveal their names if I did.

MR. RUNKLE: If you'll excuse me, Mr. Patterson, I misspoke when I -- when I -- I apparently misspoke when I said that NC WARN had gone to funders. Mr. Warren says that he did not go to anybody specifically. I apologize for my testimony.

THE WITNESS: Well, I think I can clarify it. I think what you said was accurate. I discussed with -- with a number of people, but I did not ask anyone to put up money for this kind of bond.

CHAIRMAN FINLEY: Commissioner Bailey?

EXAMINATION BY COMMISSIONER BAILEY:

Q It's almost afternoon. Good afternoon, Mr. Warren. I guess my question is going to deal with my understanding is that you're saying that your West Coast experts are saying that without the coal plant being in Asheville and without making any modifications whatsoever to any transmission lines in the western part of North Carolina, that the people of Asheville and that region can certainly be served with existing whatever hydro that you guys are claiming is out there and all the other stuff there, and even if they have to wheel power from Columbia, South Carolina up there, it certainly could be on existing transmission lines that exist up there to the point it would meet NERC's reliability standards that are required to the Duke -- to Duke Energy Progress. I mean, they don't dream that up. That's dictated to them by FERC and through NERC, obviously. So is that your position?

A I would alter one of the clauses early in your -- your question, that we do believe there's a likelihood that there could be transmission upgrades necessary, and we tried to put that into the record through reconductoring, by the way, which our understanding, as I recall, Duke Energy did not -- did not even consider that

they could have reconductored the existing transmission lines at a very cost effective rate. And it's not -- not a -- it's not vanguard technology. It's something that a lot of other utilities do. But yeah -- but the rest of your question is -- the answer is, yes, we believe that overall Duke Energy, based on what we saw in the evidence, in the case, and we were very eager to have a chance to have that debate and see if it does, in fact, as I characterized earlier, really come down to fairly straightforward math questions as to is there enough generation at the hydro plant and the other Duke Energy system, DEP and DEC, and in combination with other resources in the area. Yes, our position is it appears that there is adequate capacity throughout the region to avoid having to build another power plant.

Q So in general, NC WARN is totally against any type of power plant in the entire state of North Carolina. If DEP says we're building this not only just for this region, but for -- to upgrade the efficiency of our existing systems across the whole state of North Carolina and our ratepayers, you totally disagree with that assumption?

A Well, that -- this relates to the fact that -- you may be familiar with the fact we appealed to or -- or

filed a complaint or petition with FERC because of Duke Energy's lack of regional sharing with neighboring utilities, and we showed and filed federal doc--- federal documents in the case showing a virtual -- what I characterize as a glut of supply across the Southeast, and a glut that is projected many, many years into the future. So in general to your -- to your question, we don't see the -- the need to be building more gas, certainly not coal, power plants anywhere, not nuclear either, but not -- as if that would ever happen, given the abject failure of the US nuclear renaissance, but, yes, in general we do not see the need to be putting on more fossil fuel resources. We need to be phasing out fossil fuels through ramping up renewable technologies and putting to use Duke Energy's very large energy storage capacity in northern South Carolina that they could be putting online to help balance the intermittency of renewable technologies across the region and which their own people, plant managers are very proud of.

COMMISSIONER BAILEY: Thank you.

CHAIRMAN FINLEY: Go ahead, Commissioner Gray.

EXAMINATION BY COMMISSIONER GRAY:

Q Mr. Warren, would NC WARN support plasma arc gasification?

A If it were to ever become commercialized, I -- I'm not prepared to answer that question. I think what you're -- I don't know the latest state of that technology, Commissioner Gray. I -- several years ago a number of people were talking about that. I recall at the time it involved turning municipal waste into energy, and there was some effort to try to jumpstart some discussion in North Carolina around it. I recall that all died out because it was extremely cost ineffective, but that's -- that's the latest that I understand about that.

COMMISSIONER GRAY: Thank you.

CHAIRMAN FINLEY: Mr. Warren, just a few questions.

EXAMINATION BY CHAIRMAN FINLEY:

Q I think in response to questions earlier in the proceeding, you said that it would have been your wish that the Commission in its order -- before it issued its order on the CPCN initially, that it should have stopped the clock --

A Yes.

Q -- that you requested the Commission to do based on what other administrative tribunals could have done. Would you elaborate on what other tribunals you're

talking about exactly?

A My understanding that at state agencies, water -- on water issues, air permits, other things, if they have insufficient evidence before them or if a permit, for example, is not completed, then they are able to suspend the time frame or extend the time frame to make sure they have all the information in front of them so that they can make an appropriate decision.

Q So it's --

A That's my understanding.

Q Sure. So it's your view that the statute that we were operating under here that gave the Commission 45 days to come out with this order, a similar process should -- could have -- could have and should have been employed to stop the clock?

A I believe so, and I believe that that would have been the reasonable thing, and I think the Legislature would have understood that if the Commission were to go back and said, look, this is a complicated process and, you know, we have to make sure that we do our job appropriately and see all sides of it and make sure that the decision we make is the right one. And I think -- by the way, I think that would have avoided an awful lot of the other problems that we've seen through

-- problems that -- that have accrued to you and to us and a lot of other people.

Q And I believe you also said that it's your opinion, and I realize you're not a lawyer, but you follow these cases carefully, obviously, that your view that the Commission, based on what this law is, could just say that there should be no bond for you to proceed with your appeal?

A I think at the least you could agree that the bond should be de minimis, but...

Q Well, there's a difference between no bond and a de minimis bond. Is it your view that we could legitimately, under the statute, have no bond?

A Well, I'm not -- as you say, I'm not an attorney, and I don't recall the exact language of the statute. If the statute says that the Commission sets a bond in this case, I'll accept that that would be the case. But, again, you do have broad discretion. And, again, it's really important to remember that we are not seeking, didn't seek in the court through an appeal a stay of this project. And as Mr. Runkle described earlier, and I understand to be the case, bonds are put into place when a project is actually being sought to be stayed and stopped, and we strongly believe that Duke

Energy's shareholders should take responsibility for their decision to move forward if they think that their case is not strong enough that they're concerned that they could lose an appeal, then that's a risk that Duke Energy shareholders should bear, not their customers, not the people of the state, and certainly not critics who are -- have simply and persistently tried to seek a fair and clear process where everybody can understand and feel that the decisions made going forward are the appropriate ones.

Q All right. Let me -- in your pleadings, NC WARN traditionally says that NC WARN has approximately a thousand members, correct?

A I think what we say is over a thousand members.

Q What does one do to become a member of NC WARN, just generically?

A We've probably got some forms here. I'll hand them out for you all after the proceeding. It -- there's a -- we ask for annual membership dues that's flexible, depending on people's ability. And people get involved in a variety of ways. They volunteer. They sometimes attend hearings, as you know, other things like that.

Q So all of the members would have filled out a form to become a member of NC WARN?

A Well, sometimes they fill out a form, and sometimes they just send a donation.

Q So you can become a member of NC WARN by filling out a form, by sending in a donation. How else?

A We have a number of people who contribute time, but aren't able to put in money, and we broadly sort of count them as part of or community, too.

Q All right. Do you ever cull your rolls? Do you ever say, well, this person has moved to some other place --

A Oh, sure. Oh, sure, yeah.

Q How often do you do that?

A I don't think it's on a set schedule, but certainly if people move away or lose interest or are not able to stay involved in what we do, we certainly don't keep badgering them to do so.

Q Can you tell me, just rough numbers, what percentage of your members are customers of Duke Energy Progress?

A Oh, I assume a high percentage. I couldn't tell you directly. We have some people that support us from out of state and certainly people who are members of the co-ops and, of course, they get their juice from the same place, too.

Q And I would assume you have some members who are customers of Duke Energy Progress as opposed to -- are also members of Duke Energy Carolinas as opposed to Duke Energy Progress?

A Yes, sir.

Q All right.

A And pardon me, my previous answer, I think I was referring to -- to both DEP and DEC.

Q All right.

CHAIRMAN FINLEY: Other questions by the Commission? Commissioner Patterson?

REEXAMINATION BY COMMISSIONER PATTERSON:

Q You're a 501(c)(3)?

A Yes, sir.

Q So you file an annual report with the Department of State, right?

A Yes, sir.

Q What's your annual budget?

A I believe last year our budget was around $1.2 million.

Q Uh-huh. And you said you've got nine or 10 staff people?

A Yes, right now. Yes, sir.

Q What -- could you just -- real quick, could you

sort of describe what each of them does in, you know, the Twitter version?

A Well, we have people, as I described earlier, who work on research and work as part of our legal team. We have people who work in the field, working in communities and helping do outreach and build alliances with other groups. As you may know, we've got -- we work a lot with other groups, not just in the environmental community, but in the social justice community across the state, and a variety of other things. We do a lot of research, and we do -- we read a lot of those folks' filings and writings and things. And we -- we do a lot to try to keep up with climate science and what's happening, and trends in energy and the energy field, and we -- we craft our messages and strategies to try to promote a transition to clean energy and a more democratic process for resolving society's challenges.

Q I just wanted to understand what each of those -- do you have, say, an engineering staff?

A We work with consultants a lot, and we do not have an engineer on staff. We -- a lot of what we do is, as you all have seen, we work with different --

Q You have transmission people on staff, experts in that?

A Not on staff, but on a consultancy basis.

Q Uh-huh.

COMMISSIONER PATTERSON: All right. Thank you.

THE WITNESS: Yes, sir.

REEXAMINATION BY CHAIRMAN FINLEY:

Q One more, excuse me, Mr. Warren, but is NC WARN still dissatisfied with the procedure that we have followed for this hearing today, this morning?

A Still dissatisfied?

Q Yes.

A I think the proceeding today has been interesting. I haven't formulated an opinion on it yet. I do think that -- as I said, I think the process that led to it was -- was problematic.

And I should add, if I might take a moment, neither I nor any our people like being critical of the Utilities Commission or Duke Energy or the EPA or anyone else. We do so when we believe that democratic process has not been served, and we do so because we are so deeply, deeply concerned about the climate crisis in particular and how imminent we are toward tipping points, even as millions of people are being harmed badly on an ongoing basis, and -- but we are working with the scientists who are warning that humanity is within

probably two, three, four years of passing a point of no return toward a truly chaotic situation, not just climate chaos, but social and economic and political chaos, which is already underway in some ways, but the climate chaos is going to make all of that worse. And so we -- we do push hard to try to get a fair way for this state to make decisions that are so incredibly important to all of us going forward.

And so we don't enjoy the criticism. I know that all of you are individuals and you -- you care about this society and this state, too. We just urge you to take a broader view as to how we make these decisions and use your discretionary -- discretionary authority to open up the tent a little bit more. It's incredibly frustrating, as you might understand, for us to have lined up in this case a gentleman from Cornell University who truly is the leading methane climate expert, Dr. Robert Howarth, a gentleman from the Canadian Geological Survey, probably a leading expert on shale gas, and an engineer from the West Coast who is highly credentialed in his field, and we're unable to even get their opinions into consideration here. And so we -- we are left to use the means to get the word out to the public.

If we believe that the Legislature, or the

governor, or the attorney general, or a regulatory agency is not acting fairly, our job is to make that case in the public opinion arena. We prefer to have a more cooperative relationship with this Commission and with Duke Energy. You might be interested, and you can see on our home page a letter -- an open letter we wrote to the CEO of Duke Energy yesterday seeking a more cooperative approach moving forward, again, because it's the right way to do things in this society, it's the way we all would rather operate, and because there is so incredibly much at stake, not for just our children and grandchildren, but for people in our lifetimes. And I'm -- and I am, you know, intent that we continue pushing to try to get decision making that we can all feel good about.

CHAIRMAN FINLEY: Are there questions on the Commission's questions?

MR. RUNKLE: No, sir.

MR. SOMERS: Just one or two, if I may.

RECROSS EXAMINATION BY MR. SOMERS:

Q Mr. Warren, you testified in response to a question I believe from Commissioner Bailey about a FERC complaint that NC WARN filed. Do you remember that?

A Yes, sir.

Q And that was dismissed by FERC, correct?

A It was dismissed on a technicality, right, not on the substance of the complaint. And there was not any refutation of the numbers that we put in. They were NERC numbers, by the way. There was a mention of NERC the other day. And NERC's own numbers were showing this large glut of supply that I referred to.

Q If I understood your testimony right sort of at the end of your little -- not little, but the end of your statement there prior to my question, is it fair to say you argue that the Commission didn't consider NC WARN's evidence in ruling on the CPCN in this case?

A That's my belief. They certainly didn't fully consider it. There was no discussion about it, no discussion from Duke Energy about it, no -- you know, the proceeding that I think you mentioned earlier, where we had the -- the oral case there, that was a far cry from the evidentiary proceeding that we had insisted on and which we desperately needed in this case. I think in retrospect, a lot of people would agree it might have just been better if we could have just had this thing play out the way it always has before.

Q But you would -- you would agree that in the Commission's CPCN Order, they specifically held, quote,

"The Commission determines NC WARN's assertion of excess capacity overly simplistic and lacking credibility," unquote. Isn't that what the Commission said in their order?

A That -- that statement does not reflect a full consideration of that case that we put in, nor did it reflect an evidentiary proceeding where that testimony would have been fully vetted and -- and explored.

Q Also, the Commission said in that order, quote, "The comments filed by many of the Intervenors appeared 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," unquote.

A Are you saying that that passage refers to NC WARN's or is that -- is that -- was the beginning of that Intervenors?

Q It says Intervenors. I am not speaking for the Commission --

A Well --

Q -- but having participated in this proceeding

and listening to the arguments that you made in that case, I believe it does refer to NC WARN.

A I think it's easy to -- it's easy enough to make a statement like that in an order when there's nobody available to debate the issue, but that's not the appropriate way this Commission has always operated. If they felt that Bill Powers and other people didn't understand the situation, then you have to -- have to remember that we had a limited amount of information and opportunity to explore it in an open, fair proceeding.

MR. SOMERS: Thank you. No further questions.

CHAIRMAN FINLEY: All right. What about your exhibits, Mr. Somers?

MR. SOMERS: Yeah. Mr. Chairman, I would ask that DEP Cross Examination Exhibits 1, 2 and 3 be admitted for impeachment purposes -- I believe they go to the credibility of the witness who was the verifier for NC WARN's reply comments in this case as to the amount of the bond -- and ask that they be admitted for impeachment purposes, not for the substance of the documents.

MR. RUNKLE: Without objection.

CHAIRMAN FINLEY: So ordered.

(Whereupon, DEP Cross Examination Exhibit Numbers 1, 2 and 3 were

admitted into evidence.)

CHAIRMAN FINLEY: Okay. Thank you, Mr. Warren. You can step down there.

(Witness excused.)

CHAIRMAN FINLEY: Just a few more questions before we finish here. Let's take a look at this order of the Court of June 7, 2016, and I just would like to get the parties to tell me their interpretation of what that order means. It's very short. It says, "The Petition for Writ of Certiorari and Petition for Writ of Supersedeas filed in this cause by NC Waste Awareness and Reduction Network and The Climate Times on 19 May" -- 2006 (sic) -- "are decided as follows: The Petition for Writ of Certiorari is allowed for the limited purpose of vacating and remanding the order entered" -- May 10, 2018 (sic) -- "by the North Carolina Utilities Commission setting an appeal bond. On remand, the Commission shall, in its discretion, set bond in an amount that is in accordance with NC Gen. Stat. 62-82(b) and based upon competent evidence. Because we vacate the Commission's order, we dismiss the Petition for Writ of Supersedeas as moot."

Now, I will -- you know, that to me is not the most clear order that I have ever seen, but the way I

have interpreted that, again, I looked at the Hollowell case and I looked at the cases cited, and in that case a bond order was sent back to the Superior Court because the affidavit upon which the damages that determined the amount of the bond was not based on personal knowledge, but was based on information and belief. So how I am interpreting that, and I could easily be wrong, is that the Court of Appeals looked at the pleading that Duke Energy Progress filed before the court, it looked at the affidavit and didn't think that affidavit was appropriate and sent it back to take live evidence so that that information should be -- could be based on personal knowledge.

Now, what is your -- what are the parties' -- what is their interpretation of what this order means?

MR. RUNKLE: I agree with my colleague here. It's not very clear. It -- if it would -- if it had been more precise about what the expectation was, it would have been very helpful. My reading was a lot narrower than yours, that it had to be -- that any bond had to be set on the record as -- before you at this point rather have a new hearing. But, again, that's a -- that's my interpretation. It may go back up to the Court of Appeals.

MR. SOMERS: Mr. Chairman, my reading on this order is it says that the Commission, in its discretion, shall set a bond in an amount that's in accordance with the statute and based upon competent evidence, and what is clear to me is that the Commission has heard competent evidence today. In its discretion, it's allowed a full evidentiary hearing with cross examination, open to all parties, and is, in my opinion, able to set an appeal bond amount based upon the competent evidence it's heard today.

CHAIRMAN FINLEY: Okay. But the Hollowell case did use the phrase "competent evidence," didn't it? That's a phrase that came out of that court opinion, right?

MR. SOMERS: What I will tell you, in my opinion, is today Mr. Landseidel, on behalf of Duke Energy Progress, has testified on his own knowledge. I will also submit and reiterate that the original filing, that the Court of Appeals review was also based upon Mr. Landseidel's own personal knowledge. Perhaps they -- I won't speculate what they viewed of it, but it was clear from his testimony today that nothing has changed and it was all based upon 34 years of extensive experience and it's competent, in my opinion, for this Commission to

issue an order.

CHAIRMAN FINLEY: All right. All right. Now, Mr. Runkle, when we started this case, we addressed your June 14 response, and I told you what my ruling was as to whether or not we would have a proceeding. We've had a proceeding and we've taken evidence. And I'm looking at the last page, page 3, where you say, "Or in the alternative, if the Commission allows additional testimony," which we have, "it provides NC WARN and TCT at least ten days following Duke Energy's deadline to submit additional testimony to review and provide witnesses to respond to the testimony prior to" -- any -- any -- "to an evidentiary hearing." Now, what say you as to where you are on that request?

MR. RUNKLE: Your Honor, at this point, if we had the 10 days, we would -- we would certainly try to find one of the experts that we have talked to before in other matters to bring that testimony back. Now, we would have to confer on that and, you know, the -- it's hard to say where we are at this point, I mean, of the hearing without consultation and going through all the notes.

CHAIRMAN FINLEY: Well, when will -- when will you -- well, when will you know where you are on it?

MR. RUNKLE: I mean, are you asking for a date?

CHAIRMAN FINLEY: Yes, sir.

MR. RUNKLE: We will know by Wednesday.

CHAIRMAN FINLEY: All right. Well, you let me know. Let me know by Wednesday what your feeling is on that.

MR. RUNKLE: Okay. And to either -- to request for the 10 days or how many days that we would need and -- or whether we will have any testimony.

CHAIRMAN FINLEY: Yes, sir.

MR. RUNKLE: Okay.

CHAIRMAN FINLEY: All right. What else do we want to receive from the parties here?

MR. SOMERS: If I may, there's two more things I'd like to address at this time. The first one, just so it's clear on the record, earlier there -- Commissioner -- I'm sorry -- Chairman Finley, you asked a question about what was in the record with regard to confidential information. Mr. Landseidel testified to the gas supply contract between Duke Energy Progress and PSNC, and just so it's clear on the record, that contract was filed for approval by PSNC, so it is not in this docket. It was in a G-whatever docket. I don't know what their docket number is. But subject to knowing what that docket is,

just so it's clear on the record, that -- the contract was filed under seal by PSNC, was approved by the Commission in a docket other E-2, Sub 1089, just so that's clear.

I would also submit that regardless of whether the contracts themselves are in evidence, as I mentioned, the supply contracts -- the gas supply contracts not in evidence in this docket, likewise, the actual contracts between Duke and the three suppliers or contractors that Mr. Landseidel testified to earlier, while they aren't in evidence, I would submit that Mr. Landseidel, having negotiated those contracts and testified to the damages and the cancellation clauses, that he is competent to do so. I would argue that his testimony is credible and ultimately for the Commission to decide, but that you could accept that without the underlying contracts; however, if the Commission believes the record requires those to be filed, we would ask to do so as late-filed confidential exhibits.

MR. RUNKLE: We see no purpose to be filing the contracts. The witness' assertions of what was in them is, I think, good enough for our purposes here today. I don't think you need to review 10 feet of documents.

MR. SOMERS: I appreciate that acknowledgement

and stipulation, Mr. Runkle.

If I may, last point, I'd like to address there were a series of questions today from the Commission directed to NC WARN about their ability to post a bond in a certain amount. And if I may respectfully argue to you that NC WARN's ability to pay a bond, whether it's $2 or $240 million, is not relevant under the statute. The statute requires NC WARN in this case, and, again, I'm using NC WARN for both NC WARN and The Climate Times, to post a bond to secure damages, and damages are defined in the statute as increased construction costs from the delay in beginning construction. There's nothing in the statute that says or in some lesser amount that the potential appellant can post or sign an undertaking to.

The purpose of the statute is clear. It's to protect the company and its customers. It's not to protect NC WARN. And I would argue to the Commission in your deliberations on setting an appeal bond amount that the ability of the potential appellant in this case to post a bond is respectfully not part of the statutory precondition for them to file a Notice of Appeal. Thank you.

CHAIRMAN FINLEY: All right. Well, thank you all for your participation this morning. It's been an

inconvenience, and I apologize for that. Everybody is mad at the Chairman for having this hearing, but you'll just have to get over it.

(Laughter.)

CHAIRMAN FINLEY: I think I and the legal staff are going to proceed to work on an order, and I'm not going to require any post-hearing filings by the parties. If you want to file something, you're welcome to do so, but you need to get it in here quickly because it's my view that time is a bit of the essence, and so we're going to proceed to get an order out as quickly as we can.

So we are adjourned. Thank you.

(The hearing was adjourned.)

STATE OF NORTH CAROLINA

COUNTY OF WAKE

C E R T I F I C A T E

I, Linda S. Garrett, Notary Public/Court Reporter, do hereby certify that the foregoing hearing before the North Carolina Utilities Commission in Docket No. E-2, Sub 1089, was taken and transcribed under my supervision; and that the foregoing pages constitute a true and accurate transcript of said Hearing.

I do further certify that I am not of counsel for, or in the employment of either of the parties to this action, nor am I interested in the results of this action.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 20th day of June, 2016.

Linda S. Garrett

Linda S. Garrett
Notary Public No. 19971700150

EXHIBIT Q

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	))))))	RESPONSE BY NC WARN AND THE CLIMATE TIMES

NOW COME NC WARN and The Climate Times ("TCT"), by and through the undersigned attorney, with an affidavit from Mr. Powers in response to the testimony of Duke Energy witness, Mr. Landseidel, regarding the amount of the appeal bond.

Mr. Powers reviewed the transcript of Mr. Landseidel's testimony and oral argument from the hearing on June 17, 2016, along with his previous knowledge of the Asheville project. In his affidavit which he was able to prepare over the weekend, Mr. Powers addresses each of the components in the $240 million appeal bond proposed by Duke Energy, and concludes that none of the costs are reasonable. No bond is needed to protect ratepayers from construction delays; most of the costs rightly belong to shareholders or have been significantly exaggerated. In fact, given the declining prices for natural gas plants, the ratepayers may save money from a two-year delay.

NC WARN and TCT are now even more convinced that a careful review through an evidentiary hearing on the need for the project, and the alternatives to

it, would have led to a different outcome. Testimony and evidence would have either resulted in a much different certificate for public convenience and necessity on a more limited project, or none at all.

Respectfully submitted, this the 27th day of June 2016.

/s/ John D. Runkle

John D. Runkle
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing RESPONSE BY NC WARN AND THE CLIMATE TIMES and attached AFFIDAVIT OF WILLIAM POWERS (E-2, Sub 1089) upon each of the parties of record in this proceeding or their attorneys of record by deposit in the U.S. Mail, postage prepaid, or by email transmission.

This is the 24th day of June 2016.

/s/ John D. Runkle

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	)	AFFIDAVIT OF
Certificate of Public Convenience and Necessity	)	WILLIAM E. POWERS
to Construct a 752 Megawatt Natural Gas-Fueled	)	FOR NC WARN AND
Electric Generation Facility in Buncombe County	)	THE CLIMATE TIMES
Near the City of Asheville	)	

1. My name is William E. Powers, P.E., and I am principal of Powers Engineering, 4452 Park Blvd., Suite 209, San Diego, CA 92116. I am a consulting and environmental engineer with over 30 years of experience in the fields of power plant operations and environmental engineering. I have worked on the permitting of numerous combined cycle, peaking gas turbine, micro-turbine, and engine cogeneration plants, and am involved in siting of distributed solar photovoltaic (PV) projects. I began my career converting Navy and Marine Corps shore installation projects from oil firing to domestic waste, including wood waste, municipal solid waste, and coal, in response to concerns over the availability of imported oil following the Arab oil embargo in the 1970's.
2. I authored "*San Diego Smart Energy 2020*" (2007) and "(*San Francisco) Bay Area Smart Energy 2020*" (2012), and have written articles on the strategic cost and reliability advantages of local solar over large-scale, remote, transmission-dependent renewable resources. I have a B.S. in mechanical

engineering from Duke University, an M.P.H. in environmental sciences from UNC – Chapel Hill, and am a registered professional engineer in California.

3. I am submitting this affidavit for NC WARN and The Climate Times in response to the June 17, 2016, testimony of Duke Energy Progress (DEP) witness, Mr. Mark Landseidel. I previously submitted an affidavit in this docket as Exhibit C to the NC WARN and The Climate Times Position and Comments, filed February 12, 2016.

4. **$100M in additional environmental controls at Asheville coal units can be avoided by substituting with available regional combined cycle or hydro capacity**

Mr. Landseidel claims that DEP will incur $100 million in environmental control costs, due to existing regulatory compliance dates, if the operation of the two coal units at the Asheville plant is extended two additional years while an appeal of the proposed Asheville combined cycle plant is adjudicated. The alleged environmental compliance costs include: $25 million to modify a wastewater treatment system at the plant; $50 million to convert the fly ash collection system from wet to a dry system; $25 million to convert the bottom ash collection system from wet to dry.[1]

These costs can be avoided by shutting down the two Asheville coal units on schedule and relying on available existing regional generation to meet reliability need if that becomes necessary. There are six existing transmission

[1] Transcript of Evidentiary Hearing, June 17, 2016, NCUC Docket E-2 Sub 1089, p. 37.

interties to DEP West with a total capacity of at least 2,200 MW.[2,3] DEP West is "winter peaking" service territory. Even when the N-1 NERC grid reliability standard is applied, the provision of service to all customers without interruption with the largest single 230 kV transmission line or largest generation element (N-1) is out-of-service at peak load, DEP West will have at least 1,600 to 1,800 MW of available transmission capacity and at least 300 MW of existing generation capacity without Asheville 1 and 2 coal units.[4] This quantity of existing reliably available capacity in DEP West, at least 2,000 MW, is about double the DEP West winter peak load. The currently available reserve margin in DEP West, applying the NERC federal grid reliability standard, is several times the reserve margin requirement of 17 percent.

DEP West has available off-the-shelf hydropower and combined cycle gas turbine options in the region to supply capacity if additional capacity is needed due to a 24-month delay caused by an appeal.

Four Smoky Mountain Hydro units near the North Carolina-Tennessee border have a capacity of 378 MW and produce 1.4 million MWh annually. These units are in the TVA system, which is connected to DEP West by a single 161 KV line from TVA to the substation at the Walters Hydro Plant in

[2] Richard S. Hahn affidavit, February 12, 2016, NCUC Docket E-2 Sub 1089, Table 1, p. 4. Total capacity of the six existing transmission interties to DEP-West is at least 2,200 MVA.
[3] For the purposes of this affidavit, "MW" is assumed to equal "MVA".
[4] Hahn affidavit, Exhibit C.

DEP West. The power produced by these units is not currently contracted for purchase.[5]

The underutilized merchant 523 MW Columbia Energy combined cycle plant outside of Columbia, SC, built more than a decade ago when the capital cost of combined cycle power construction was lower than it is today, could serve some or all of any need that might arise.[6] Columbia Energy LLC was granted party status in this proceeding on February 4, 2016.[7] According to Columbia Energy, DEP is legally obligated to purchase Columbia's energy and capacity at DEP's avoided cost, and the company is pursuing efforts to sell its capacity via a power purchase agreement with DEP.[8]

5. **$40M in major equipment contracts' cancellation costs**

Mr. Landseidel indicates that DEP will incur $40 million in major equipment contract cancellation costs in the event of an appeal: "Subsequent to the May 2nd filing, we have now given full release to the three major equipment suppliers, one for the two gas turbines, one for the two steam turbines and one for the two boilers, or in combined cycle we call them heat recovery steam generators or HRSGs, so they've been fully released and they were released on May 31st."[9]

However, DEP signed those major equipment contracts when the parties to Docket No. E-2, Sub 1089 were still in the process of exhausting their

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[5] Ibid, p. 11.
[6] Petition to Intervene of Columbia Energy LLC, February 2, 2016, NCUC Docket E-2 Sub 1089, p. 1.
[7] Order Granting Petition To Intervene, February 4, 2016, NCUC Docket E-2 Sub 1089.
[8] Petition to Intervene of Columbia Energy LLC, February 2, 2016, NCUC Docket E-2 Sub 1089, p. 2.
[9] Transcript of Evidentiary Hearing, June 17, 2016, NCUC Docket E-2 Sub 1089, p. 38.

administrative and legal remedies to the approval of the Ashville Modernization Project. DEP could not be certain the NCUC approval was definitively final when the contracts were signed. As such, these contracts were signed at risk and are the responsibility of Duke Energy shareholders, not DEP ratepayers or parties in Docket No. E-2, Sub 1089 that are exercising their administrative and legal rights in a timely manner.

6. **$8M in sunk development costs**

DEP claims, as a basis for the proposed bond value, that it is entitled to recover all of its development costs related to the Asheville Modernization Project: "My estimate would be is that if we were to delay the project for two years, we would have to rework a significant amount of this development effort, rebid equipment, rebid construction, rework our schedule, our cost estimate. A lot of the work we've done to date would effectively be wasted and we'd have to do it over again or rework."[10]

DEP is incorrect on this point. These are "at risk" costs that are the responsibility of DEP shareholders. By way of example, DEP initially pursued a major new transmission line to meet projected reliability need in DEP West. Presumably DEP sunk substantial costs in developing the transmission line without certainty that the transmission line would ultimately be approved and built. The costs invested in unsuccessfully developing the transmission line were at risk costs that are an aspect of any major development project that may or may not be built. Neither parties to Docket No. E-2, Sub 1089 or

[10] Transcript of Evidentiary Hearing, June 17, 2016, NCUC Docket E-2 Sub 1089, p. 46.

escalator in 2016.[13] A 24-month delay may in fact save DEP substantial money on the construction cost of the Asheville Modernization Project.

8. **$45M in estimated fixed firm gas transportation service costs during a two year delay**

DEP misrepresents the alternatives it is has available regarding the gas transportation contract with PSNC: "Duke Energy Progress entered into a gas transportation contract with PSNC. That contract has been approved by this Commission. And in that contract, Duke Energy is required to pay for transportation on a monthly basis whether it's used or not, and if the project was delayed for two years, there would be a two-year period where DEP would be paying for this gas transportation and not actually bringing gas into the plant."[14]

DEP has the business option to resell its firm capacity to third parties. There would likely be some discount on the sale of this capacity under typical conditions. However, during times of high demand in the Northeast, such as during winter cold snaps, DEP's firm capacity could likely be resold at a substantial premium to the terms of its contract with PSNC. It is not credible that DEP would allow this firm pipeline capacity to go unused and unsold during the 24-month appeal. If the capacity is resold, there may ultimately be relatively little difference between the cost of DEP using the firm capacity and the price a third party, or third parties, are willing to pay to DEP over time to

[13] Chemical Engineering Magazine, Current Economic Trends: April 2016, June 20, 2016.
[14] Transcript of Evidentiary Hearing, June 17, 2016, NCUC Docket E-2 Sub 1089, p. 50.

utilize that capacity. As a result, there is no basis for asserting any bond value to cover the cost of unused firm natural gas capacity.

This completes my affidavit.

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, William E. Powers, verify that the contents of the above affidavit filed in this docket are true to the best of my knowledge, except those matters stated on information and belief, and as to those matters, I believe them to be true.

William E. Powers

William E. Powers

Date 6/27/16

Sworn to and subscribed before me this the 27th day of June, 2016.

Elyce Marie Martinez

Notary Public

My commission expires: 10/26/2016

(seal)

OFFICIAL SEAL
ELYCE MARIE MARTINEZ
NOTARY PUBLIC-CALIFORNIA
COMM. NO. 1995401
SAN DIEGO COUNTY
MY COMM. EXP. OCT. 26, 2016

EXHIBIT R

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 (CPCN) to construct two 280 MW combined cycle natural gas-fired electric generating units in Buncombe County, North Carolina (the Project or Facility) in compliance with G.S. 62-110.1 and the Mountain Energy Act, Session Law 2015-110. This act required the Commission to issue its order on the CPCN application within 45 days of filing.

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, a prerequisite for appeal of the Commission's March 28, 2016 order, in an amount of $250 and requesting an oral argument or evidentiary hearing on the bond requirement.

On April 27, 2016, the Commission issued a 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 indicated that the Commission's 44-page comprehensive and detailed CPCN Order properly found that the construction of the two 280 MW combined cycle natural gas-fired units (CC units) were necessary to reliably meet the needs of DEP's customers and to provide for the early retirement of the superannuated 379 MW Asheville Coal Units 1 and 2 within the expedited time frame established by the General Assembly. DEP indicated that the approximate cost of the Project was $1 billion.

DEP indicated that it had not decided if it would delay the beginning of construction in response to the potential appeal. Construction was to begin not sooner than October 1, 2016, but if delays occurred due to the appeal, the reasonably estimated increased costs would be approximately $100 million in potential coal unit environmental controls and

approximately $140 million in potential increased combined cycle construction costs. DEP requested that the Commission set the bond at a minimum of $50 million. DEP indicated 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 highlighted that the appeal bond is to secure payment of damages in the event an appeal is simply unsuccessful, not upon a higher standard such as a finding that the appeal was frivolous.

DEP argued that unlike 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 non-exemption strengthens the argument that the Mountain Energy Act requires an appeal bond for the present case.

DEP argued that NC WARN's suggested bond amount of $250 was absurd in that the sum of $250 could not provide adequate protection for DEP's customers from potential construction cost delays for a $1 billion generation construction project. DEP stated that this nominal bond amount failed 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 was set "prohibitively high" and, in essence, that prohibited the appellate process, DEP stated that potential appellants are in control of whether the appellant pays damages and whether a strong appeal is mounted. DEP argued that if NC WARN's appeal is successful, it will not be required to pay damages. DEP further argued that if the appeal is unsuccessful, and if there are no damages from increased costs of the Facility due to the appeal, no damages will be awarded. DEP argued that the process of appealing orders allowing for the construction of generating facilities is not a "nominal" matter and that 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 stated timeline so that older, less efficient coal units may be retired.

DEP indicated 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 highlighted that even NC WARN recognized in its Motion to Set Bond that the bond requirement is to provide security for payment of "potential damages caused by construction delays due to the appeal."

DEP explained that in the present case, the two CC units must be operational before January 31, 2020, for the Coal Ash Management Act (CAMA)[1] deadlines to be extended by the Mountain Energy Act. If the two CC units are delayed in response to an appeal, DEP argued that it would need to invest approximately $100 million in additional

[1] Section 2 of the Mountain Energy Act, Session Law 2015-110 amends Section 3(b) of the Coal Ash Management Act (CAMA), Session Law 2014-122.

environmental controls pursuant to CAMA. Thus, one potential damage would be the incurrence of approximately $100 million in new environmental controls that otherwise would have been avoided if the CC units were built on schedule.

DEP indicated that since the issuance of the CPCN Order, DEP has been finalizing contracts with suppliers and contractors. DEP stated that it needed to authorize certain contractors 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, potential major equipment contract cancellation costs would be approximately $40 million, plus $8 million in sunk development costs. DEP estimated 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 indicated that it would still be obligated to pay Public Service Company of North Carolina, Inc. (PSNC) 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 estimated that the potential increased combined cycle facility costs due to a two-year delay would be approximately $140 million, for a total increased cost of $240 million for the Facility.

On May 5, 2016, NC WARN filed a Verified Reply to DEP's Response to Motion to Set Bond. In summary, NC WARN argued that DEP's response was an attempt to bully NC WARN away from an appeal. NC WARN argued that DEP has the burden to quantify and substantiate the amount of bond needed to secure against damages from appeal-related delays in beginning of construction of the Facility. NC WARN stated that DEP provided unsubstantiated and extravagant estimates of potential damages. NC WARN indicated that DEP's assertions of potential damages were not sufficiently documented, that DEP provided no evidence regarding the 2.5% annual cost escalation and did not provide an explanation or break-down of its ultimate $50 million bond estimate. NC WARN stated 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.[2]

NC WARN argued 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 one required by an injunction. NC WARN stated 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.

As to its contention that DEP's assertions of potential damages were not sufficiently documented, NC WARN stated that DEP did not identify the major equipment contracts, the reasons the contracts might be cancelled or the explanation of how DEP estimated that the cancellation of the contracts would result in $40 million in damages.

[2] The Commission likewise 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), with or without an injunction or stay, because the Commission is unaware of any appeal since 1965 of any CPCN to which G.S. 62-82(b) applies.

DEP indicated a potential expenditure of $8 million in sunk development costs but provided no evidence to substantiate such estimate. As for DEP's estimate of delay costs based upon two-years, NC WARN argued that a two-year appellate process is on the high end. NC WARN further argued that DEP did not explain or support its two-year estimate of $50 million in increased construction costs nor provide evidence supporting its 2.5% annual cost escalation.

NC WARN further asserted that DEP may experience construction delays for reasons unrelated to the appeal. One example could be the upcoming environmental permitting process for the Facility, including air quality permitting. NC WARN stated that any bond determination should recognize that construction delays might be caused for reasons unrelated to the appeal.

On May 10, 2016, the Commission issued its Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b). The Commission required NC WARN to file an executed undertaking in the sum of $10 million or a bond in the sum of $10 million prior to filing a notice of appeal.

On May 19, 2016, NC WARN filed in the Court of Appeals a Petition for Writ of Certiorari, Petition for Writ of Supersedeas, and Motion for Temporary Stay of the Commission's May 10, 2016 Order Setting Undertaking or Bond. On May 24, 2016, the Court of Appeals denied NC WARN's Motion for Temporary Stay.

On May 27, 2016, NC WARN filed a Notice of Appeal and Exceptions in Docket No. E-2, Sub 1089 to the Commission's March 28 and May 10, 2016 orders without filing the required undertaking or appeal bond.

On May 31, 2016, in the Court of Appeals, DEP filed a Response to Petition for Writ of Certiorari and Petition for Writ of Supersedeas.

On May 31, 2016, DEP filed a Motion to Dismiss the Appeal for NC WARN's failure to file the required undertaking or appeal bond. On June 3, 2016, NC WARN filed a response opposing the dismissal.

On June 7, 2016, the Court of Appeals allowed NC WARN's Petition for Writ of Certiorari for the limited purpose of vacating and remanding the Commission's order setting bond. The Court of Appeals stated that on remand "the Commission shall, in its discretion, set bond in an amount that is in accordance with N.C. Gen. Stat. 62-82(b) and based upon competent evidence."

On June 8, 2016, in response to the Court's order, the Commission issued an Order Setting Hearing, providing DEP and NC WARN an evidentiary hearing on the issue of setting an undertaking or bond pursuant to G.S. 62-82(b). The Commission ordered both DEP and NC WARN to sponsor witness(es) on the issue of the amount of the bond.

On June 14, 2016, NC WARN filed a Response to Order. In its response, NC WARN moved that the Commission not allow additional evidence on remand or, in the alternative, provide NC WARN at least ten additional days to submit additional testimony prior to an evidentiary hearing. On June 17, 2016, at the beginning of the evidentiary hearing, the Commission denied NC WARN's motion to exclude additional testimony on remand. In the denial of NC WARN's motion, the Commission stated that NC WARN had cited in its May 19, 2016 petition to the Court of Appeals Currituck Associates Residential Partnership v. Hollowell, 170 N.C. App. 399, 612 S.E.2d 386 (2005), in which the Court remanded a Superior Court bond order "for a new determination of the proper bond amount based upon competent evidence." The Court held that the affidavit in Hollowell should have been based upon personal knowledge. Id. at 405, 612 S.E.2d at 390. The Court cited Iverson v. TM One, Inc., 92 N.C. App. 161, 374 S.E.2d 160 (1985), which held, "[i]f the parties desire to present new evidence, the trial court should consider that evidence." Hollowell, at 405,170 N.C. App. at 405, 612 S.E.2d at 390. (Tr. pp. 12-13)

After denying NC WARN's motion, the Commission proceeded with the evidentiary hearing on the bond determination. DEP presented the testimony of Mark Landseidel. DEP's May 2, 2016 response, as verified by Mr. Landseidel, was treated as prefiled direct testimony and, after being adopted by DEP witness Landseidel from the witness stand, was admitted into the record as if given orally from the stand. Mr. Landseidel's testimony was entered into the record without objection. NC WARN indicated that it would not be presenting any witnesses. Citing the Commission's June 8, 2016 Order, DEP requested to examine the executive director of NC WARN, Jim Warren, who verified NC WARN's Reply dated May 5, 2016. Pursuant to G.S. 62-65(a), the Chairman exercised his authority to call witnesses who are present in the hearing room and called Mr. Warren to testify. NC WARN objected to Mr. Warren's testimony based upon lack of preparation; however, DEP's cross-examination exhibits were introduced for impeachment purposes into the record without objection.

At the conclusion of the hearing, the Commission asked NC WARN about its motion for additional time to present a witness. NC WARN indicated it had not contacted any witnesses prior to the hearing and that NC WARN would let the Commission know on or before Wednesday, June 22, 2015, whether it would withdraw such motion to provide a witness on the issue. On June 22, 2015, NC WARN filed a Response indicating that NC WARN planned to confer with a potential witness on Friday, June 24, 2016 and, with the Commission's forbearance, would notify the Commission on Friday, June 24, 2016, whether the potential witness was available to provide an affidavit or testify at a hearing. On Friday, June 24, 2016, NC WARN filed Update by NC WARN and The Climate Times indicating that NC WARN conferred with its witness, Bill Powers, and that NC WARN would be filing an affidavit from him on Monday, June 27, 2016. On June 27, 2016, NC WARN filed the Affidavit of William E. Powers. Mr. Powers' affidavit addressed cost avoidance and operational options for DEP relative to its modernization project.[3] On

[3] Mr. Powers verified "that the contents of the above affidavit filed in this docket are true to the best of my knowledge, except those matters stated on information and belief, and as to those matters, I believe them to be true."

June 29, 2016, DEP filed a response to the affidavit filed on NC WARN's behalf replying in opposition to the affidavit and requesting that the Commission deny further delay efforts by NC WARN.

Based upon consideration of the filings, testimony, and exhibits received into evidence at the hearing, and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. Duke Energy Progress, LLC, is a duly organized public utility operating under the laws of the State of North Carolina and is subject to the jurisdiction of this Commission. The Company is engaged in the business of generating, transmitting, distributing and selling electric power to the public in a broad area in eastern North Carolina and an area in western North Carolina in and around the City of Asheville. DEP is a wholly-owned subsidiary of Duke Energy Corporation, and its office and principal place of business are located in Raleigh, North Carolina.

2. The Commission has jurisdiction over the certification for construction of generation facilities, and practices of public utilities operating in North Carolina, including DEP, under Chapter 62 of the General Statutes of North Carolina.

3. North Carolina General Statute 62-82(b) requires that prior to any filing of a notice of appeal from an order of the Commission that awards a certificate under G.S. 62-110.1, the appealing party must file a bond or undertaking as determined by the Commission prior to the filing of the notice of appeal. Specifically, G.S. 62-82(b) states:

> (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.

4. Mark E. Landseidel is the Director of Project Development and Initiation in the Project Management and Construction Department of DEP. Mr. Landseidel has worked for DEP for 34 years and for 25 of those years has been in major project development and construction.

5. Mr. Landseidel has worked on 200 capital projects ranging in size from $1 million to $1.5 billion. Of those projects, 20 were new generation projects and eight were gas-fired generation projects. In these projects, Mr. Landseidel was primarily responsible for developing cost estimates and implementing the projects. For most, if not all, of these projects, Mr. Landseidel was responsible for negotiating the contracts with suppliers and contractors and had some role in contract development and negotiation.

6. As to the current Asheville combined cycle units, Mr. Landseidel was involved in the development and negotiation of contracts related to the major equipment supply, the engineering procurement construction contract, earthworks contract, as well as all other contracts required to build the project.

7. Mr. Landseidel provided the estimated increased construction costs that DEP would incur due to appeal-caused delay in the beginning of construction that were reflected in DEP's May 2, 2016 Verified Response filed with the Commission. Mr. Landseidel based his estimated cost increases not on pure guess, but upon his firsthand knowledge of the Project and his years of previous experience with construction delays.

8. It is Mr. Landseidel's experience that there were construction delays in approximately 20% of the 200 capital projects with which he was involved, or, in other words, in one of every five projects, which is typical in the industry. Mr. Landseidel experienced various reasons for such construction delays, such as permit delays, late delivery of equipment to the site, non-performance by a contractor, bad weather, and labor or contract disputes. Contracts are negotiated to include terms addressing such events should they occur by providing cancellation or termination clauses.

9. Mr. Landseidel has had to estimate damages due to construction project delays in approximately eight to ten prior projects where disputes occurred.

10. At the June 17, 2016 hearing, Mr. Landseidel changed DEP's proposed bond amount from "a minimum of $50 million" contained in the Verified Response, in which DEP had not determined whether there would be an actual appeal delay, to $240 million, representing DEP's total amount of estimated increased costs for construction delay of the generating facility, the same total set forth in the May 2, 2016 Verified Response.

11. Onsite construction of DEP's $1 billion Project is to begin not earlier than October 1, 2016. If an appeal is pending in October, 2016, DEP will delay construction.

12. A legitimate calculation of the added cost to the generating Project resulting from delay in beginning construction due to the NC WARN appeal of the Commission's March 28, 2016 order is approximately $240 million. The $240 million in increased cost due to delay from the appeal can be broken down into several components: $100 million in potential coal unit environmental controls costs and $140 million in potential increased combined cycle construction costs and related costs.

13. The potential increase in environmental controls costs in the sum of $100 million is a reasonable estimate and is due to a scenario of the combined cycle units not being built and operational before January 31, 2020, because of appeal delay. Under the Coal Ash Management Act (CAMA), certain environmental requirements as listed hereafter will be extended only if the CC units are operational before January 31, 2020. These additional environmental costs that cannot be avoided if the CC units are not operational before January 31, 2020, are: $25 million for modification of a wastewater treatment system, $50 million to convert the fly ash collection system from a wet system to a dry system, and $25 million to convert the bottom ash collection system from a wet to dry system.

14. The reasonable potential increase in appeal-caused delay costs due to increased construction costs of the combined cycle units due to the cancellation costs of the three major equipment contracts is $40 million. The three major equipment contracts are for the two gas turbines, the two steam turbines and the two boilers. The contracts indicate how much the cancellation costs will be if a contract is terminated by the owner in a given month. The $40 million is based on the assumption that the contracts will be cancelled in October 2016. It is reasonable that DEP will cancel the contracts in October rather than putting the contract on hold because there are no provisions in the major equipment supply contracts to suspend manufacturing. DEP's sole right under the contracts at the present time is the right to terminate.

15. The reasonable potential increase in appeal delay costs due to increased construction costs of the combined cycle units due to sunk development costs is $8 million. These sunk development costs include the costs of preparing the site for construction, including project management, engineering, project controls, environmental health and safety, supply chain, corporate resources, as well as consultant fees.

16. The reasonable potential increase in appeal-caused delay costs due to increased construction costs of the combined cycle units due to increased project costs is $50 million. In calculating the $50 million, it is appropriate to assume a two-year delay and an escalation rate of costs for labor and materials of 2.5%.

17. A reasonable appeal delay cost is in the sum of $45 million due to DEP's obligation to pay Public Service Natural Gas Company (PSNC) approximately $45 million in estimated fixed firm transportation service costs during a two-year appeal delay. The $45 million is based upon the Commission-approved contract which requires DEP to pay for transportation on a monthly basis whether or not it is used. Paying the monthly fees is in the best interests of DEP's customer as opposed to DEP's cancelling the contract. If

DEP were to cancel the contract, DEP would pay a $17 million cancellation fee, but if DEP requested the gas to be delivered at a later date, DEP would not receive the benefits of the gas project being constructed in tandem with an existing PSNC project, and the transportation rate would more than double from the current contract rate because the incremental cost would be much higher. A reasonable appropriate estimate in the difference in the contract rate is approximately $25 million more per year for the life of the plant.

18. A reasonable estimate for the length of time for a delay caused by the appellate process is approximately two years.

19. The potential increase in the cost of the generating facilities at issue due to an appeal-related construction delay beginning not earlier than October 1, 2016, is not less than $98 million. The amount of $98 million represents $40 million in potential damages related to the cancellation costs of three major equipment contracts, $8 million in potential damages related to sunk development costs, and $50 million in increased project costs for the increased cost of labor and materials.

20. A bond in the sum of not less than $98 million is a reasonably sufficient amount to discharge the obligation imposed upon NC WARN pursuant to G.S. 62-82(b).

DISCUSSION AND CONCLUSIONS OF LAW

I.

The procedural aspects of this case have become confused. The Commission issued its CPCN Order on March 28, 2016. General Statutes Section 62-82(b) requires an appellant from the order to post a bond or undertaking as a prerequisite for appeal. Appeal pursuant to G.S. 62-90 was due on or before April 27, 2016. On April 25, 2016, NC WARN moved to extend the time for filing notice of appeal for 30 days until May 27, 2016. Also, NC WARN requested the Commission to establish a bond of $250, and requested a hearing or oral argument on the bond amount issue. In an effort to comply with G.S. 62-82(b), the Commission established a procedural schedule that would allow DEP to respond and for NC WARN to reply but which would result in the issuance of an order within sufficient time to allow NC WARN to comply before notice of appeal was due. The Commission granted NC WARN's motion to extend the time for filing notice of appeal. Under G.S. 62-90, the Commission could not extend the time for notice of appeal beyond May 27, 2016. Any pre-notice of appeal hearing the Commission could have scheduled would have of necessity been scheduled between May 5 and May 20, 2016. Although NC WARN has filed three motions before the Court of Appeals, it has not requested an extension of time to file its notice of appeal.

On May 2, 2016, DEP filed a response verified by Mark E. Landseidel, Director of Project Development and Initiation in the Project Management and Construction Department of Duke Energy Corporation, in which he calculated the additional costs resulting from appeal to be $240 million. As established at the hearing on June 17, 2016, Mr. Landseidel has had responsibility for the full development the Western Carolinas

Modernization Project (Tr. p. 15), thus his testimony is based on firsthand knowledge. For 25 years Mr. Landseidel has worked for Duke Energy in major project development. (Tr. p. 29) He has been responsible for 200 projects in sizes up to $1.5 billion, with a total cost in the range of $8 billion. Id. At the hearing, Mr. Landseidel testified that at the time he signed the Verified Response, he knew the contents of the response and that the same were true and correct based upon his personal knowledge. (Tr. p. 31)

In its May 2, 2016 response, DEP requested that the Commission establish the bond of $50 million. DEP represented that it intended to begin construction not earlier than October 1, 2016, but as of May 2, 2016, DEP, without knowledge of NC WARN's grounds for appeal, was unwilling or unable to state whether it would delay beginning of construction due to the pendency of the appeal.

On May 10, 2016, the Commission issued an order requiring a $10 million bond or undertaking as a condition for NC WARN's notice of appeal. The Commission required DEP to inform the Commission by September 1, 2016, whether it would begin construction or delay due to the pendency of NC WARN's appeal. The Commission suggested it would revoke and/or modify the bond requirement if DEP determined to begin construction as initially scheduled. Otherwise, the Commission would hold a hearing to revisit the amount of the bond or undertaking.

On May 23, 2016, four days before notice of appeal was due in accordance with the granted extension of time, NC WARN filed in the North Carolina Court of Appeals a Petition for Writ of Certiorari, Writ of Supersedeas and Motion for Temporary Stay of the Commission's May 10, 2016 order. NC WARN's petition did not address the Commission's March 28, 2016 CPCN Order. Among other arguments, NC WARN maintained that before the G.S. 62-82(b) bond requirement became operative, DEP was required to represent that it would delay beginning of construction due to the appeal.

On May 24, 2016, the Court of Appeals issued an order denying the Motion for Temporary Stay. On May 27, 2016, NC WARN filed its notice of appeal to the March 28, 2016 order without bond or undertaking and also to the Commission's May 10 order.

On May 31, 2016, DEP filed a Motion to Dismiss the Notice of Appeal of NC WARN on the grounds that NC WARN had failed to file the bond or undertaking required by G.S. 62-82(b).

On June 7, 2016, the Court of Appeals issued an order stating:

> The petition for writ of certiorari is allowed for the limited purpose of vacating and remanding the order entered on 10 May 2016 by the North Carolina Utilities Commission setting the appeal bond. On remand, the Commission shall, in its discretion, set bond in an amount that is in accordance with N.C. Gen. Stat. 62-82(b) and based on competent evidence. Because we vacate the Commission's order, we dismiss the petition for writ of supersedeas as moot.

Aware that the Court had remanded only with the direction to set bond "based on competent evidence" and cognizant that the time for filing notice of appeal had expired without NC WARN's having filed any bond or undertaking with its May 27, 2016 notice of appeal, the Commission nevertheless promptly scheduled a hearing for June 17, 2016, for the purpose of taking "competent evidence" on which to set the bond.

At the June 17, 2016 hearing, DEP witness Landseidel repeated the testimony he had given by affidavit on May 2, 2016, and provided limited additional backup support for the $240 million, none of which was inconsistent with the May 2 affidavit. Witness Landseidel testified that as a result of developments in the case through June 17, 2016, DEP had determined that if an appeal was pending in October 2016, DEP would delay beginning of construction on the Facility. (Tr. pp. 33-34) Mr. Landseidel was subject to cross-examination by NC WARN.

Although having been ordered to do so by order of the Commission, NC WARN presented no evidence.

At the June 17, 2016 hearing, the Commission requested that NC WARN and DEP provide their understanding of the intent of the June 7, 2016 order of the Court of Appeals. Both parties expressed uncertainty as to their interpretation of the Court's intent. (Tr. pp. 139-140) NC WARN maintained that the order should be interpreted narrowly and that the Commission should take no evidence in addition to that already on record in the case. (Tr. p. 139) DEP maintained that the Landseidel affidavit of May 2, 2016, based on his personal knowledge met the "competent evidence" requirement. (Tr. pp. 140-141)

At the June 17, 2016 hearing, NC WARN stated at one point that no bond was required (Tr. pp. 120-121), at another that a de minimus bond was satisfactory. (Tr. pp. 73-74) NC WARN revealed that it had made no effort to obtain funds with which to post a bond or undertaking. (Tr. p. 120) NC WARN maintained that it should not be required to post a bond and declined to suggest or state a specific amount for the bond in response to the Commission's questions as to a bond amount or undertaking which NC WARN would be able to meet. (Tr. pp. 85-86) NC WARN represented that due to the procedural nature of the proceeding it was unable to respond to DEP's evidence as to the proper amount of the bond or undertaking. Id. NC WARN has maintained that as a non-profit, it will be unable to post any substantial bond or undertaking.[4]

The Commission inquired of the parties' understanding of the status of this case in light of the fact that the Court of Appeals had denied the Motion for Temporary Stay and granted the Motion for Writ of Certiorari, but NC WARN had filed notice of appeal without

[4] The Commission has spent considerable time and effort to comply with NC WARN's request to set a bond pursuant to G.S. 62-82(b) and to comply with the Court's June 7, 2016 order. This time and effort probably have been an academic exercise. Section 62-82(b) requires more than the $250 de minimus bond NC WARN is willing to post. While the bond requirement is not contingent on whether the appellant can post it, practically, if the appellant is unable or unwilling to post more than a de minimus bond, the effort to establish with precision a substantial bond becomes an unnecessary exercise.

bond or undertaking on May 27, 2016, while DEP had moved to dismiss the appeal for failure to comply with G.S. 62-82(b).

NC WARN responded that should the Commission issue an order establishing a bond or undertaking with which NC WARN takes issue (apparently any amount greater than $250), NC WARN could ask the Court of Appeals to review the order and if the Court agreed with NC WARN, its appeal could proceed and the motion to dismiss would be denied. (Tr. pp. 71-72) DEP responded that G.S. 62-82(b) is clear and unequivocal: it requires a bond or undertaking as an essential feature of the notice of appeal; no bond or undertaking has been filed; the time for valid notice of appeal has expired; therefore, NC WARN's appeal must be dismissed. (Tr. p. 74)

At the June 17, 2016 hearing, NC WARN represented that the posture of its appeal had been altered as a result of DEP's representation that it would delay beginning of construction of the Facility not earlier than October 1, 2016. (Tr. p. 86) Nevertheless, NC WARN requested additional time to consult with a witness to determine whether it wished to provide evidence on the bond amount. (Tr. pp. 141-142)

In order for the Commission to comply with the June 7, 2016 order of the Court of Appeals, the Commission notes that the Court granted NC WARN's Motion for Writ of Certiorari based on NC WARN's filing of May 19, 2016. While the Court of Appeals required the Commission to set the bond "based on competent evidence," it provided no additional guidance. However, in its motion, NC WARN cited but a single case, Currituck Associates Residential Partnership v. Hollowell, 170 N.C. App. 399, 612 S.E.2d 386 (2005).

In Hollowell the issue before the trial court was a contract to sell lots. The trial court established a $1 million appeal bond.[5] The appellee based its claim on potential damages resulting from delay in developing the property of $1.369 million on an affidavit signed by an "attorney-in-fact" based on the affiant's "information and belief." The Court questioned the trial court's "rounding down" to $1 million. Hollowell, 170 N.C. App. at 403, 612 S.E.2d at 389. After the Court determined that the affidavit was inadequate, the Court remanded the case "to the trial court for a determination of the proper bond amount based on competent evidence." Id. at 405, 612 S.E.2d at 390 (emphasis added). In its June 7 order the Court, presumably after taking into account NC WARN's citation to Hollowell, likewise required the Commission to establish the bond amount based on "competent evidence."

While DEP witness Landseidel was far more qualified than an "attorney-in-fact," and his verified response was based on his personal knowledge and not on information and belief, to the extent the Court of Appeals deemed the Verified Response to be less than competent as evidence, the Commission determines that witness Landseidel's live testimony at the June 17, 2016 hearing, which was subject to cross-examination and

[5] The statute at issue in Hollowell was G.S. 1-292, addressing the setting of bond for the appeal of a judgment directing the sale or delivery of possession of real property. Its terms and requirements are substantially different from those of G.S. 62-82(b), addressing appeals from the granting of authority to build electric generating projects.

which was not contradicted by witness testimony or other evidence, in fact constitutes competent evidence.

In its May 10, 2016 order, the Commission established a pre-notice of appeal bond or undertaking amount of $10 million, expressly indicating that the Commission would revisit the matter and conceivably alter the $10 million in a subsequent order. To the extent following Hollowell the Court of Appeals was concerned by the "rounding down," the Commission notes by establishing the bond in this order at not less than $98 million, there is no rounding down and with no contingency of subsequent alteration. Likewise, in response to NC WARN's assertion that the Commission "never cited to any facts to support why the $10 million is the proper bond amount," the Commission's selection of $98 million cannot be the subject of this criticism based upon evidence establishing $40 million in potential damages related to the cancellation costs of three major equipment contracts, $8 million in potential damages related to sunk development costs, and $50 million in increased project costs for the increased cost of labor and materials. Any objective reading of the Commission's May 10, 2016 order establishes that the reduction of the requested bond amount to $10 million and the willingness potentially to revoke the requirement after September 1, 2016, should DEP begin construction, were provisions favorable to NC WARN.

II.

In its petition for writ of certiorari, NC WARN asserted:

> 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 such, NC WARN maintained that the Commission's bond order was erroneous because it failed to require DEP to state that DEP would in fact delay beginning of construction of the generating plants before NC WARN had filed its notice of appeal. NC WARN misreads the requirements and purposes of G.S. 62-82(b). The statute requires a party at the time it files notice of appeal to file a bond or undertaking. The bond or undertaking will be used to recompense the utility building the generating facility only if and when events to occur in the future transpire. These events are (1) the utility delays the beginning of construction of the Facility due to the appeal; and (2) the utility prevails and the appellant does not prevail on its appeal. The utility bears no burden to represent that it will not delay irrespective of the exceptions on appeal even if its inclination would be not to delay. Neither of these eventualities can be known before appeal is filed. Indeed, neither can be known until the utility knows the basis of the appeal and, as to the eventuality of what the appellate court might do in response to the appeal, what the ultimate outcome of the appeal will be.

Section 62-82(b) imposes on appellants the requirement to recompense the utility only after these future eventualities have occurred, but imposes the requirement to establish the mechanism to provide the source of the funds from which the future recompense shall come at the time it files notice of appeal. Filing of the bond or undertaking comes at the time of filing notice of appeal irrespective of whether the funds will be drawn upon. Recompense, if any, comes later, depending on the outcome of future events. Taken to its logical extreme, NC WARN's argument might be that DEP is entitled to no bond or undertaking unless it shows before appeal is filed that it will prevail once the appeal has run its course. NC WARN's assertion that it should be exempted from the bond requirement because DEP has not shown before notice of appeal is filed that it will delay beginning of construction due to the appeal is a case of placing the cart before the horse.

At the June 17, 2016 hearing, the Commission asked NC WARN's counsel repeatedly to point to any language in G.S. 62-82(b) to support NC WARN's reading of the statute. Counsel could point to no such language. (Tr. pp. 86-89)

Moreover, at the June 17, 2016 hearing, DEP committed that following the Court's remand order, NC WARN's appeal poses greater risks of uncertainties and that, if appeal is pending in October 2016, DEP will not begin construction of the Facility on the scheduled date.[6] Thus, even if NC WARN's reading of G.S. 62-82(b) had any merit or validity, this significant more recent development renders its position meaningless. At the June 17, 2016 hearing NC WARN conceded as such. (Tr. p. 86)

III.

In its petition for writ of certiorari, NC WARN asserted:

> 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 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?

However, NC WARN made no effort at the June 17, 2016 hearing to present any evidence to contradict DEP's estimates. NC WARN cites no case addressing the

[6] "At the time the Company, we made this filing, we hadn't had time to consider the risks associated with construction delay in the event of an appeal. At this time, though, the Company has considered those risks. We consider it to be an important decision, one that has potential risk impact to our customers whom we're obligated to provide clean, affordable, reliable electricity, as well as potential impacts to our shareholders. As such, the Company's not in a position to proceed with the $1 billion project, starting construction, if there's an appeal pending. To say it another way, in October if there's an appeal pending, we will delay construction." (Tr. pp. 33-34)

specificity with which projections of future delay damages must be supported. To the extent the estimates were "over-the-top," NC WARN had opportunity to present testimony at the hearing supporting this assertion. It presented no such testimony. Nevertheless, at the June 17, 2016 hearing, DEP witness Landseidel provided additional background and detail. Mr. Landseidel played a role in negotiating and developing the contracts. (Tr. pp. 30-31) He testified:

> Q All right. Would you please explain how you derived that $40 million estimate?
>
> A Those three contracts, the two gas turbines, the two steam turbines and the two boilers, each of those contracts have specific cancellation schedules in those that specifies if the contract is terminated by the owner at a – in a specific month, how much the cancellation cost would be, and that's the basis for this $40 million, assuming they were canceled in October.
>
> Q All right. Why would Duke Energy Progress cancel the contracts in October instead of just putting them on hold or delaying them with those counterparties?
>
> A There's no provision in the major equipment supply contracts to suspend the manufacturing. You can understand they're – they're going into manufacturing, ordering materials. They can't just arbitrarily say, well, we'll just put this on hold and do something else, so it's difficult for them. It's something that could be negotiated possibly, but the only thing we have certain right now is that we have a right to terminate, and in that case the supplier's sole remedy is this cancellation payment. That's what we believe would be a reasonable estimate of the construction delay.
>
> Q All right. The next item, carrying over on to page 9 of the May 2nd response and your prefiled testimony, reference an additional $8 million in sunk development costs associated with the project. Is that number still accurate today?
>
> A It is.
>
> Q Would you please describe for the Commission what the $8 million in sunk development costs entail?
>
> A It excludes the major equipment supply contracts, but it's development costs to date to get the project – at that stage in October we're ready for construction, so it involves project management, engineering, project controls, environmental health and safety, your supply chain, corporate resources, operations, all the people, a team of around 25 or 30 people, Duke employees or contractors that are developing the project to get it ready for construction. The other major component of these development costs will be consultants. We have owners engineer, site specialty companies that do site studies, a company that helps prepare air

permits, so there are consultants' fees as well. The majority would be the owner labor, and then a significant piece of it, also, the consultants. And at that stage, that would be about 1 percent of the total project cost, which is quite reasonable for a project like this.

Q All right. And how many of that $8 million has been incurred to date?

A Through May, approximately $5 million.

Q Okay. And in your prefiled response and testimony, you noted in the footnote, footnote 15 on page – the bottom of page 9, approximately half of those estimated sunk development costs may need to be written off if the project were to be delayed. Would you explain what you mean by that?

A Yeah. My estimate would be is that if we were to delay the project for two years, we would have to rework a significant amount of this development effort, rebid equipment, rebid construction, rework our schedule, our cost estimate. A lot of the work we've done to date would effectively be wasted and we'd have to do it over again or rework. So I'd estimate, in my experience, about half of that would be considered rework.

(Tr. pp. 44-46)

At the bond hearing, despite having been instructed to do so, NC WARN, as with its May 5, 2016 response, presented no evidence to contradict this testimony. Moreover, NC WARN chose not to cross-examine Mr. Landseidel on this evidence. NC WARN represented that it had chosen not to consult with any witness to challenge this evidence. (Tr. p. 83) While pleading lack of time to prepare, NC WARN had known DEP's position and assertions on these costs since May 2, 2016, when DEP filed its May 2 Verified Response. Further, NC WARN had asked for a hearing on April 25, 2016, that, if conducted in time for NC WARN to post bond with its notice of appeal, would have allowed NC WARN far less time to prepare. The Commission finds DEP's evidence, based on its witness' firsthand knowledge, credible, competent and appropriate for the Commission to rely upon in establishing the bond amount.

IV.

In its petition for writ of certiorari, NC WARN asserted:

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."

In response DEP witness Landseidel testified:

> Q All right. You testified in that prefiled response that there would be increased project costs of $50 million, assuming a 2.5 percent annual cost escalation rate during that two-year period. Do you see that?
>
> A I do.
>
> Q Is that number still accurate and true –
>
> A Yes.
>
> Q -- to the best of your knowledge?
>
> A Correct.
>
> Q Are you sure?
>
> A Yes.
>
> Q All right. Would you please explain how you calculated that $50 million figure?
>
> A Simply the arithmetic, the approximate billion dollars of the project escalated at two and a half percent for two years was an additional $50 million. The two and a half percent rate was based upon our Integrated Resource Planning Group who routinely looks at historical data for labor and material cost increases, and then two and a half percent is roughly the 20-year average, and that's what we use for resource planning, and I think it's reviewed by the – by this Commission's Staff from time to time. So two and a half percent is a reasonable estimate for escalation of the cost to the plant, that if we build it two years later, the labor and materials are going to be more expensive than if we did it today.
>
> Q And have you – do you have personal experience with delays and escalation rates and whether projected escalation rates turn out to, in fact, be accurate after the fact?
>
> A Well, oftentimes it could be – it could be different. In this case for equipment – equipment, materials and labor for power plants, there's potential that there could be higher escalation rates going forward.

(Tr. pp. 48-49)

At the June 17, 2016 hearing, NC WARN provided no evidence to contradict this testimony. Again, NC WARN did not cross-examine DEP witness Landseidel on his annual cost escalation rate testimony. The Commission finds this evidence, based on the witness' firsthand knowledge, credible, competent and appropriate for Commission to rely upon in establishing the bond amount.

V.

NC WARN in its May 23 petition asserted:

> 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.

At the bond hearing, NC WARN did not go "on and on," nor contradict DEP's evidence. Nevertheless DEP witness Landseidel provided additional support for the other costs composing the $240 million.

> Q Okay. The next item you discussed in the Verified Response, your prefiled testimony, was that Duke Energy Progress will be obligated to pay Public Service Company approximately $45 million in estimated fixed firm transportation service costs during a two-year delay, even though the plant would not be in operation. Do you see that?
>
> A Yes.
>
> Q Is that number still accurate?
>
> A It is.
>
> Q Would you explain to the Commission how you determined that $45 million cost increase?
>
> A Yes. Duke Energy Progress entered into a gas transportation contract with PSNC. That contract has been approved by this Commission. And in that contract, Duke Energy is required to pay for transportation on a monthly basis whether it's used or not, and if the project was delayed for two years, there would be a two-year period where we'd be paying for this gas transportation and not actually bringing gas into the plant, obviously. And if you use the contract volume and the contract estimated rates, that's how you get to the number of $45 million.
>
> Q All right. And was that contract filed by PSNC with this Commission and approved?
>
> A Yes, it was.
>
> Q All right. Why wouldn't Duke just cancel the contract with PSNC if there's going to be a two-year or however long appeal delay?
>
> A It's an alternative. We thought about it. We've estimated that if we were to cancel it in October for delayed construction, there would be a cancellation payment to PSNC in the neighborhood of $17 million, but the real problem is, is that if we build a gas – if we go back to them later and

want the gas pumped later and they haven't done it coincident with their existing project, the incremental cost is much higher. When we were developing this project and looking at the benefits of doing it now the estimated transportation rate was more than double what the current rate is in this contract, which would equate to roughly $25 million a year for the life of the plant, ultimately, if it's built, so at this time we think a more prudent step would be to incur those – those transportation costs and keep that – keep that contract in place.

Q So if I'm understanding your testimony, you're saying if Duke cancelled the contract with PSNC, it would be a $17 million, per the contract, cancellation fee, plus an approximately $25 million increase in the gas contract rate for the life of the plant?

A That's right, for the life of the contract.

Q $25 million per year more.

A Correct.

Q Why didn't you choose that bigger number?

A I don't think that would be the best – in the best interest of our customers at this time.

Q All these numbers that you submitted on May 2nd and have testified to here today under oath, do you believe they're reasonable?

A I do.

Q Are they on the high side?

A I don't think so. I think ultimately it's hard to estimate a construction delay. There are a lot of factors. But based on these and the diligence we put behind these, I think the total delay costs we've estimated are reasonable. Could be more; could be less.

Q Throughout your testimony, and as noted in footnote 16 at the bottom of page 9 of that prefiled testimony and the May 2nd response, it notes that certain cost estimates were filed confidentially under seal with the Commission in this proceeding, correct?

A Yes.

Q And so you've used, in your terms, round numbers in your cost estimates for damages in the form of increased construction costs from a delay in beginning construction due to the appeal; is that right?

A Correct.

Q Are those round numbers intended to inflate the numbers for any reason?

A No, absolutely not.

Q What is your best estimate using your 34 years of experience, your engineering professional judgment, as to what the increased cost in construction would be due to a delay in beginning construction caused by an appeal for this project?

A For delay in construction of two years, my best estimate is a total of $240 million.

(Tr. pp. 49-53)

As in its petition in which NC WARN chose not to go on and on, at the June 17, 2016 bond hearing NC WARN chose not to cross-examine Mr. Landseidel on the PSNC-related damage evidence or to present its own contradictory evidence. The Commission finds witness Landseidel's testimony, based on the witness' firsthand knowledge, credible, competent and appropriate evidence upon which the Commission should rely in establishing the bond amount.

VI.

On June 27, 2016, ten days after the hearing held on June 17, 2016, NC WARN filed an affidavit of William E. Powers. In his affidavit, Mr. Powers indicated that he has over 30 years of experience in the fields of power plant operations and environmental engineering, and that he has worked on numerous combined cycle and peaking gas turbine plants, among others. Mr. Powers claimed that DEP would not need to incur $100 million in environmental control costs for the two coal units because, in his opinion, DEP could retire the two coal units without replacing them with the two CC units. Mr. Powers stated DEP could rely upon the existing transmission and import existing hydropower and supply from existing CC units. Mr. Powers claimed that the $40 million in major equipment cancellation contracts could have been avoided and that this $40 million as well as $8 million in sunk development costs should be the responsibility of DEP shareholders. With respect to the $50 million increased project costs, Mr. Powers cited to a Chemical Engineering magazine to argue that DEP's calculation of these future costs is overstated. Mr. Powers argued that DEP can mitigate the $45 million in firm transportation service costs during the two-year delay by reselling the capacity to third parties.

On June 29, 2016, DEP filed DEP's Reply to Response by NC WARN and The Climate Times and to Late-Filed Affidavit of William E. Powers for NC WARN and The Climate Times. In its filing, DEP stated that NC WARN, in an attempt to avoid an appeal bond, ignores the plain purpose and language of G.S. 62-82(b). DEP argued that Mr. Powers' affidavit is simplistic, factually incorrect and an attempt by NC WARN to re-litigate arguments in the underlying CPCN case, which are not relevant to the setting of a proper bond amount pursuant to the statute. Specifically, as to the $45 million in fixed

firm gas transportation service costs, DEP stated that Mr. Powers is absolutely incorrect that DEP has the ability to resell PSNC capacity. DEP indicated that the contract at issue does not deal with interstate pipeline capacity and that no secondary capacity release market exists on PSNC's system. DEP stated that the incremental gas facilities being installed are specifically designed to provide firm deliveries to the Project.

The Commission assigns no weight to the limited evidence addressing the computation of potential appeal-related damages in this late-filed affidavit because it is lacking in credibility.[7] William Powers has over 30 years of experience in the fields of power plant operations and environmental engineering and states he has been involved in permitting numerous combined cycle plants and is currently an engineer in California. Nowhere in William Powers' affidavit does he give any indication that he has been involved in the project development and construction of such projects, but merely involved in the permitting process, which is only a piece of the entire planning and construction of a generation facility. Further, being involved in permitting "numerous" facilities is not comparable to Mr. Landseidel's experience of working on over 200 capital projects, where Mr. Landseidel was primarily responsible for developing cost estimates and implementing projects. As far as the actual response to Mr. Landseidel's estimated cost increases for the two CC units approved by the CPCN, Mr. Powers misunderstands the task of his affidavit. The Commission must post a bond that covers potential increased costs in the generating facility due to delay caused by the appeal. Mr. Powers addresses cost avoidance and operational options for DEP relative to its modernization project rather than increases in cost that would flow from the delay of the already approved project.

In response to DEP's representation of potential $100 million damages due to delay from NC WARN's appeal due to environmental control costs, NC WARN witness Powers maintains "these costs can be avoided by shutting down the two Asheville coal units on schedule and relying on available existing regional generation to meet reliability need if that becomes necessary." The Commission rejects this argument, which does not address the quantification of increased costs of the Facility approved resulting from appeal-related delays. In its CPCN Order of March 28, 2016, the Commission approved construction of the two 280 MW CC units. The bond requirements of G.S. 62-82(b) are to

[7] In addition, the lack of credibility in NC WARN's underlying position and on the bond issue determinations is underscored by the sworn testimony of witness Jim Warren, NC WARN's Executive Director, who signed the verification to NC WARN's May 5, 2016 Reply to Duke Energy Progress' Response to Motion to Set Bond. Mr. Warren inaccurately asserts that the Commission has discretion to set a "nominal bond." (Tr. p. 100) He describes the procedures required by the Commission as a "shell game." (Tr. p. 102) He describes the Commission's efforts to establish a bond in response to NC WARN's request as "shielding Duke – and themselves...." (Tr. p. 105) He testified that "the entire process all the way back to the Legislature is not one befitting the State of North Carolina...." (Tr. p. 110) He testified erroneously, "It's incredibly frustrating, as you might understand, for us to have lined up in this case a gentleman from Cornell University who truly is the leading methane climate expert, Dr. Robert Howarth, a gentleman from the Canadian Geological Survey, probably a leading expert on shale gas, and an engineer from the West Coast who is highly credentialed in his field, and we're unable to even get their opinions into consideration here." (Tr. p. 133) In fact, the Commission in its March 28, 2016 order accepted and summarized NC WARN's evidence, including that of Dr. Howarth and Mr. Powers, and NC WARN's many other arguments, both substantive and procedural, and addressed and rejected them in significant detail in its order. (March 28, 2016 Order, pp. 11, 19, 26-27, 36-43).

provide a funding mechanism for future potential damages for delay from appeal for "beginning the construction of the facility which is occasioned by the appeal." (emphasis added) Meeting the need identified by G.S. 62-110.1 through alternative means other than constructing the Facility, the Commission issued the CPCN for DEP to construct is not responsive to the issue the Commission must address in setting the bond pursuant to G.S. 62-82(b).

Moreover, NC WARN's assertions go to the merits of the underlying CPCN Order and simply repeat NC WARN's arguments made in the proceeding from which the March 28, 2016 order resulted and from which NC WARN is attempting to perfect a legal appeal. The Commission addressed and rejected those arguments in its March 28, 2016 order. Should NC WARN post its bond and pursue its appeal, the place and time to pursue these arguments is to the Court of Appeals in its brief on the merits. Should NC WARN prevail, it will not be liable on its bond. However, its assertion that this argument should support disregarding the $100 million in setting the bond is in error.

With respect to DEP's representation of $40 million in potential damages due to major equipment contract cancellation, NC WARN witness Powers represents "DEP signed those major equipment contracts when the parties to Docket No. E-2, Sub 1089 were still in the process of exhausting their administrative and legal remedies to the approval of the Asheville Modernization Project." In other words, as a result of the Commission's granting a CPCN for the Project, DEP sought to comply and undertook steps to construct the Project, when it should have delayed due to the potential pendency of NC WARN's appeal. Of course, had DEP followed the course NC WARN now belatedly suggests, it would have experienced the same or similar delays "due to NC WARN's appeal" as enumerated by DEP in its evidence. Moreover, this NC WARN argument is completely contradictory to the earlier NC WARN argument that DEP as a precondition to setting the bond should have communicated its intent to delay or to not delay the beginning of construction of the project and NC WARN's unequivocal but erroneous representation that DEP would not delay.[8]

As with his first argument, this Powers argument does not address the computation of the $40 million. This is another legal argument that NC WARN could have made without an engineering witness at the June 17, 2016 hearing.

With respect to the $8 million in sunk development costs, witness Powers makes a legal argument, alleging that these should be borne by DEP's shareholders. Section 62-82(b) places the cost responsibility for appeal-related delays on the appellant whose appeal causes the delay and who loses its appeal before the appellate court. NC WARN's legal argument, which it repeats through its witness Powers, an engineer apparently lacking in relevant project development and construction experience, simply flies in the

[8] "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)...." NC WARN, May 5, 2016 Reply, p.2.

face of the statute at issue. Mr. Powers does not list among his credentials any training that qualifies him to offer legal opinions.

With respect to the $50 million increased project costs, Mr. Powers takes issue with the 2.5 percent annual cost escalation based on DEP's 20-year average historical labor and material increases. Mr. Powers bases his projections on future costs or data from a Chemical Engineering Magazine. The Commission finds persuasive DEP witness Landseidel's testimony based on the 20-year average historical data for labor and material cost increases relied upon by DEP in building generating plants, not the more limited chemical engineering cost index. The data relied upon by witness Landseidel are reviewed by the Public Staff of the Utilities Commission. The validity of the comparison to electric generating plant costs and chemical engineering costs is not apparent. Furthermore, in response to Mr. Landseidel's $50 million increase in project costs, Mr. Powers cited to Current Economic Trends for August 2015, and March 2016, which mentions the Chemical Engineering Plant Cost Index (CEPCI) from the Chemical Engineering Magazine. The Commission has reviewed the Current Economic Trends articles, which seem to be monthly update-type articles. The March 2016 article, of which the Commission takes judicial notice, actually indicates that some of the individual subindices rose in January including pipes, valves and fittings, pumps and compressors and electrical equipment. The May 2016 and June 2016 Economic Trends, of which the Commission also takes judicial notice, shows Construction Labor, Buildings and Engineering & Supervision subindices all rising. In any event, upon balancing and reviewing increases in project costs, the Commission finds credible Mr. Landseidel, with his 34 years of experience, with 25 years being in major project development and construction of electric generating plants, not information from a magazine article, which is not based upon the personal knowledge of the affiant and which does not directly pertain to the costs of planning and constructing an electric generation plant of the type approved in the Commission's March 28, 2016 order.

As for the $45 million in estimated fixed firm gas transportation service costs, Mr. Powers states that DEP could mitigate the damages by reselling its firm capacity costs to third parties. Mr. Powers therefore asserts that no amount of bond is necessary for these fixed firm gas transportation service costs. Mr. Powers' qualifications to express opinions on the PSNC gas project and transportation contract are not apparent. The Commission, based on its own expertise in gas transportation service costs, does not find it credible that DEP could mitigate its payments in this fashion. The Commission accepts DEP's explanation that the PSNC capacity cannot be resold on PSNC's system or sold to a hypothetical customer elsewhere as the capacity is not interstate capacity and there is no secondary release market on PSNC's system. Mr. Powers' conclusory observations here clearly are subject to the same criticisms NC WARN leveled at DEP's initial verified response due to the absence of factual support. Moreover, this argument, if valid, is more appropriate at some future point when determining the proper amount of damages to be funded by a bond and whether DEP appropriately mitigated its costs, not at a stage where the question is what are the increased costs due to the appeal delay for purposes of setting a bond to protect the ratepayers of North Carolina.

VII.

Although the Commission has considered the affidavit and determined that it lacks credibility, the Commission could have rejected the affidavit as untimely filed. The Commission issued the CPCN Order on March 28, 2016. Notice of appeal pursuant to G.S. 62-90 was due April 27 and could only be extended by Commission order to May 27, 2016. In its May 19 pleading to the Court of Appeals, NC WARN asserted that during its investigation of its potential appeal it "discovered that there is a unique bond requirement" in G.S. 62-82(b). Section 62-82 has been on the books since 1965. On April 25, two days before appeal was due and 32 days until notice of appeal, after an extension had to be filed, NC WARN moved to set the bond at $250. NC WARN sought evidentiary hearing and oral argument at that time.

Two days later (April 27), the Commission issued its order requiring DEP to file a response on May 2 (7 days over a weekend), making the due date May 5 for NC WARN to respond. This left 22 days before notice of appeal, as extended, was due. Any order setting bond would have required time for NC WARN to comply.

On May 10, the Commission issued its order establishing bond, five days after the last pleading. If the Commission had granted NC WARN's request for pre-notice of appeal hearing on bond, it would have had to do so between May 5 and May 10, or at the latest May 20, which would have given too little time for NC WARN to comply. Had NC WARN sought an order on bond earlier, the Commission would not have been under such time constraints.

At the time of the June 17, 2016 hearing, NC WARN had DEP's verified response since on or about May 2 (46 days). On June 17, 2016, the case was 20 days beyond May 27 when NC WARN filed notice of appeal without any bond.

In the Commission's June 8, 2016 order setting hearing on the bond issue in response to the June 7, 2016 order on remand from the Court of Appeals, the Commission required "NC WARN [to] sponsor a witness or witnesses with respect to any factual issues NC WARN wishes to raise response to DEP's evidence."

NC WARN filed a response on June 13, 2016. It asserted "[e]xperts who may be available to assist NC WARN and TCT in the review of Duke Energy's new testimony are not available on such short notice, nor could such an expert, even if available, provide coherent testimony under cross-examination in response to evidence submitted provided by Duke Energy only a few hours before." NC WARN requested "[i]f the Commission allows additional testimony, it provides NC WARN and TCT at least ten days following Duke Energy's deadline to submit additional testimony to review and provide witnesses to respond to the testimony prior to an evidentiary hearing."

In spite of the Commission's instructions to the contrary, NC WARN appeared at the June 17, 2016 hearing without a witness and not prepared to present evidence on the issues the Commission had listed for discussion. NC WARN had not talked with a potential witness before the hearing. NC WARN requested until June 22, 2016, to inform

the Commission where NC WARN stood on its request to present a witness. On June 22, 2016, NC WARN informed the Commission that it would reply by June 24, 2016. On June 24, 2016, NC WARN informed the Commission that it would file an affidavit on June 27, 2016. On June 27, 2016, NC WARN filed the Powers affidavit. This was 63 days after NC WARN had initially requested the Commission to hold a hearing on the issue on the amount of the bond and 55 days after DEP's filing of its calculations on the $240 million request. NC WARN requested a hearing on April 25. By doing so, it implied it would be prepared to participate expeditiously. NC WARN's lack of preparation on June 17, 2016, is not excusable or credible. Presenting a witness after the bond hearing hindered, if not prevented, cross-examination.

The Commission strongly urges NC WARN to follow procedural rules in the future. NC WARN mischaracterized the Commission's request at the end of the hearing on June 17, 2016. The Commission merely asked whether NC WARN was still moving to introduce a witness on the issue of the amount of the bond; the Commission did not grant NC WARN's request to introduce further evidence after the June 17, 2016 hearing. The Commission did not grant NC WARN's motion for an extension to file an affidavit from an expert after the June 17, 2016 hearing. Upon questioning as to what stopped NC WARN from attempting to obtain their own witness with knowledge of construction costs of CC units to bring to the hearing on June 17, 2016, NC WARN's counsel stated, "I'd have to ask my clients that ... I can't answer that question at this point."(Tr. p. 82) NC WARN's counsel thereafter consulted with his client and informed the Commission that NC WARN had not consulted an engineer or a construction expert prior to the June 17, 2016 hearing. (Tr. pp. 82-83) The Commission finds that the affidavit of William E. Powers was not timely filed in accordance with the Commission's June 8, 2016 order and that NC WARN has not shown good cause why it failed to comply.

VIII.

While NC WARN asserts that a two-year time frame for measuring the length of a potential appeal is "on the high end," it provides no evidence taking issue with the two years. "High end" or not, the Commission determines for purposes of establishing bond that two years is reasonable. Notice of appeal was due April 27, 2016. The Commission granted NC WARN's motion to extend to May 27, 2016. DEP has moved to dismiss due to NC WARN's failure to post bond. The issue of the amount of the bond as of this date has not been finally resolved, thus placing in question the effective date of the notice of appeal, if effective at all. Should the Commission grant the motion to dismiss, more time will elapse should this action be challenged and overruled. NC WARN already has obtained an extension of the time for filing the proposed record on appeal. The due date for filing and settling the record on appeal is uncertain due to the outstanding question on the bond and the notice of appeal. NC WARN forecasts that the Commission's setting of other than a nominal bond, which it does in this order, will result in additional filings for writs in the Court of Appeals. Due to the complicated procedural aspects of the potential appeal of this case to date, and the likelihood of potential additional procedural disputes, the Commission determines that two years is appropriate.

In its positions on the issue of the bond as with its positions on the underlying CPCN Order, NC WARN's primary complaints are that the Commission has attempted to comply with statutes enacted by the General Assembly and that such compliance results in decisions contrary to NC WARN's wishes and positions. Under the Mountain Energy Act the General Assembly expressed a desire that the gas-fired electric generating plants be constructed in Asheville to replace the older coal-fired plants and that the Commission issue its order on DEP's CPCN petition within 45 days from the filing of the petition. The 45-day requirement is unambiguous and unequivocal. Nevertheless, NC WARN asserts that the Commission should have disregarded this requirement. (Tr. p. 125-127) NC WARN asserts that the Commission should have "stopped the clock" following the example of other agencies operating in compliance with other regulatory constructs. Id.

Support for DEP's costs for the gas-fired generating facility were filed with its January 15, 2016 application in part under a designation of proprietary trade secrets. While asserting that DEP's costs are insufficiently supported, NC WARN refuses to execute a non-disclosure agreement to see the support because it asserts the trade secrets should be made public irrespective of the provisions of G.S. 132-1.2 with which it disagrees.[9] (Tr. p.77)

NC WARN's position is that the bond requirements of G.S. 62-82(b) should not apply to NC WARN because as a non-profit, its financial situation means it cannot attempt to comply and because its concerns with the Commission's order in compliance with the Mountain Energy Act are of such significance that its appeal should proceed without a bond or undertaking.

NC WARN asserts that it should be exempted from the bond requirements of G.S. 62-82(b) because it is a non-profit organization unable to post bond greater than $250.[10] NC WARN executive director Jim Warren testified that the bond should be set not even at $250 as initially requested by NC WARN, but should be set at zero. (Tr. p. 98) NC WARN points to no language in G.S. 62-82(b) stating or even suggesting any such exemption. "No appeal ... may be taken ... unless ... such party [appealing] shall have filed ... a bond...." (Emphasis added.) NC WARN disregards the underlying purpose of G.S. 62-82(b). The statute requires parties to CPCN proceedings in which the Commission authorizes the time-consuming construction of major, costly generating plants desiring to appeal the approval orders to provide security in the event appeal-caused delays result in increased costs and the appeal proves unsuccessful. The

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[9] NC WARN is all for transparency when it is doing the asking. However, when the questions are directed to NC WARN, the need for transparency disappears:

Q Mr. Runkle said that you went to your funders about this bond and they would not – they wouldn't fund it. Who are those funders?

MR. RUNKLE: I would – I would object to – we could file that under confidentiality agreements, but I don't think that's proper to put out into open session.

(Tr. p. 120)

[10] NC WARN's proffer of a $250 bond apparently is based on G.S. 1-285, requiring appeal bonds for appeals from civil causes or special proceedings. Such bonds are to serve as a source of funds to cover court costs for which appellant might be responsible. The types of costs covered by G.S. 1-285 are expressly excluded from G.S. 62-82(b).

statute does not permit the Commission to waive the requirements. The bond requirement is not optional, nor does the Commission have the discretion not to set an appropriate bond designed to cover increased costs resulting from appeal-caused delays. The statute plainly places on the appealing party the financial risk of what potentially could be extensive additional costs. Otherwise, these costs would be added to the cost of the generating facility to be recovered from consumers through higher rates. The statute is clear that a bond is required even if no damages are ultimately awarded. The Commission, therefore, rejects NC WARN's contention that no bond is required in the absence of an injunction or due to the fact that NC WARN is a non-profit or too financially insubstantial to post an adequate bond.

In imposing the bond requirement as a prerequisite to the filing of the notice of appeal, the General Assembly has acknowledged the substantial risk potentially borne by ratepayers arising from the delay of necessary generating facilities caused by unsuccessful appeals. Ostensibly, parties that claim, like NC WARN does, that they are unable or unwilling to meet the financial prerequisites for filing notice of appeal, are the very parties to which the requirement is directed. NC WARN asserts that this unequivocal requirement of the statute effectively prevents it from proceeding with its appeal. This assertion may be correct. However, because it is the very result the General Assembly demanded and anticipated when it enacted G.S. 62-82(b) in 1965, the Commission is not the forum in which to take issue with the statute.

The Commission rejects NC WARN's assertion that costs from appeal-caused delays for the beginning of construction arising from an unsuccessful appeal by NC WARN should be borne by stockholders, not NC WARN. Before recompense is due, NC WARN must lose on appeal and the Commission must measure the damages through the increase in the cost of such generating facility caused by the appeal. Increased costs from delay in this context would not be caused by stockholders, but by NC WARN.

The Commission rejects NC WARN's contention that delays could be caused by conditions other than the NC WARN's appeal. On cross-examination, NC WARN questioned DEP witness Landseidel with respect to other ways the Asheville plant could be delayed. NC WARN asked if the plant could be delayed by the Department of Environmental Quality (DEQ), stating that the coal ash pit had not been cleaned up properly, to which Mr. Landseidel indicated that such an event was very unlikely. As for any delay due to air permitting, Mr. Landseidel stated that the schedule called for foundations to begin in November 2017 and that the final air permit should be issued in September 2016; (Tr. p. 56) therefore, an air permitting delay would be an unlikely cause of construction delay. As for NC WARN's argument that other potential events could cause a construction delay, the potential delays presented by NC WARN are speculative and would be moot because they could only occur if the project was not being delayed due to the appeal. Moreover, if delays from causes other than the appeal resulted in damages, NC WARN would not be liable for those damages on its bond.

IX.

The Commission finds and concludes, in its discretion, based on the competent evidence discussed above, that a bond in the sum of not less than $98 million is a reasonably sufficient amount to discharge the obligation imposed upon NC WARN pursuant to G.S. 62-82(b). This amount represents $40 million in potential damages related to the cancellation costs of three major equipment contracts, $8 million in potential damages related to sunk development costs, and $50 million in increased project costs for the increased cost of labor and materials to build the two CC units. The Commission in its discretion determines not to include in the bond amount DEP's estimated damages of $100 million related to potential coal unit environmental control costs and DEP's estimated damages of $45 million related to fixed firm transportation service costs that DEP will have to pay PSNC during a two-year delay. Although, as discussed above, the Commission could have included the full $240 million, in this respect, the Commission is acting conservatively, within its discretion, when determining the proper amount of the bond based upon the evidence. The statute states "such damages to be measured by the increase in the cost of such generating facility." The $98 million clearly falls within this category.

The Commission further determines that the only competent evidence regarding the amount of potential damages measured by the increase in the cost of the generation facility due to appeal-related delay of the beginning of construction upon which the Commission could rely to properly set a bond amount is Mr. Landseidel's testimony.

IT IS THEREFORE ORDERED, in the Commission's discretion, and based on competent evidence, that the amount of the bond or undertaking shall be set in the sum of $98 million and that NC WARN shall have five calendar days from the date of issuance of this order to file the bond or undertaking with the Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 8th day of July, 2016.

NORTH CAROLINA UTILITIES COMMISSION

Janice H. Fulmore

Janice H. Fulmore, Deputy Clerk

EXHIBIT S

Lawrence B. Somers
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July 20, 2016

VIA ELECTRONIC FILING

Gail L. Mount
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

RE: Duke Energy Progress, LLC's Renewed Motion to Dismiss Appeal of NC WARN and The Climate Times
Docket No. E-2, Sub 1089

Dear Ms. Mount:

I enclose Duke Energy Progress, LLC's Renewed Motion to Dismiss Appeal 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

Enclosure

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 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	)	DUKE ENERGY PROGRESS' RENEWED MOTION TO DISMISS APPEAL OF NC WARN AND THE CLIMATE TIMES

NOW COMES Duke Energy Progress, LLC, ("DEP" or "the Company") pursuant to N.C. Gen. Stat. §62-82(b), N.C. Gen. Stat. §62-90, North Carolina Rule of Appellate Procedure 25(a), and the Commission's July 8, 2016 *Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)*, and hereby renews its motion to dismiss the Notice of Appeal and Exceptions by NC WARN and The Climate Times (collectively, "Potential Appellants"), filed on May 27, 2016 ("Notice of Appeal").[1] In support of its Motion, the Company states as follows:

1. On March 28, 2016, the Commission issued its *Order Granting Application in Part, with Conditions, and Denying Application in Part* ("CPCN Order"), holding 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.

2. On April 25, 2016, along with a Motion to Set Bond, Potential Appellants filed a Motion for an Extension of Time to File Notice of Appeal and Exceptions. The

[1] DEP's original Motion to Dismiss Appeal of NC WARN and The Climate Times was filed on May 31, 2016, because of Potential Appellants' failure to file a bond or undertaking as required by statute and Commission Order. That Motion is still pending before the Commission. The Company's original Motion is incorporated herein by reference.

Commission granted the motion, extending the period to file notice of appeal until May 27, 2016.[2]

3. On May 10, 2016, the Commission issued its *Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)* ("Original Appeal Bond Order"), which required Potential Appellants to file an executed undertaking or bond on or before May 27, 2016 as a condition of, and prior to, filing their Notice of Appeal.

4. On May 19, 2016, Potential Appellants filed a Petition for a Writ of Certiorari, a Petition for a Writ of Supersedeas, and a Motion for Temporary Stay with the North Carolina Court of Appeals, seeking review of and temporary relief from the Commission's Original Appeal Bond Order. The Court of Appeals denied Potential Appellants' Motion for a Temporary Stay on May 24, 2016.

5. On May 27, 2016, Potential Appellants filed their Notice of Appeal; however, they expressly noted they did so without filing the undertaking or appeal bond required by N.C. Gen. Stat. §62-81(b) and the Original Appeal Bond Order.[3]

6. On May 31, 2016, DEP filed a Response to Petition for Writ of Certiorari and Petition for Writ of Supersedeas with the Court of Appeals and filed a Motion to Dismiss the Appeal with the Commission due to Potential Appellants' failure to timely file the prerequisite appeal bond or undertaking with the Commission.

7. On June 3, 2016, Potential Appellants filed a response with the Commission in opposition to DEP's Motion to Dismiss Appeal.

8. On June 7, 2016, the Court of Appeals allowed NC WARN's petition for the limited purpose of vacating and remanding the Commission's Original Appeal Bond

[2] Under N.C. Gen. Stat. §62-90(a), the Commission can only extend the time not to exceed 30 additional days.
[3] Notice of Appeal, at p. 2.

Order, stating, "The Commission shall, in its discretion, set bond in an amount that is in accordance with N.C. Gen. Stat. 62-82(b) and based upon competent evidence."[4]

9. In response, on June 8, 2016, the Commission issued its *Order Setting Hearing*, which scheduled an evidentiary hearing to receive competent evidence on the amount of the appeal bond or undertaking.

10. On June 14, 2016, Potential Appellants filed a response to the Commission's Order, in which it moved that the Commission not allow additional evidence at the hearing, or in the alternative, to provide NC WARN at least ten additional days to submit additional testimony.

11. On June 17, 2016, the Commission denied the Motion of NC WARN and proceeded with the evidentiary hearing.

12. On June 27, 2016, NC WARN filed a late-filed exhibit, an affidavit from William E. Powers.

13. On June 29, DEP filed a response to that affidavit.

14. On July 8, the Commission issued its *Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)* ("Remand Bond Order"), setting the amount of the bond or undertaking at $98 million and allowing NC WARN five calendar days (July 13, 2016) from the issuance of the order to file the bond or undertaking with the Commission.

15. NC WARN did not file a bond or undertaking with Commission within five days as required by the Commission's Remand Bond Order and has to this point given no indication they plan to file a bond or undertaking.

ARGUMENT

Potential Appellants failed to timely file the prerequisite undertaking or appeal bond required by N.C. Gen. Stat. §62-82(b) and the Remand Bond Order, and their

[4] The Court of Appeals Order was issued after the May 27, 2016 deadline for filing the Notice of Appeal.

appeal should be dismissed as a matter of law. 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 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.* (Emphasis added).

In setting Potential Appellants' appeal bond or undertaking at $98 million in the Remand Bond Order, the Commission determined that the only competent evidence in the record was that of DEP witness Mr. Mark Landseidel and ordered NC WARN to file a bond or undertaking of $98 million within five days of its July 8, 2016 Order.[5]

Accordingly, because of their failure to take action to perfect their appeal on a timely basis by filing the required undertaking or bond - - twice now - - Potential Appellants' Notice of Appeal should be dismissed pursuant to North Carolina Court of Appeals Rule 25(a). Rule 25(a) provides, in pertinent part, as follows,

> If after giving notice of appeal from any court, commission, or commissioner *the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal*

[5] Remand Bond Order at pp. 16; 20-21. In its Remand Bond Order, the Commission held as follows, "The potential increase in the cost of generating facilities at issue due to an appeal-related construction delay beginning not earlier than October 1, 2016, is not less than $98 million. The amount of $98 million represents $40 million in potential damages related to the cancellation costs of three major equipment contracts, $8 million in potential damages related to sunk development costs, and $50 million in increased project costs for the increased cost of labor and materials." (See page. 9, emphasis in original).

> *for decision, the appeal may on motion of any other party be dismissed.* Prior to the filing of an appeal in an appellate court, motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court, motions to dismiss are made to that court. . . . motions made under this rule to a commission may be heard and determined by the chair of the commission. (Emphasis added.)

Because Appellant's notice of appeal has not yet been filed in the Court of Appeals (as the appeal has not yet been docketed), DEP's motion to dismiss is properly before this Commission pursuant to Rule 25(a) and should be granted.

WHEREFORE, for all the foregoing reasons, and for the reasons outlined in the Motion to Dismiss Appeal filed on May 31, 2016, DEP respectfully requests that the Commission dismiss Potential Appellants' Notice of Appeal.

Respectfully submitted, this the 20th day of July 2016.

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ATTORNEYS FOR DUKE ENERGY PROGRESS, LLC

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Progress, LLC's Renewed Motion to Dismiss Appeal 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 20th day of July, 2016

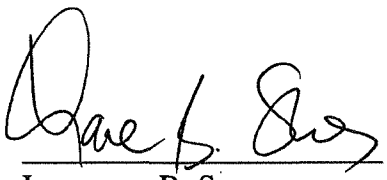

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EXHIBIT T

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' RESPONSE TO RENEWED MOTION TO DISMISS APPEAL

NOW COME NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-90 and Rule 25 of the North Carolina Rules of Appellate Procedure, and serve the following Response to Duke Energy Progress LLC's ("DEP") Renewed Motion to Dismiss Appeal. In support of this Response, NC WARN and The Climate Times state as follows:

BACKGROUND

1. On March 28, 2016, the N.C. Utilities Commission ("Commission") entered an Order Granting Application in Part, with Conditions, and Denying Application in Part ("CPCN Order").

2. Appeals from orders granting certificates of public convenience and necessity are generally subject to the bond requirements described in N.C. Gen. Stat. § 62-82(b). Thus, on April 25, 2016, NC WARN and The Climate Times filed a Motion to Set Bond. To allow time for the Commission's ruling on the Motion to Set Bond, NC WARN and The Climate Times simultaneously filed a Motion for Extension of Time to

File Notice of Appeal and Exceptions, and the Commission extended the deadline for appeals to May 27, 2016.

3. 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 NC WARN and The Climate Times with an opportunity to file a Reply. Consistent with this Procedural Order, DEP filed a Response on May 2, 2016, and NC WARN and The Climate Times filed a Reply on May 5, 2016.

4. In its Response, DEP refused to state that an appeal would result in delays in the initiation of construction. *DEP's Response* ¶ 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.

5. Among other things, NC WARN and The Climate Times' Reply of May 5 called the Commission's attention to the fact that DEP failed to substantiate any of its alleged damages estimates. *Reply* ¶¶ 5-6. The Reply again challenged DEP to state that an appeal would result in delays in the beginning of construction and noted that no public interest group, including NC WARN and The Climate Times, could ever post a $50 million bond. *Id.* ¶¶ 11-12. Finally, the Reply emphasized that NC WARN and The Climate Times are not seeking an injunction or stay of the Commission's CPCN Order. *Id.* ¶ 3.

6. On May 10, 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("First Bond Order"). The First Bond Order 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 First Bond Order required a bond or undertaking of $10,000,000.00. *Id.* at 7. However, it goes without saying that the Petitioners could not afford a $10,000,000.00 bond, and could not honestly sign an undertaking representing the ability to pay $10,000,000.00 in damages. Thus, the First Bond Order was tantamount to dismissing any appeal of the CPCN Order.

7. On May 19, 2015, NC WARN and The Climate Times filed a Petition for Writ of Certiorari with the N.C. Court of Appeals. The Petition for Writ of Certiorari asked the Court of Appeals to overturn the First Bond Order. Further, on May 27, 2016, NC WARN and The Climate Times filed a Notice of Appeal and Exceptions with the Commission concerning the CPCN Order and First Bond Order.

8. Before the Court of Appeals ruled on the Petition for Writ of Certiorari, On May 31, 2016 DEP filed a Motion to Dismiss the Notice of Appeal and Exceptions of NC WARN and The Climate Times. The basis of DEP's Motion to Dismiss was that NC WARN and The Climate Times did not post a $10,000,000 bond or undertaking. NC WARN and The Climate Times filed a Response to the Motion to Dismiss on June 3, 2016, arguing that the bond amount was erroneous and that the appeal should not be dismissed while the Court of Appeals was reviewing the original Petition for Writ of Certiorari.

9. Before the Commission could rule on DEP's Motion to Dismiss, the Court of Appeals, in an Order of June 7, 2016, allowed the Petition for Writ of Certiorari for the purpose of vacating and remanding the First Bond Order and requiring the Commission to set a bond based on competent evidence.

10. The Commission, on June 8, 2016, entered an Order that calendared a bond hearing for June 17, 2016. On June 14, 2016, NC WARN and The Climate Times filed a Response to Order Setting Hearing, in which they objected to the Commission's accepting evidence not previously submitted during its deliberation over the First Bond Order.

11. The bond hearing was held on June 17, 2016. Subsequently, on June 27, 2016, NC WARN and The Climate Times filed the Affidavit of William Powers concerning the bond issue.

12. On July 9, 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Second Bond Order"). The Second Bond Order required that NC WARN and The Climate Times, to appeal the CPCN Order, post a bond or undertaking of $98 million within five (5) days. Obviously the Petitioners could not afford a $98,000,000.00 bond, and could not honestly sign an undertaking representing the ability to pay $98,000,000.00 in damages, so no bond or undertaking was filed within the 5-day deadline.

13. On July 20, 2016, DEP filed a Renewed Motion to Dismiss the Notice of Appeal and Exceptions of NC WARN and The Climate Times.

ARGUMENT

14. DEP's Renewed Motion to Dismiss is premised upon the Second Bond Order. However, on or before August 8, 2016, NC WARN and The Climate Times will be filing a Notice of Appeal and Exceptions as to the Second Bond Order; and also on or before August 8, 2016, NC WARN and The Climate Times will file with the N.C. Court of Appeals a Petition for Writ of Certiorari as to the Second Bond Order. Thus the

Second Bond Order is the subject of a strong appellate challenge. If DEP's Renewed Motion to Dismiss is granted, it is quite realistic that the Court of Appeals reverses the Second Bond Order yet NC WARN and The Climate Times will have no recourse to challenge the CPCN Order because their appeal will have already been dismissed. Hence, NC WARN and The Climate Times respectfully request that judgement on the Renewed Motion to Dismiss be deferred until the appellate process runs its course. The remainder of this Response is dedicated to demonstrating the legitimacy of the challenge to the Second Bond Order.

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. The $98 million bond required by the Second Bond Order was based upon the following damage estimates: "The amount of $98 million represents $40 million in potential damages related to the cancellation costs of three major equipment contracts, $8 million in potential damages related to sunk development costs, and $50 million in increased project costs for the increased cost of labor and materials." *Second Bond Order* p 9. Yet each of these damage estimates is deficient and unsupported by record evidence.

18. Consider first the estimate of $40 million in potential damages related to the cancellation of costs of three major equipment contacts. Neither DEP nor the Second Bond Order considered whether these contracts could be extended, or cancelled without penalty, or cancelled for damages amounting to less than $40 million. Further, DEP signed these contracts on May 31, 2016, after NC WARN and The Climate Times filed the Notice of Appeal and Exceptions with the Commission in regards to the application and while the parties to this docket were still in the process of litigation over the bond amount. *See Powers Aff.* ¶ 5. Thus, when it signed these contracts, DEP was aware that NC WARN and The Climate Times had not yet exhausted their legal remedies and still assumed the risk that it would not receive a certificate of public convenience and necessity. The financial burden of such a decision should fall on the company and its shareholders, not on ratepayers or parties seeking appellate review of the application.

19. As to the $8 million estimate for sunk development costs, DEP is exercising mere speculation unsupported by record evidence. DEP's witness testified: "My estimate would be is that if we were to delay the project for two years, we would

have to rework a significant amount of this development effort . . . ." *Transcript of Bond Hearing* p 46. DEP did not testify, however, that all of these development costs would be sunk, or that development work to date could not be reused.

20. Also unsupported is the $50 million estimate for increased project costs for the increased cost of labor and materials. DEP arrived at this number by assuming a 2.5 percent annual cost escalation over a 2-year appellate delay. *Id.* at 48-49. However, NC WARN and The Climate Times submitted an Affidavit from William E. Powers, a consulting and environmental engineer with over 30 years of experience in power plant operations and environmental engineering. *Powers Aff.* ¶ 1. Mr. Powers testified, citing industry statistics, that "industrial construction costs are lower in 2016 than they were in 2014," and "[t]he current trend in plant construction costs . . . is negative." *Id.* ¶ 7. Thus, "[a] 24-month delay may in fact save DEP substantial money." *Id.* No evidence in the record contradicts Mr. Powers's testimony.

21. Perhaps most importantly, requiring a $98 million bond is completely prohibitive of appeals and is therefore unconstitutional. Article I, Section 35, of the North Carolina Constitution is an Open Courts provision which states that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." Obviously no public interest group, including NC WARN and The Climate Times, could post a $98 million bond. Hence the Second Bond Order deprives parties of the right to access this State's appellate courts.

22. Undersigned counsel is aware of no case in this State addressing whether monetary fees (other than standard filing fees) violate the Open Courts provision of the

North Carolina Constitution. However, substantial case law throughout the nation provides that substantial monetary fees constitute a violation of open courts laws in numerous states. *E.g.*, *Fent v. State ex rel. Dept. of Human Servs.*, 236 P.3d 61 (OK 2010); *G.B.B. Invs. Inc. v. Hinterkopf*, 343 So. 2d 899 (Fla. Ct. App. 1977); *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419 (Fla. 1992); *In re Estate of Dionne*, 518 A.2d 178 (N.H. 1986); *R. Commc'ns Inc. v. Sharp*, 875 S.W.2d 314 (Tex. 1994); *Jensen v. State Tax Comm'n*, 835 P.2d 965 (Utah 1992). In its forthcoming appeals—which will be filed on or before August 8, 2016—NC WARN and The Climate Times will argue that, based on the North Carolina Constitution's Open Courts provision, the Second Bond Order is unconstitutional.

23. Therefore, the $98 million bond is unsupported by record evidence or essential findings of fact, and furthermore, violates the Open Courts clause of the State Constitution. It follows that the Second Bond Order is defective. Yet it is the Second Bond Order that is the basis for DEP's Renewed Motion to Dismiss. NC WARN and The Climate Times should not be barred from pursuing an appeal based on a defective Second Bond Order. Instead of dismissing this appeal, NC WARN and The Climate Times respectfully request that the Commission wait for the forthcoming appellate process to run its course.

CONCLUSION

For the reasons set forth above, NC WARN and The Climate Times respectfully request that DEP's Renewed Motion to Dismiss Appeal be denied or, in the alternative, a ruling on the Renewed Motion to Dismiss Appeal should be withheld until the forthcoming appellate process runs its course.

Respectfully submitted, this the 26th day of July, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day he served a copy of the foregoing NC WARN AND THE CLIMATE TIMES' RESPONSE TO RENEWED MOTION TO DISMISS APPEAL 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 26th day of July, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: _____
Matthew D. Quinn

EXHIBIT U

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	))))))	NOTICE OF APPEAL AND EXCEPTIONS BY NC WARN AND THE CLIMATE TIMES

NOW COME NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-90 and Rule 18 of the North Carolina Rules of Appellate Procedure, and give Notice of Appeal to the North Carolina Court of Appeals from the North Carolina Utilities Commission's ("Commission") Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) issued on July 8, 2016 ("Second Bond Order"). The present Notice of Appeal and Exceptions is in addition to the previously filed Notice of Appeal and Exceptions (filed on May 27, 2016) that challenged the Order Granting Application in Part, With Conditions, and Denying Application in Part issued on March 28, 2016 ("CPCN Order") and the First Bond Order of May 10, 2016.

As set forth below, the Commission in its Second Bond Order, required that NC WARN and The Climate Times post a $98 million bond or undertaking as a condition of appealing the CPCN Order. Contrary to North Carolina law, the Second Bond Order was not supported by record evidence or adequate findings of fact, and the Second Bond Order is unconstitutional.

EXCEPTION NO. 1:

The Commission erred in making its Conclusions of Law, pages 14-28 of the Second Bond Order, and supporting findings of fact, pages 6-9, regarding the need for a bond or undertaking on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The relevant statute, N.C. Gen. Stat. § 62-82(b), requires a finding that an appeal will result in a delay in construction. No competent evidence to that effect was presented to the Commission. Instead, all evidence about delays from an appeal was speculative and contradicted by other portions of the record. In fact, the Commission committed error on pages 13-14 when it stated that DEP bears no burden to state that an appeal will result in delay.

EXCEPTION NO. 2:

The Commission erred in making its Conclusions of Law, pages 14-28 of the Second Bond Order, and supporting findings of fact, pages 6-9, regarding the need for a bond or undertaking on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are

unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

No competent evidence was submitted to the Commission in support of any bond amount whatsoever. Only conclusory, hypothetical damage amounts were provided by DEP for the Commission's consideration without supporting evidence. The Commission did not make adequate findings of fact, and was not presented with evidence, as to why $98 million was the appropriate amount for the bond or undertaking.

EXCEPTION NO. 3:

The Commission erred in making its Conclusions of Law, pages 14-28 of the Second Bond Order, and supporting findings of fact, pages 6-9, regarding the bond or undertaking amount of $98 million on the grounds that this bond was beyond the Commission's statutory authority and jurisdiction; violates constitutional provisions; is affected by errors of law; and is not in the public interest.

In Article I, Section 35, of the North Carolina Constitution is an Open Courts provision which states that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." No public interest group could post a $98 million bond. Hence the Second Bond Order deprives NC WARN and The Climate Times of the right to access this State's appellate courts in violation of the State's Constitution.

CONCLUSION

For the reasons set forth above, the Second Bond Order was arbitrary and capricious; affected by errors of law; unsupported by competent, material, and substantial evidence in light of the entire record; violates constitutional provisions; was beyond the Commission's statutory power and jurisdiction; and was not in the public interest.

Respectfully submitted, this the 28th day of July, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day he served a copy of the foregoing 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 28th day of July, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: _____
Matthew D. Quinn

EXHIBIT V

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 DISMISSING APPEAL FOR FAILURE TO COMPLY WITH BOND PREREQUISITE

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 (CPCN) to construct two 280 MW combined-cycle natural gas-fired electric generating units in Buncombe County, North Carolina (the Project or Facility) in compliance with G.S. 62-110.1 and the Mountain Energy Act, Session Law 2015-110. This act required the Commission to issue its order on the CPCN application within 45 days of filing.

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, a prerequisite for appeal of the Commission's March 28, 2016 order, in an amount of $250 and requesting an oral argument or evidentiary hearing on the bond requirement.

On April 27, 2016, the Commission issued a 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 indicated that the Commission's 44-page comprehensive and detailed CPCN Order properly found that the construction of the two 280 MW combined-cycle natural gas-fired units (CC units) were necessary to reliably meet the needs of DEP's customers and to provide for the early retirement of the superannuated 379 MW Asheville Coal Units 1 and 2 within the expedited time frame established by the General Assembly. DEP indicated that the approximate cost of the Project was $1 billion. DEP argued that the increased cost of the Facility could potentially be $240 million and requested that the bond be set at $50 million.

On May 5, 2016, NC WARN filed a Verified Reply to DEP's Response to Motion to Set Bond. In summary, NC WARN argued that DEP's response was an attempt to bully NC WARN away from an appeal. NC WARN argued that DEP has the burden to quantify

and substantiate the amount of bond needed to secure against damages from appeal-related delays in beginning of construction of the Facility. NC WARN stated that DEP provided unsubstantiated and extravagant estimates of potential damages. NC WARN indicated that DEP's assertions of potential damages were not sufficiently documented, and that DEP did not provide an explanation or break-down of its ultimate $50 million bond estimate.

On May 10, 2016, the Commission issued its Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) (First Bond Order). The Commission required NC WARN to file an executed undertaking or a bond in the sum of $10 million prior to filing a notice of appeal. The Commission established a procedure that potentially authorized NC WARN to be relieved of this requirement based on subsequent events.

On May 19, 2016, NC WARN filed in the Court of Appeals a Petition for Writ of Certiorari, Petition for Writ of Supersedeas, and Motion for Temporary Stay of the Commission's First Bond Order. On May 24, 2016, the Court of Appeals denied NC WARN's Motion for Temporary Stay.

On May 27, 2016, NC WARN filed a Notice of Appeal and Exceptions in Docket No. E-2, Sub 1089 to the Commission's March 28 and May 10, 2016 orders without filing the required undertaking or appeal bond as required by G.S. 62-82(b) and the First Bond Order.

On May 31, 2016, in the Court of Appeals, DEP filed a Response to Petition for Writ of Certiorari and Petition for Writ of Supersedeas.

On May 31, 2016, DEP filed a Motion to Dismiss the Appeal for NC WARN's failure to file the required undertaking or appeal bond. On June 3, 2016, NC WARN filed a response opposing the dismissal.

On June 7, 2016, the Court of Appeals allowed NC WARN's Petition for Writ of Certiorari for the limited purpose of vacating and remanding the Commission's First Bond Order. The Court of Appeals stated that on remand "the Commission shall, in its discretion, set bond in an amount that is in accordance with N.C. Gen. Stat. 62-82(b) and based upon competent evidence."

On June 8, 2016, in response to the Court's order, the Commission issued an Order Setting Hearing, providing DEP and NC WARN an evidentiary hearing on the issue of setting an undertaking or bond pursuant to G.S. 62-82(b). The Commission ordered both DEP and NC WARN to sponsor witness(es) on the issue of the amount of the bond.

On June 14, 2016, NC WARN filed a Response to Order. In its response, NC WARN moved that the Commission not allow additional evidence on remand or, in the alternative, provide NC WARN at least ten additional days to submit additional testimony prior to an evidentiary hearing. On June 17, 2016, at the beginning of the evidentiary hearing, the Commission denied NC WARN's motion to exclude additional

testimony on remand. After denying NC WARN's motion, the Commission proceeded with the evidentiary hearing on the bond determination.

At the conclusion of the hearing, the Commission asked NC WARN about its motion for additional time to present a witness. NC WARN indicated it had not contacted any witnesses prior to the hearing and that NC WARN would let the Commission know on or before Wednesday, June 22, 2016, whether it would withdraw such motion to provide a witness on the issue. On June 22, 2016, NC WARN filed a Response indicating that NC WARN planned to confer with a potential witness on Friday, June 24, 2016, and, with the Commission's forbearance, would notify the Commission on Friday, June 24, 2016, whether the potential witness was available to provide an affidavit or testify at a hearing. On Friday, June 24, 2016, NC WARN filed an update indicating that NC WARN conferred with its witness, Bill Powers, and that NC WARN would be filing an affidavit from him on Monday, June 27, 2016. On June 27, 2016, NC WARN filed the Affidavit of William E. Powers. On June 29, 2016, DEP filed a response to the affidavit filed on NC WARN's behalf replying in opposition to the affidavit and requesting that the Commission deny further delay efforts by NC WARN.

On July 8, 2016, the Commission issued an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) (Second Bond Order) setting the bond or undertaking at $98 million based upon the evidence presented to the Commission. The Commission provided NC WARN five days from the issuance of the Second Bond Order to file the bond or undertaking with the Commission.

NC WARN did not file a bond or undertaking within the five days as required by the Second Bond Order and G.S. 62-82(b).

On July 20, 2016, DEP filed a renewed motion to dismiss NC WARN's appeal. On July 26, 2016, NC WARN filed its response to DEP's renewed motion to dismiss the appeal.

On July 28, 2016, NC WARN filed notice of Appeal and Exceptions as to the Second Bond Order.

DEP'S RENEWED MOTION TO DISMISS APPEAL

In its motion, DEP argues that NC WARN has failed to file the prerequisite undertaking or bond required by G.S. 62-82(b) and the Second Bond Order and, therefore, NC WARN's appeal should be dismissed as a matter of law. DEP cites to G.S. 62-82(b), which provides, in part:

> (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. [Emphasis added.]

In the Second Bond Order, the Commission found that, based upon the competent evidence presented, the potential increase in the cost of the generating facility at issue due to an appeal-related construction delay is not less than $98 million. DEP indicated that NC WARN has not perfected its appeal in a timely manner as required by Rule 25(a) of the North Carolina Rules of Appellate Procedure. Rule 25(a) provides:

> If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court ... motions made under this rule to a commission may be heard and determined by the chair of the commission.

Based upon Rule 25(a), DEP moves that the Commission grant its motion to dismiss the appeal.

NC WARN'S RESPONSE TO RENEWED MOTION TO DISMISS APPEAL

In its response, NC WARN admits that it has not filed a bond or undertaking as required by the Commission's Second Bond Order. NC WARN argues that it plans to file a notice of appeal as to the Second Bond Order and a Petition for Writ of Certiorari requesting review of the Second Bond Order on or before August 8, 2016. NC WARN argues that, if the appellate court rules in its favor as to the Second Bond Order and the Commission has dismissed its appeal, it will have no recourse to challenge the CPCN Order because the appeal will have been dismissed. Therefore, NC WARN requests that the Commission defer judgment on DEP's motion to dismiss the appeal until the appellate process runs its course. The remainder of NC WARN's response is non-responsive to DEP's motion to dismiss, but, rather, outlines the arguments it plans to make to the appellate court regarding the Second Bond Order.

FINDINGS, DISCUSSION AND CONCLUSIONS OF LAW

The law is clear. Pursuant to Rule 25(a) of the Rules of Appellate Procedure, upon motion of any other party, an appeal may be dismissed if "the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision." North Carolina General Statutes Section 62-82(b), entitled Compensation for Damages Sustained by Appeal from Award of Certificate under G.S. 62-110.1; Bond Prerequisite to Appeal, mandates that: "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" in such amount sufficient for the appellant to recompense the party awarded the certificate for damages from an unsuccessful appeal caused by appeal-related delays in beginning construction of the facility. The statute states the measure of damages is the increase in the cost of the facility.

The Commission obtained competent evidence on the potential increase in the cost of the facility and within its discretion issued an order on July 8, 2016, setting a bond amount sufficient for NC WARN to satisfy its obligation to recompense DEP and, ultimately, North Carolina rate-paying citizens for damages in the event of an unsuccessful appeal. The Commission provided NC WARN five days from the date of the order to file such bond or undertaking. The order was in compliance with the Commission's statutory duty under G.S. 62-82(a) requiring a bond as a prerequisite to any appeal from certificates to build certain generation facilities.

NC WARN requested the Commission to set bond by motion filed April 25, 2016. Much litigation has transpired in the meantime. On July 26, 2016, NC WARN asserts before the Commission that G.S. 62-82(b) unconstitutionally deprives NC WARN of its rights to court access. Acts of the General Assembly are presumed to be constitutional. State ex rel. Martin v. Preston, 325 N.C. 438, 382 S.E.2d 473 (1989). It is not within the Commission's jurisdiction as a quasi-judicial administrative agency to rule on the constitutionality of a statute. Great Am. Ins. Co. v. Gold, 254 N.C. 168, 173, 118 S.E.2d 792 (1961).

Based upon NC WARN's own admission and certified copies of the Commission's docket entries, which are attached hereto, the Commission finds that NC WARN has not posted the prerequisite bond to pursue its appeal. Accordingly, pursuant to Rule 25(a), NC WARN has failed to take the necessary actions to present the appeal.

IT IS, THEREFORE, ORDERED that DEP's Motion to Dismiss Appeal of North Carolina Waste Awareness and Reduction Network and The Climate Times shall be, and is hereby, granted.

ISSUED BY ORDER OF THE COMMISSION.

This the 2nd day of August, 2016.

NORTH CAROLINA UTILITIES COMMISSION

Paige J. Morris

Paige J. Morris, Deputy Clerk

State of North Carolina Utilities Commission

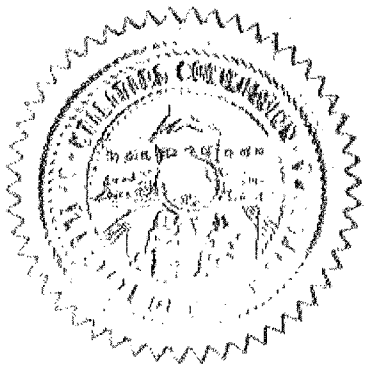
Certification

I, Julie Kennedy, Clerk of The North Carolina Utilities Commission, do hereby certify the attached (four 4 sheets) to be a true copy from the official records of this office viz;

Duke Energy Progress, LLC
Docket Number E-2 Sub 1089
Table of Contents

In Witness Whereof, I have hereunto set my hand and affixed the official seal of the Commission.

This, the 1st day of August, 2016.



Julie Kennedy

Julie Kennedy, Clerk

North Carolina Utilities Commission

03-Docket Table of Contents ~ Docket # E-2 Sub 1089

PDT: 8/1/2016 10:03AM

Related Companies (Entities): DUKE ENERGY PROGRESS, LLC
Docket Create Date: 09/16/2015
Docket Description: Petition for CPCN to Construct a Combined Cycle Natural Gas Fueled Electric Generation Facili

Doc Date	Doc Class	Means Received	Doc Description
12/16/2015	Filing	Internet	DEP's Notification of Intent to File for Western Carolinas Modernization Project
12/18/2015	Order		Order Scheduling Public Hearing and Requesting Investigation and Report by the Public Staff
12/21/2015	Filing	Internet	Motion to Intervene by NC WARN and The Climate Times and Motion for Evidentiary Hearing
12/22/2015	Filing	Internet	Petition to Intervene of MountainTrue and Sierra Club
12/29/2015	Filing	Internet	CIGFUR II's Petition to Intervene
12/30/2015	Order		Order Granting Petition to Intervene
12/31/2015	Filing	Regular Mail	Response to NCWarns's Motion to Intervene and Motion for Evidentiary Hearing
01/05/2016	Filing	Internet	Affidavit of Publication
01/06/2016	Filing	Internet	Reply by NC WARN and The Climate Times
01/06/2016	Filing	Staff	Courtroom Confirmation Letter for Hearing Scheduled on Tuesday, January 26, 2016 at Buncombe Co. Courthouse
01/14/2016	Filing	Hand Delivered	CUCA's Petition to Intervene
01/14/2016	Order		Order Granting Petition to Intervene
01/15/2016	Filing	E-Mail	Consumer Statement of Position (3)
01/15/2016	Filing	Internet	DEP Application for CPCN and Motion for Partial Waiver
01/15/2016	Filing	Internet	Confidential Petition for Certificate of Public Convenience for Partial Waiver of Commission Rule Re-61
01/15/2016	Order		Order Granting Petition to Intervene
01/15/2016	Order		Order Denying NC WARN and The Climate Times' Motion for an Evidentiary Hearing
01/19/2016	Filing	E-Mail	Consumer Statement of Position Emails (2)
01/20/2016	Filing	E-Mail	Consumer Statement of Position Emails (60)
01/20/2016	Filing	Hand Delivered	NCSEA's Petition to Intervene
01/20/2016	Order		Order Granting Petition to Intervene
01/20/2016	Order		Order Granting Petition to Intervene
01/21/2016	Filing	E-Mail	Consumer Statement of Position Emails (21)
01/22/2016	Filing	E-Mail	Consumer Statement of Position Emails (14)
01/22/2016	Filing	Regular Mail	Consumer Position (4)
01/22/2016	Order		Order on Procedure for Accepting Comments of the Parties
*01/25/2016	Filing	Regular Mail	Consumer Statement of Position Emails (20)
01/25/2016	Filing	Internet	Motions to Compel by NC WARN and The Climate Times
01/26/2016	Filing	Internet	Petition to Intervene of Grant Millin
01/26/2016	Filing	Internet	Petition to Intervene of Grant Millin Docket - Truncated Version
01/26/2016	Filing	E-Mail	Consumers Statement of Position Emails (9)
*01/26/2016	Filing	E-Mail	Consumer Statement of Position Emails (13)
01/26/2016	Order		Order Granting Petition to Intervene
01/27/2016	Filing	E-Mail	Consumer Statement of Position Emails (16)

Related Companies (Entities): DUKE ENERGY PROGRESS, LLC
Docket Create Date: 09/16/2015
Docket Description: Petition for CPCN to Construct a Combined Cycle Natural Gas Fueled Electric Generation Facili

Doc Date	Doc Class	Means Received	Doc Description
01/28/2016	Filing	E-Mail	Consumer Statement of Position Emails (19)
01/28/2016	Filing	E-Mail	Consumer Statement of Position Email (1)
01/29/2016	Filing	Regular Mail	Consumer Statement of Position Emails (6)
01/29/2016	Filing	Internet	DEP's Confidential Pages from Exhibit 1A
01/29/2016	Filing	Internet	DEP's Cover Letter Transmitting Confidential Pages
01/29/2016	Order		Order Granting Waiver of Prefiling and Testimony Requirements
02/01/2016	Filing	Staff	Click for Audio: E-2, Sub 1089, January 26, 2016
02/01/2016	Filing	Internet	DEP's Letter and Confidential Pages from Revised Exhibits to CPCN Application
02/01/2016	Filing	Internet	DEP's Letter and Revised Exhibits to CPCN Application
02/01/2016	Filing	Internet	DEP's Response to NC Warn and The Climate Times' Motions to Compel and Affidavit of Michael Delowery
02/01/2016	Filing	E-Mail	Consumers Statement of Position Emails (32)
02/02/2016	Filing	E-Mail	Consumer Statement of Position (13)
02/02/2016	Filing	Internet	Columbia Energy, LLC's Petition to Intervene
02/03/2016	Filing	E-Mail	Consumer Statement of Position Email (1)
*02/04/2016	Filing	E-Mail	Consumer Statement of Position Emails and Letter (8)
02/04/2016	Order		Order Denying Motion to Compel
02/04/2016	Order		Order Granting Petition to Intervene
*02/05/2016	Filing	E-Mail	Consumer Statement of Position (10)
02/05/2016	Filing	Internet	Petition to Intervene by Brad Rouse
02/05/2016	Filing	Internet	Petition to Intervene by Richard Fireman
02/08/2016	Filing	Internet	Brad Rouse's Certificate of Service to Petition to Intervene Filed on 2/5/2016
02/08/2016	Filing	Other	Consumer Statement of Position Emails/Letters (22)
02/08/2016	Order		Order Granting Petition to Intervene
02/08/2016	Order		Order Granting Petition to Intervene
02/09/2016	Filing	E-Mail	Consumer Statement of Position Email (1)
02/09/2016	Filing	Internet	Comments Intervener (Statement of Position)
02/09/2016	Filing	E-Mail	Consumers Statement of Positon (2)
02/10/2016	Filing	E-Mail	Consumers Statement of Position Emails (3)
02/10/2016	Filing	Internet	Comments of Brad Rouse
02/10/2016	Filing	Hand Delivered	NCSEA's Comments
02/10/2016	Filing	Hand Delivered	NCSEA's Comments - Confidential Pages 11, 12 and 13
02/11/2016	Filing	E-Mail	Consumers Statement of Position Emails and Letters (4)
02/12/2016	Filing	Internet	NC WARN & The Climate Times Comments
02/12/2016	Filing	Internet	Comments of MountainTrue and the Sierra Club
02/12/2016	Filing	Internet	Comments of Columbia Energy, LLC
02/12/2016	Filing	Internet	Statement of Richard Fireman
*02/15/2016	Filing	Staff	Transcript of Testimony - Heard: Tuesday, January 26, 2016 in Asheville, North Carolina
02/15/2016	Filing	E-Mail	Consumer Statement of Position Emails (8)
02/15/2016	Filing	Staff	Official Exhibits for 1-26-2016 Hearing (Asheville)
02/15/2016	Filing	E-Mail	Consumer Statement of Position Emails (11)
02/16/2016	Filing	E-Mail	Consumer Statement of Positions (8)

Related Companies (Entities): DUKE ENERGY PROGRESS, LLC
Docket Create Date: 09/16/2015
Docket Description: Petition for CPCN to Construct a Combined Cycle Natural Gas Fueled Electric Generation Facili

Doc Date	Doc Class	Means Received	Doc Description
* 02/17/2016	Filing	E-Mail	Consumer Statement of Position Emails (8)
02/18/2016	Filing	E-Mail	Consumer Statement of Position Email (3)
02/19/2016	Filing	E-Mail	Consumer Statement of Position Emails (5)
02/19/2016	Filing	Internet	NC WARN and Climate Time's Cover Letter and Affidavit for J. David Hughes
02/19/2016	Filing	Internet	NC WARN and The Climate Times' Response
02/22/2016	Filing	Regular Mail	Consumer Statement of Position Email (16)
02/23/2016	Filing	E-Mail	Consumer Statement of Positions (4)
02/24/2016	Filing	Internet	Additional Comments by Brad Rouse
02/25/2016	Filing	E-Mail	Consumer Statement of Position Email (1)
02/25/2016	Filing	Internet	DEP's Reply Comments to Additional Comments of Brad Rouse
02/26/2016	Filing	Internet	2nd Additional comments of Brad Rouse
02/26/2016	Filing	Regular Mail	Statement of Grant Millin
02/26/2016	Filing	Internet	NC WARN and TCL Additional Comments
02/29/2016	Filing	Regular Mail	Consumer Statement of Position (3)
02/29/2016	Filing	Regular Mail	Consumer Statement of Position (7)
02/29/2016	Order		Notice of Decision
03/01/2016	Filing	E-Mail	Consumer Statement of Position Email (1)
03/10/2016	Filing	Regular Mail	Consumer Statement of Position Letter (1)
03/28/2016	Filing	E-Mail	Consumer Statement of Position Email
03/28/2016	Order		Order Granting Application in Part, with Conditions, and Denying Application in Part
04/21/2016	Filing	Regular Mail	Consumer Statement of Position to AG's Office
04/25/2016	Filing	Internet	Motion for Extension of Time to File Notice of Appeal and Exceptions of NC WARN and The Climate Times
04/25/2016	Filing	Internet	Motion to Set Bond for Appeal of NC WARN and The Climate Times
04/25/2016	Filing	Internet	Notice of Appearance on Behalf of NC WARN and The Climate Times for Matthew D. Quinn
04/26/2016	Order		Order Extending Time to File Notice of Appeal and Exceptions
04/27/2016	Order		Procedural Order on Bond
05/02/2016	Filing	Internet	DEC's Verified Response to Motion to Set Bond of NC WARN and the Climate Times
05/05/2016	Filing	Internet	NC WARN and The Climate Times's Verified Reply to DEP's Response to Motion to Set Bond
05/10/2016	Order		Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)
05/23/2016	Filing	Regular Mail	Petition for Writ of Certiorari, Petition for Writ of Suerpsedeas, and Motion For Temporary Stay Filed in NC Court of Appeals
05/24/2016	Filing	Regular Mail	NC Court of Appeals Order
05/27/2016	Filing	Internet	Notice of Appeal and Exceptions of NC WARN and The Climate Times
05/31/2016	Filing	Internet	DEP's Motion to Dismiss Appeal of NC WARN and The Climate Times
06/03/2016	Filing	Internet	NC WARN and The Climate Times' Response to Motion to Dismiss Appeal
06/03/2016	Filing	Regular Mail	DEPS's Response Filed in NC Court of Appeals
06/07/2016	Filing	Regular Mail	North Carolina Court of Appeals Order

Related Companies (Entities): DUKE ENERGY PROGRESS, LLC
Docket Create Date: 09/16/2015
Docket Description: Petition for CPCN to Construct a Combined Cycle Natural Gas Fueled Electric Generation Facili

Doc Date	Doc Class	Means Received	Doc Description
06/08/2016	Order		Order Setting Hearing
06/14/2016	Filing	Internet	NC WARN / The Climate Times (TCT) Response to Order
06/20/2016	Filing	E-Mail	Click for Audio: E-2, Sub 1089, Volume 2, June 17, 2016
06/21/2016	Filing	Staff	Transcript of Testimony (Heard in Raleigh 6-17-2016) Volume 2
06/22/2016	Filing	Staff	Official Exhibits for June 17, 2016 Hearing
06/22/2016	Filing	Internet	NC WARN / TCT Response to Chairman's Inquiry
06/23/2016	Filing	Internet	DEP's Reply in Opposition to Response by NC WARN and The Climate Times
06/23/2016	Filing	Internet	NC WARN and The Climate Times' Motion for Extension of Time to Serve Proposed Record on Appeal
06/24/2016	Filing	Internet	Update by NC Warn and the Climate Times
06/27/2016	Filing	Internet	Response by NC WARN and The Climate Times and Affidavit of William Powers
06/29/2016	Filing	Internet	DEP's Reply to Response by NC WARN and The Climate Times and to Late-Filed Affidavit
06/30/2016	Order		Order Granting Motion for Extension of Time to File Proposed Record on Appeal
07/08/2016	Order		Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)
07/20/2016	Filing	Internet	DEP's Renewed Motion to Dismiss Appeal of NC WARN and The Climate Times
07/26/2016	Filing	Internet	NC WARN and The Climate Times' Response to Renewed Motion to Dismiss Appeal
07/28/2016	Filing	Internet	NC WARN and The Climate Times' Notice of Appeal and Exceptions as to the Second Bond Order

Count ALL Documents Listed: 127

End of Report

EXHIBIT W

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1089

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	)	DUKE ENERGY PROGRESS' VERIFIED MOTION TO DISMISS APPEAL OF SECOND BOND ORDER

NOW COMES Duke Energy Progress, LLC, ("DEP" or "the Company") pursuant to N.C. Gen. Stat. §62-82(b), N.C. Gen. Stat. § 62-90, and North Carolina Rule of Appellate Procedure 25(a), and respectfully files this Motion to Dismiss Appeal of Second Bond Order filed by NC WARN and The Climate Times[1] (collectively, "Potential Appellants") on July 28, 2016. In support thereof, DEP states specifically as follows:

1. On March 28, 2016, the Commission issued its *Order Granting Application in Part, with Conditions, and Denying Application in Part* ("CPCN Order"), holding 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.

2. On April 25, 2016, along with a Motion to Set Bond, Potential Appellants filed a Motion for an Extension of Time to File Notice of Appeal and Exceptions. The Commission granted the motion, extending the period to file notice of appeal until May 27, 2016.

[1] As explained herein, DEP submits that that NC WARN and The Climate Times do not have the status as Appellants because they have repeatedly ignored the North Carolina General Statutes, the Rules of Appellate Procedures, and this Commission's Orders, and have therefore failed, on multiple occasions, to perfect an appeal as required by law.

3. On May 10, 2016, The Commission issued its *Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)* ("First Appeal Bond Order), which required Potential Appellants to file an executed undertaking or bond on or before May 27, 2016 and prior to filing their Notice of Appeal.

4. On May 19, 2016, Potential Appellants filed a Petition for a Writ of Certiorari, a Petition for a Writ of Supersedeas, and a Motion for Temporary Stay with the North Carolina Court of Appeals, seeking review of and temporary relief from the Commission's Appeal Bond Order. On May 27, 2016, Potential Appellants filed a Notice of Appeal; without posting an appeal bond in violation of the N.C Gen. Stat. § 62-82(b) and the First Appeal Bond Order.

5. On May 31, 2016, DEP filed a Response to Petition for Writ of Certiorari and Petition for Writ of Supersedeas with the Court of Appeals and filed a Motion to Dismiss Potential Appellants' Appeal of the CPCN Order for failure to file a bond with the Commission.

6. On June 3, 2016, Potential Appellants filed a response opposing the dismissal.

7. On June 7, 2016, the Court of Appeals allowed Potential Appellants' Petition for Certiorari for the limited purpose of vacating and remanding the Commission's Order setting bond, stating, "the Commission shall set the bond in an amount that is in accordance with N.C. Gen. Stat. § 62-82 (b) and based upon competent evidence."[2]

[2] The Court of Appeals issued an Order Denying a Motion to Stay on May 24, 2016. The deadline for filing the Notice of Appeal expired on May 27, 2016, as extended by the Commission. Under N.C. Gen. Stat. §62-90 (a), the Commission could not extend the date for filing the Notice of Appeal beyond that date.

8. On June 8, 2016, the Commission issued an Order Setting Hearing on the issue of setting an undertaking or bond pursuant to N.C. Gen. Stat. § 62-82(b), requiring both Potential Appellants to sponsor witnesses to testify on the appropriate amount of the bond.

9. On June 14, 2016, Potential Appellants filed a response to the Commission's Order, moving the Commission not to allow additional evidence at the hearing or to provide Potential Appellants 10 additional days to submit additional evidence.[3]

10. On June 17, 2016, the Commission denied the Motion of Potential Appellants and proceeded with the evidentiary hearing. Despite the Commission Order requiring both DEP and Potential Appellants to sponsor witnesses on the bond issue, NC WARN failed to comply with the Commission's Order to present a witness, and even objected when DEP called NC WARN Executive Director, James Warren to testify at the hearing.

11. On June 27, 2016, NC WARN filed a late-filed exhibit, an affidavit from William E. Powers.

12. On June 29, 2016, DEP filed a response to that affidavit.

13. On July 8, 2016, the Commission issued an *Order Setting Undertaking or Bond Pursuant to N.C. Gen. Stat. § 62-82(b)* (Second Bond Order) setting the amount of the bond or undertaking at $98 million and providing Potential Appellants until July 13,

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The Court of Appeals Order granting the Petition for Certiorari was not issued until after the deadline for filing the Notice of Appeal. To a large extent, the timing of these Orders resulted in the procedural complexities of this docket.

[3] Incredibly, Potential Appellants asked the Commission not to hold the evidentiary hearing they had sought in their April 26, 2016 Motion to Set Bond and in their Petition filed with the Court of Appeals.

2016 to file the bond or undertaking with the Commission. As to affidavit of William Powers, the Commission stated in its Order, "The Commission assigns no weight to the limited evidence addressing the computation of appeal related damages in the late-filed affidavit because it is lacking in credibility." Second Bond Order at p. 21 and n. 7.

14. On July 20, 2016, DEP filed a Renewed Motion to Dismiss the Appeal for Potential Appellants for failure to again file the appeal prerequisite bond with the Commission.

15. On July 28, 2016, Potential Appellants filed a Notice of Appeal and exceptions as to the Second Bond Order.

16. On August 4, 2016, the Commission issued its *Order Dismissing Appeal for Failure to Comply with Bond Prerequisite*, dismissing the Appeal of the CPCN Order.

17. Potential Appellants knowingly failed to take timely action to perfect their appeal of the Commission's Second Bond Order, which required Potential Appellants to file the bond or undertaking within 5 days of the issuance of the July 8, 2016 Order. Potential Appellants failed to file a bond by July 13, 2016, as required and, as of this date, have still not filed a bond or undertaking and has demonstrated no intention of doing so.

ARGUMENT

It is undisputed that Potential Appellants have to file the necessary bond or undertaking as a condition to filing an appeal under N.C. Gen. Stat. § 62-82(b),

> (b) Compensation for Damages Sustained by Appeal from Award of Certificate under G.S. 62-110. *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.* (Emphasis added)

As the Commission has held repeatedly, the purpose of the appeal bond requirement is to protect DEP's customers from increases in construction costs due to appeal-related delays. As the Commission held,

> The statute plainly places on the appealing party the financial risk of what could be extensive additional costs. Otherwise, these costs would be added to the cost of the generating facility to be recovered from consumers through higher rates.[4]

With their appeal of the Second Bond Order, Potential Appellants seek to simply act as if they are above law and ignore the specific requirements of N.C. Gen. Stat. § 62-82(b). In determining the meaning of a statute, the court must ascertain the intention of the legislature and carry such intention into effect to the fullest degree. *Ballard v. City of Charlotte*, 235 N.C. 484, 487, 70 S.E.2d 575, 577 (1952). The General Assembly did not intend for the purpose of the statute to be avoided by permitting Potential Appellants to make an end run.[5] Potential Appellants' appeal challenging the CPCN Order was

[4] Second Bond Order at p. 27.

[5] N.C. Gen. Stat. § 62-82(b) is the only Chapter 62 statute with such a requirement. Clearly, the General Assembly knew the economic and reliability consequences of unnecessary appeals related to the construction of new generating capacity.

dismissed by the Commission Order dated August 4. Now they seek to challenge the CPCN Order by appealing the Second Bond Order. Potential Appellants cannot simply ignore the requirements of N.C. Gen Stat. § 62-82(b). Again, the intent of the statute is to protect customers from delay caused by failed appeals, which cause damages relating to increased costs, and potential threats to reliability. Allowing Potential Appellants' appeal of the Second Bond Order to proceed without the filing of a bond would cause the same delay, the same cost increases, the same potential threat to reliability and would render the statute meaningless. Most critically, however, *allowing Potential Appellants to appeal without filing the bond would provide no protection whatsoever for DEP's customers* for construction cost increases caused by the appeal-related delay.

This does not mean that NC WARN is deprived of a potential remedy. To the extent Potential Appellants seek a review of the Second Bond Order, the appropriate mechanism is to file a Petition for Writ of Certiorari with the Court of Appeals.[6] Potential Appellants are no doubt aware of the process because that is the action they took in appealing the First Bond Order on May 23. However, this time and for whatever reason, rather than properly filing a Petition for Writ of Certiorari, Potential Appellants filed a Notice of Appeal instead. It seems nonsensical that a party would contemplate filing both a Petition for Writ of Certiorari and a Notice of Appeal. However, Potential Appellants argued against the dismissal of their Appeal of the CPCN Order, partly by guaranteeing to this Commission, "On or before August 8 NC WARN and the Climate

[6] It was through the granting of a similar Writ that created the need for a Second Bond Order.

Times will file with the N.C. Court of Appeals a Petition for a Writ of Certiorari before August 8, 2016."[7] Currently, no such Petition has been filed.

This is DEP's third Motion to Dismiss filed in this Docket. In DEP's view, Potential Appellants have attempted to delay resolution of this Docket by filing invalid notices of appeal, unnecessary responses, oppositions to hearings that it had requested and empty promises of future filings to come. In the meantime, DEP's customers in Carolinas are facing potential increased construction costs due to appeal related delays of a new power plant the Commission has determined is required by the public convenience and necessity.

Potential Appellants' Notice of Appeal should be dismissed pursuant to North Carolina Court of Appeals Rule 25(a). Rule 25(a) provides, in pertinent part, as follows,

> If after giving notice of appeal from any court, commission, or commissioner *the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed.* Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court. . . . motions made under this rule to a commission may be heard and determined by the chair of the commission. (Emphasis added)

Because Potential Appellants' Notice of Appeal has not yet been filed in the Court of Appeals (as the appeal has not yet been docketed), DEP's motion to dismiss is properly before this Commission pursuant to Rule 25(a) and should be granted. To the extent required under Rule 25(a), DEP asks that this verified motion also be treated as an

[7] NC WARN and The Climate Times' *Response to Renewed Motion to Dismiss Appeal*, pg. 4, July 26, 2016

affidavit to show the failure of Potential Appellants to take timely action to perfect their appeal.

WHEREFORE, for all the foregoing reasons, DEP respectfully requests that the Commission dismiss NC WARN's Notice of Appeal of the Second Bond Order filed on July 28, 2016.

This 12th _day of August, 2016.

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ATTORNEYS FOR DUKE ENERGY
PROGRESS, LLC

STATE OF NORTH CAROLINA)
)
) VERIFICATION
COUNTY OF WAKE)
)

Lawrence B. Somers, being first duly sworn, deposes and says:

That he is the Deputy General Counsel of Duke Energy Corporation; that he has read the forgoing, Duke Energy Progress's Affidavit in Support of Motions to Dismiss and knows the contents thereof, that the same is true to the best of his knowledge information and belief.

Lawrence B. Somers

Sworn to and subscribed by me this 12th day of August, 2016

Notary Public

My Commission Expires: 3/28/2019

DEANA W WALKER
NOTARY PUBLIC
WAKE COUNTY, NC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing VERIFIED MOTION TO DISMISS APPEAL OF SECOND BOND ORDER was served on the following parties to this matter by electronic service or by depositing the same, postage prepaid and properly addressed with the United States Postal Service. Department to:

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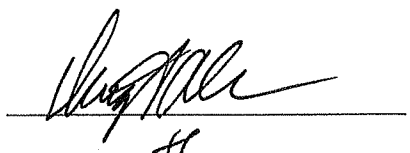

This the 12th day of August, 2016

EXHIBIT X

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	))))))	NOTICE OF APPEAL AND EXCEPTIONS BY NC WARN AND THE CLIMATE TIMES

NOW COME NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-90 and Rule 18 of the North Carolina Rules of Appellate Procedure, and give Notice of Appeal to the North Carolina Court of Appeals from the North Carolina Utilities Commission's ("Commission") Order Granting Application in Part, With Conditions, and Denying Application in Part issued on March 28, 2016 ("CPCN Order") and Order Dismissing Appeal for Failure to Comply with Bond Prerequisite issued on August 2, 2016 ("Dismissal Order"). The present Notice of Appeal and Exceptions is in addition to the previously filed Notice of Appeal and Exceptions (filed on July 28, 2016) that challenged the Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) issued on July 8, 2016 ("Second Bond Order").

NC WARN and The Climate Times want to preserve any right to appellate review, but the law is unclear on whether the correct route to appeal is through the present Notice of Appeal and Exceptions or, alternatively, a petition with the N.C. Court of Appeals. NC WARN and The Climate Times acknowledge that an

appeal of the CPCN Order has been dismissed once before; however, the present Notice of Appeal and Exceptions is designed to preserve appellate review in the event that the Second Bond Order and Dismissal Order are reversed. Thus, in an abundance of caution, NC WARN and The Climate Times both file the present Notice of Appeal and Exceptions and simultaneously a Petition for Writ of Certiorari with the N.C. Court of Appeals.

As set forth below, the Commission in its CPCN Order grants a certificate of public convenience and necessity (the "certificate") to Duke Energy Progress, LLC ("DEP") for its proposed natural gas-fired electric generation facility in Buncombe County (the "facility"). Contrary to North Carolina law, the CPCN Order fails to meet the standards for the issuance of a certificate, i.e., the project is both fair and reasonable, and the facility is in the public convenience and is necessary. The decision to issue the certificate was not based on a fair process or a complete record. Moreover, the state statute, the Mountain Energy Act of 2015, Session Law 2015-110, under which the Commission granted the certificate, is unconstitutional on its face and as applied by the Commission.

As also set forth below, the Dismissal Order is entirely premised upon the Second Bond Order. However, the Second Bond Order was not supported by competent evidence supporting a bond or undertaking of $98 million. Furthermore, the Second Bond Order is unconstitutional under the Open Courts Clause of the N.C. Constitution. Thus, the Dismissal Order was improper.

EXCEPTION NO. 1 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 8 and 43-44 of the CPCN Order, and supporting findings of fact, pages 29 and 39-43, based on an unfair process resulting in an incomplete record. As a result, these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

In making its conclusions and findings, the Commission relied on a "paper record" based on an arbitrarily-limited opportunity for filing comments based on its interpretation of the Mountain Energy Act of 2015, Session Law 2015-110, that the decision had to be rendered within 45 days of the filing of the application. As a result, the Commission did not follow its normal hearing process of allowing intervention, modified discovery, the prefiling of expert testimony, an evidentiary hearing with cross examination and rebuttal witnesses, and submittal of proposed decisions and briefs. A single public hearing was held only 6 days after the application was filed. As a result, the record upon which the certificate was granted was incomplete and due process was violated.

As applied by the Commission, the Mountain Energy Act of 2015 was additionally in violation of North Carolina constitutional and statutory requirements prohibiting monopolies unless they are fairly regulated. N.C. Const. art. I, § 34.

EXCEPTION NO. 2 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 8 and 43-44 of the CPCN Order, and supporting findings of fact, pages 29 and 39-43, by following the provisions of the Mountain Energy Act of 2015, Session Law 2015-110, which is unconstitutional on its face in that it grants a private emolument to a public utility that is essentially unregulated due to the Mountain Energy Act of 2015. As a result, the grounds upon which the Commission determined these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The Mountain Energy Act of 2015 grants a single company, DEP, an exclusive emolument, i.e., an unreasonably expedited review period, in violation of the North Carolina Constitution. N.C. Const. art. I, § 32.

EXCEPTION NO. 3 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 7 and 43-44 of the CPCN Order, and supporting findings of fact, pages 35 and 37-38, regarding the devastating impacts of the methane vented and leaked from the fuel infrastructure from fracking gas wellhead to burn point on the grounds that these conclusions and related findings of fact are beyond the Commission's

statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The Commission was required to support its conclusions of law with competent findings of fact. It has not done so regarding the climate impacts from methane venting and leakage. There are no facts or evidence in the entire record supporting the Commission's conclusion, while there are dispositive statements by experts through affidavit that the proposed plants will have an adverse impact on the climate.

EXCEPTION NO. 4 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 7, 43-44 of the CPCN Order, and supporting findings of fact, pages 31-35, regarding the economic risks associated with the project's reliance on natural gas, on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The Commission was required to support its conclusions of law with competent findings of fact. It has not done so regarding the economic risks associated with fracking gas availability and price increases over the life of the

facility. There are no facts or evidence in the entire record supporting the Commission's conclusion, while there are dispositive statements by experts through affidavit that the reliance on fracking gas is an unreasonable risk. In the CPCN Order, the Commission ignores the unrefuted testimony of experts on the risks of reliance on natural gas as the fuel source for its proposed generating plants because of the future reduced availability of natural gas and the predicted price increases. This will result in unfair and unreasonable rate hikes for consumers from escalating fuel costs and stranded assets.

EXCEPTION NO. 5 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 7 and 43-44 of the CPCN Order, and supporting findings of fact, pages 29-37, regarding the need for the project on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The Commission was required to support its conclusions of law with competent findings of fact. It has not done so regarding the need for the project as it ignored evidence that the increased capacity is both unnecessary and cost ineffective. Part of the record was affidavit testimony from experts that the need for the project had not been adequately proved, yet the Commission failed to make findings of fact refuting this evidence.

EXCEPTION NO. 6 (as to the Dismissal Order):

The Commission erred in making its Conclusions of Law, pages 5-6 of the Dismissal Order, and supporting findings of fact, page 5, regarding dismissal of the Notice of Appeal and Exceptions of May 27, 2016, on the grounds that the Dismissal Order is entirely premised upon the erroneous Second Bond Order.

The bond statute, N.C. Gen. Stat. § 62-82(b), requires a finding that an appeal will result in a delay in construction. No competent evidence to that effect was presented to the Commission. Instead, all evidence about delays from an appeal was speculative and contradicted by other portions of the record. In fact, the Commission committed error on pages 13-14 of the Second Bond Order when it stated that DEP bears no burden to state that an appeal will result in delay.

For these reasons, the Dismissal Order relies on conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

EXCEPTION NO. 7 (as to the Dismissal Order):

The Commission erred in making its Conclusions of Law, pages 5-6 of the Dismissal Order, and supporting findings of fact, page 5, regarding dismissal of

the Notice of Appeal and Exceptions of May 27, 2016, on the grounds that the Dismissal Order is entirely premised upon the erroneous Second Bond Order.

No competent evidence was submitted to the Commission in support of any bond amount whatsoever. Only conclusory, hypothetical damage amounts were provided by DEP for the Commission's consideration without supporting evidence, yet there was affidavit testimony provided that refuted the conclusory statements submitted by DEP. The Commission did not make adequate findings of fact as to why $98 million was the appropriate amount for the bond or undertaking and why the affidavit testimony refuting these amounts was disregarded.

For these reasons, the Dismissal Order relies on conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

EXCEPTION NO. 8 (as to the Dismissal Order):

The Commission erred in making its Conclusions of Law, pages 5-6 of the Dismissal Order, and supporting findings of fact, page 5, regarding dismissal of the Notice of Appeal and Exceptions of May 27, 2016, on the grounds that the Dismissal Order is entirely premised upon the erroneous Second Bond Order.

Article I, Section 35, of the North Carolina Constitution is an Open Courts Clause which states that "[a]ll courts shall be open; every person for an injury

done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." No public interest group could post a $98 million bond. Hence the Second Bond Order deprives NC WARN and The Climate Times of the right to access this State's appellate courts in violation of the State's Constitution.

For these reasons, the Dismissal Order relies on conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

CONCLUSION

For the reasons set forth above, the CPCN Order and Dismissal Order were arbitrary and capricious; affected by errors of law; unsupported by competent, material, and substantial evidence in light of the entire record; violate constitutional provisions; beyond the Commission's statutory power and jurisdiction; and was not in the public interest.

Respectfully submitted, this the 18th day of August, 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 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 18th day of August, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: _____
Matthew D. Quinn

EXHIBIT Y

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' RESPONSE TO DEP'S MOTION TO DISMISS APPEAL OF SECOND BOND ORDER

NOW COME NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-90 and Rule 25 of the North Carolina Rules of Appellate Procedure, and serve the following Response to Duke Energy Progress LLC's ("DEP") Motion to Dismiss Appeal of Second Bond Order. In support of this Response, NC WARN and The Climate Times state as follows:

BACKGROUND

1. On March 28, 2016, the N.C. Utilities Commission ("Commission") entered an Order Granting Application in Part, with Conditions, and Denying Application in Part ("CPCN Order").

2. Appeals from orders granting certificates of public convenience and necessity are generally subject to the bond requirements described in N.C. Gen. Stat. § 62-82(b). Thus, on April 25, 2016, NC WARN and The Climate Times filed a Motion to Set Bond. To allow time for the Commission's ruling on the Motion to Set Bond, NC WARN and The Climate Times simultaneously filed a Motion for Extension of Time to

File Notice of Appeal and Exceptions, and the Commission extended the deadline for appeals to May 27, 2016.

3. On May 2, 2016, DEP filed a Response to the Motion to Set Bond. In its Response, DEP refused to state that an appeal would result in delays in the initiation of construction. *DEP's Response* ¶ 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.

4. Among other things, NC WARN and The Climate Times' Reply of May 5 called the Commission's attention to the fact that DEP failed to substantiate any of its alleged damages estimates. *Reply* ¶¶ 5-6. Also, the Reply emphasized that NC WARN and The Climate Times are not seeking an injunction or stay of the Commission's CPCN Order. *Id.* ¶ 3.

5. On May 10, 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("First Bond Order"). The First Bond Order 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 First Bond Order required a bond or undertaking of $10,000,000.00. *Id.* at 7. However, it goes without saying that the Petitioners could not afford a $10,000,000.00 bond. Thus, the First Bond Order was tantamount to dismissing any appeal of the CPCN Order.

6. On May 19, 2015, NC WARN and The Climate Times filed a Petition for Writ of Certiorari with the N.C. Court of Appeals. The Petition for Writ of Certiorari asked the Court of Appeals to overturn the First Bond Order. Further, on May 27, 2016,

NC WARN and The Climate Times filed a Notice of Appeal and Exceptions with the Commission concerning the CPCN Order and First Bond Order.

7. Before the Court of Appeals ruled on the Petition for Writ of Certiorari, on May 31, 2016, DEP filed a Motion to Dismiss the Notice of Appeal and Exceptions of NC WARN and The Climate Times. The basis of DEP's Motion to Dismiss was that NC WARN and The Climate Times did not post a $10,000,000 bond or undertaking. NC WARN and The Climate Times filed a Response to the Motion to Dismiss on June 3, 2016, arguing that the bond amount was erroneous and that the appeal should not be dismissed while the Court of Appeals was reviewing the original Petition for Writ of Certiorari.

8. Before the Commission could rule on DEP's Motion to Dismiss, the Court of Appeals, in an Order of June 7, 2016, allowed the Petition for Writ of Certiorari for the purpose of vacating and remanding the First Bond Order and requiring the Commission to set a bond based on competent evidence.

9. The Commission, on June 8, 2016, entered an Order that calendared a bond hearing for June 17, 2016. On June 14, 2016, NC WARN and The Climate Times filed a Response to Order Setting Hearing, in which they objected to the Commission's accepting evidence not previously submitted during its deliberation over the First Bond Order.

10. The bond hearing was held on June 17, 2016. Subsequently, on June 27, 2016, NC WARN and The Climate Times filed the Affidavit of William Powers concerning the bond issue.

11. On July 9, 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Second Bond Order"). The Second Bond Order required that NC WARN and The Climate Times, to appeal the CPCN Order, post a bond or undertaking of $98 million within five (5) days. Obviously the Petitioners could not afford a $98,000,000.00 bond, and could not honestly sign an undertaking representing the ability to pay $98,000,000.00 in damages, so no bond or undertaking was filed within the 5-day deadline.

12. On July 20, 2016, DEP filed a Renewed Motion to Dismiss the May 27, 2016 Notice of Appeal and Exceptions that challenged the CPCN Order. NC WARN and The Climate Times filed their Response on July 26, 2016.

13. On July 29, 2016, NC WARN and The Climate Times filed a Notice of Appeal and Exceptions as to the Second Bond Order.

14. Shortly thereafter, on August 2, 2016, the Commission entered an Order Dismissing Appeal as to the May 27, 2016 Notice of Appeal and Exceptions that challenged the CPCN Order.

15. On August 12, 2016, DEP filed a Motion to Dismiss Appeal of Second Bond Order. Hence, presently DEP is attempting to dismiss only a challenge to the Second Bond Order mounted in NC WARN and The Climate Times' July 29, 2016 Notice of Appeal and Exceptions.

ARGUMENT

16. The entire basis for DEP's Motion to Dismiss is that that no bond was posted. *Motion to Dismiss* p 5.

17. However, there is no bond requirement for appeals from a bond order. Instead, the bond statute by its express terms applies only to appeals from a certificate of public convenience and necessity. The bond statute states, in relevant part:

> 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 . . . . *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).

18. Thus, the bond requirement exists only for an "appeal from any order of the Commission which awards any such certificate." *Id.* Yet NC WARN and The Climate Times' July 29, 2016 Notice of Appeal was related to only the Second Bond Order and not the CPCN Order. Hence, there is no bond requirement.

19. Additionally, the appeal of the Second Bond Order should not be dismissed because that appeal presents important legal issues to our State. By way of example but not limitation, the North Carolina Constitution, Article I, Section 35, contains an Open Courts Clause stating that "[a]ll courts shall be open . . . ." Obviously no public interest group, including NC WARN and The Climate Times, could post a $98 million bond. Hence the Second Bond Order deprives NC WARN, The Climate Times, and other public interest groups in subsequent cases from accessing our State's appellate courts in violation of the N.C. Constitution. This argument has been accepted by

multiple courts throughout the country. *E.g.*, *R. Commc'ns Inc. v. Sharp*, 875 S.E.2d 314 (Tex. 1994).

20. In its Motion to Dismiss, DEP argues that the Second Bond Order should be challenged with a petition for writ of certiorari with the N.C. Court of Appeals, not a notice of appeal. In fact, NC WARN and The Climate Times have taken both tracks by filing both a petition with the Court of Appeals on August 18, 2016, and by filing the Notice of Appeal and Exceptions on July 29, 2016. These two paths were taken because the law is unclear on what is the correct approach. Consider, for example, *Currituck Assocs. Res. P'ship v. Hollowell*, 170 N.C. App. 399, 612 S.E.2d 386 (2005). There, the trial court ordered a $1 million appellate bond, and the defendant obtained appellate review of the bond amount by filing a notice of appeal, not a petition with the Court of Appeals. *Id.* at 401, 612 S.E.2d at 388.

21. The bond requirement does not apply to the appeal of the Second Bond Order, and the challenge to the Second Bond Order is of paramount importance to our State's jurisprudence. DEP's Motion to Dismiss should therefore be denied.

CONCLUSION

For the reasons set forth above, NC WARN and The Climate Times respectfully request that DEP's Motion to Dismiss Appeal of Second Bond Order be denied.

Respectfully submitted, this the 23 day of August, 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 NC WARN AND THE CLIMATE TIMES' RESPONSE MOTION TO DISMISS APPEAL OF SECOND BOND ORDER 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 23 day of August, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: _____
Matthew D. Quinn

EXHIBIT Z

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September 9, 2016

VIA ELECTRONIC FILING

Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

RE: Duke Energy Progress, LLC's Verified Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal Filed by NC WARN and the Climate Times
Docket No. E-2, Sub 1089

Dear Chief Clerk:

I enclose Duke Energy Progress, LLC's Verified Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal Filed by 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 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	DUKE ENERGY PROGRESS LLC's VERIFIED MOTION TO DISMISS SECOND NOTICE OF APPEAL AND RENEWED MOTION TO DISMISS NOTICE OF APPEAL FILED BY NC WARN AND THE CLIMATE TIMES

NOW COMES Duke Energy Progress, LLC ("DEP" or "the Company"), pursuant to N.C. Gen. Stat. §62-82(b), N.C. Gen. Stat. § 62-90, and North Carolina Rule of Appellate Procedure 25(a), and moves to dismiss the Notice of Appeal and Exceptions filed on August 18, 2016 by NC WARN and The Climate Times (collectively, "NC WARN") and respectfully renews its Verified Motion to Dismiss the Appeal of the Second Bond Order filed on August 12, 2016. Although DEP has filed numerous pleadings outlining the history of this case and they have been outlined in multiple orders of the Commission, for ease of reference, relevant portions of the history of this case are, once again, stated as follows:

1. On March 28, 2016, the Commission issued its *Order Granting Application in Part, with Conditions, and Denying Application in Part* ("CPCN Order"), holding 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.

2. On April 25, 2016, along with a Motion to Set Bond, NC WARN filed a Motion for an Extension of Time to File Notice of Appeal and Exceptions. The Commission granted the motion, extending the period to file notice of appeal until May 27, 2016.

3. On May 10, 2016, The Commission issued its *Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)* ("First Appeal Bond Order), which required NC WARN to file an executed undertaking or bond on or before May 27, 2016 and prior to filing their Notice of Appeal.

4. On May 19, 2016, NC WARN filed a Petition for a Writ of Certiorari, a Petition for a Writ of Supersedeas, and a Motion for Temporary Stay with the North Carolina Court of Appeals, seeking review of and temporary relief from the Commission's Appeal Bond Order. On May 27, 2016, NC WARN filed a Notice of Appeal, without posting an appeal bond in violation of the N.C. Gen. Stat. § 62-82(b) and the First Appeal Bond Order.

5. On May 31, 2016, DEP filed a Response to Petition for Writ of Certiorari and Petition for Writ of Supersedeas with the Court of Appeals and filed with the Commission a Motion to Dismiss NC WARN's Appeal of the CPCN Order for failure to file a bond.

6. On June 3, 2016, NC WARN filed a response opposing the motion to dismiss.

7. On June 7, 2016, the Court of Appeals allowed NC WARN's Petition for Certiorari for the limited purpose of vacating and remanding the Commission's Order setting bond, stating, "the Commission shall set the bond in an amount that is in accordance with N.C. Gen. Stat. § 62-82 (b) and based upon competent evidence."

8. On June 8, 2016, the Commission issued an Order Setting Hearing on the issue of setting an undertaking or bond pursuant to N.C. Gen. Stat. § 62-82(b), requiring both NC WARN and DEP to sponsor witnesses to testify on the appropriate amount of the bond.

9. On June 14, 2016, NC WARN filed a motion to prevent the Commission from allowing additional evidence at the hearing, or to provide NC WARN ten more days to submit additional evidence.

10. On June 17, 2016, the Commission denied the Motion of NC WARN and proceeded with the evidentiary hearing. Despite the Commission's Order that both DEP and NC WARN sponsor witnesses on the bond amount, NC WARN failed to present any witnesses, and even objected when DEP called NC WARN Executive Director James Warren to testify.

11. On July 8, 2016, the Commission issued an Order Setting Undertaking or Bond pursuant to N.C. Gen. Stat. § 62-82(b) ("Second Bond Order") setting the amount of the bond or undertaking at $98 million and allowing NC WARN until July 13, 2016 to file the bond or undertaking with the Commission.

12. On July 20, 2016, DEP filed a Renewed Motion to Dismiss the Appeal for NC WARN for failure to perfect their appeal by not filing the prerequisite bond with the Commission.

13. On July 28, 2016, NC WARN filed a Notice of Appeal and exceptions as to the Second Bond Order.

14. On August 2, 2016, the Commission issued its *Order Dismissing Appeal for Failure to Comply with Bond Prerequisite*, which dismissed NC WARN's appeal of the CPCN Order ("Dismissal Order").

15. On August 4, 2016, NC WARN filed a Proposed Record on Appeal. The record on appeal addressed multiple issues, including NC WARN's appeal to the CPCN Order, which was dismissed by this Commission on August 2, 2016. On August 12, 2016, DEP filed a Verified Motion to Dismiss Appeal of Second Bond Order.

16. On August 23, 2016, NC WARN filed a response in opposition to DEP's Verified Motion to Dismiss Appeal of Second Bond Order.

17. On August 18, 2016, NC WARN filed yet another Notice of Appeal and Exceptions as to the CPCN Order and Dismissal Order, once again without posting a bond or undertaking in violation N.C. Gen. Stat. § 62-82(b) and the Orders of this Commission. NC WARN stated, "NC WARN acknowledges that an appeal of the CPCN Order has been dismissed once before, however the present Notice of Appeals and Exceptions is designed to preserve appellate review in the event the Second Bond Order and Dismissal Order are reversed."[1] NC WARN further stated it would file a Petition for Writ of Certiorari with N.C. Court of Appeals because it believed "the law is unclear on whether the correct route is to appeal though" a notice of appeal or a petition for certiorari.[2]

18. On August 18, 2016, NC WARN filed a Petition for Certiorari with the Court of Appeals, which sought to have the Court of Appeals review (1) the CPCN Order, (2) the Second Bond Order, and (3) the Dismissal Order. DEP and the Public Staff filed responses in opposition with the Court of Appeals on September 2, 2016.

19. On September 6, 2016, the North Carolina Court of Appeals issued its Order denying NC WARN's Petition for Writ of Certiorari in its entirety. As to the Court of Appeals, this ruling is final as to the issues in NC WARN's petition.[3] Currently, NC WARN has two notices of appeal pending at the Commission, and neither has yet been docketed with the Court

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[1] August 18, 2016 notice of appeal at pp. 1-2. Effectively, NC WARN was appealing the same Order that had previously been dismissed. Although the Second Bond Order was subsequently issued by the Commission, NC WARN still has failed to file a bond or undertaking.

[2] *Id.* at p. 1.

[3] "Once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case." *North Carolina Nat. Bank v. Virginia Carolina Builders,* 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983).

of Appeals. Those appeals are NC WARN's Notice of Appeal and Exceptions to the Second Bond Order filed July 28, 2016, and NC WARN'S Notice of Appeal and Exceptions filed August 18, 2016, which applies to the CPCN Order and the Dismissal Order. DEP currently has a Motion to Dismiss NC WARN'S July 28, 2016 Notice of Appeal and Exceptions as to the Second Bond Order pending before this Commission, and that Motion to Dismiss is incorporated herein by reference.

ARGUMENT

Through a series of repeated appeals and petitions, NC WARN is impermissibly and desperately attempting to delay the construction of the Western Carolinas Modernization Project, as approved by this Commission on March 28, 2016, and as affirmed by the Court of Appeals on September 6, 2016. NC WARN has once again failed to file the necessary bond or undertaking as a condition to filing an appeal under N.C. Gen. Stat. § 62-82(b),

> (b) Compensation for Damages Sustained by Appeal from Award of Certificate under G.S. 62-110. *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.* (Emphasis added)

In its most recent Notice of Appeal as to the CPCN Order, NC WARN acknowledged that "the appeal of the CPCN Order has been dismissed once before, however, the present Notice of Appeal is designed to preserve appellate review in the event the Second Bond Order and Dismissal Order are reversed." Although NC WARN acknowledged the dismissal of its earlier

appeal on the same issues, it has nonetheless filed the same appeal again in defiance of Commission Orders and N.C. Gen. Stat.§ 62-82(b).

In its August 18, 2016 Petition for Certiorari to the Court of Appeals, NC WARN consolidated its arguments made over the course of many months and multiple filings. It argued that the CPCN Order was not supported by competent, material and substantial evidence, that the Mountain Energy Act is unconstitutional, that the Second Bond Order violated the Open Courts Clause of the North Carolina Constitution and was similarly not supported by competent, material and substantial evidence, and finally that the Dismissal Order should be reversed because it was based on a legally deficient Second Bond Order. In its September 6, 2016 Order, the Court of Appeals denied NC WARN's petition in its entirety, summarily rejecting each of the arguments raised by NC WARN. The Court's decision effectively ends the issues that NC WARN has chosen to argue repeatedly. Once an appellate court rules on a question, the decision of that court becomes the law of the case and governs the question not only when the case is remanded to the trial court, but on a subsequent appeal of the same case. The seminal case for this principal is *North Carolina Nat. Bank v. Virginia Carolina Builders,* 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983), which has been cited by the appellate courts in North Carolina almost 30 times.

This is DEP'S fourth motion to dismiss an appeal in this Docket. In this Motion, DEP is asking this Commission to dismiss NC WARN's appeal filed August 18, 2016 that includes an appeal of the CPCN Order[4] (which this Commission has already dismissed once) and the Notice of Appeal of the Second Bond Order filed on July 28, 2016 (to which DEP has already filed a

[4] This Commission dismissed a previous Appeal by NC WARN on this issue. *Order Dismissing Appeal for Failure to Comply with Bond Prerequisite,* August 8, 2016.

previous Motion to Dismiss). Further, DEP asks the Commission to order that the proposed record on Appeal filed by NC WARN on August 4, 2016 is invalid because it was filed in connection with the appeal of an Order that had been previously dismissed by the Commission.[5] In DEP's view, NC WARN has deliberately attempted to delay resolution of this Docket by filing duplicative and frivolous appeals at the risk of severe economic consequences to DEP's customers. The Commission is well aware of the time sensitivity associated with the construction of the new gas-fired generation units in Asheville and the commensurate retirement of the existing Asheville coal units. DEP will not repeat the compelling reasons justifying a quick resolution of these pending issues because the Commission's CPCN Order details the time sensitivity of this project with particularity. NC WARN has engaged in a charade in this docket, and it is time for the charade to end.

NC WARN's Notices of Appeal should be dismissed pursuant to North Carolina Court of Appeals Rule 25(a). Rule 25(a) provides, in pertinent part, as follows:

> If after giving notice of appeal from any court, commission, or commissioner *the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed.* Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court. . . . motions made under this rule to a commission may be heard and determined by the chair of the commission. (Emphasis added)

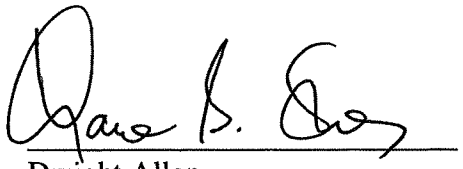
Because NC WARN's Notice of Appeal has not yet been filed in the Court of Appeals (as the appeals have not yet been docketed), DEP's motion to dismiss is properly before this Commission pursuant to Rule 25(a) and should be granted. To the extent required under Rule 25(a), DEP asks that this verified motion also be treated as an affidavit to show the failure of NC WARN to take timely action to perfect their appeal. DEP reiterates to the Commission that it

[5] The record on appeal also addresses NC WARN's appeal of the Second Bond Order, which is still before the Commission subject to a Motion to Dismiss.

currently has pending a Motion to Dismiss of NC WARN's Notice of Appeal of the Second Bond Order. DEP again incorporates that motion by reference.

WHEREFORE, for all the foregoing reasons, DEP respectfully requests that the Commission dismiss NC WARN's Notice of Appeal and Exceptions filed August 18, 2016, NC WARN'S Notice of Appeal of the Second Bond Order filed July 28, 2016 and order that the Proposed Record on Appeal and Documentary Exhibits filed on August 4, 2016 are invalid because no valid appeals are currently pending.

Respectfully submitted, this 9th day of September, 2016.



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ATTORNEYS FOR DUKE ENERGY PROGRESS, LLC

State of North Carolina)
)
County of Wake)
)

VERIFICATION

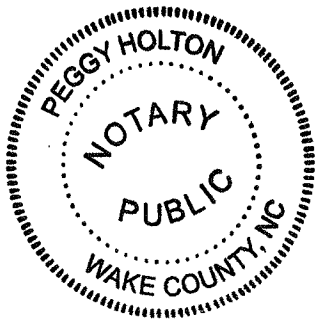
The undersigned, Lawrence B. Somers, Deputy General Counsel for Duke Energy Corporation personally appeared before me who after first being duly sworn, said that he is authorized to make this verification, that he has read the foregoing motion, and knows the contents thereof; and that the same are true and correct to the best of his knowledge, information and belief.

Lawrence B. Somers

Sworn and subscribed to me this 9th day of September 2016.

Notary Public

Seal:



My Commission Expires
12/22/2016

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Progress, LLC's Verified Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal Filed by 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 9th day of August, 2016

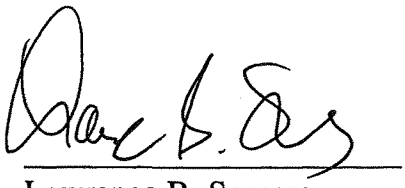

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EXHIBIT AA

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' RESPONSE TO DEP'S MOTION TO DISMISS SECOND NOTICE OF APPEAL AND RENEWED MOTION TO DISMISS NOTICE OF APPEAL

NOW COME NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-90 and Rule 25 of the North Carolina Rules of Appellate Procedure, and serve the following Response to Duke Energy Progress LLC's ("DEP") Verified Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal filed September 9, 2016.[1] In support of this Response, NC WARN and The Climate Times state as follows:

BACKGROUND

1. On March 28, 2016, the N.C. Utilities Commission ("Commission") entered an Order Granting Application in Part, with Conditions, and Denying Application in Part ("CPCN Order").

2. Appeals from orders granting certificates of public convenience and necessity are generally subject to the bond requirements described in N.C. Gen. Stat. § 62-

[1] Verification of the motion by DEP counsel does not add substantive weight to the motion.

82(b). Thus, on April 25, 2016, NC WARN and The Climate Times filed a Motion to Set Bond. To allow time for the Commission's ruling on the Motion to Set Bond, NC WARN and The Climate Times simultaneously filed a Motion for Extension of Time to File Notice of Appeal and Exceptions, and the Commission extended the deadline for appeals to May 27, 2016.

3. On May 2, 2016, DEP filed a Response to the Motion to Set Bond. In its Response, DEP refused to state that an appeal would result in delays in the initiation of construction. *DEP's Response* ¶ 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.

4. Among other things, NC WARN and The Climate Times' Reply of May 5 called the Commission's attention to the fact that DEP failed to substantiate any of its alleged damages estimates. *Reply* ¶¶ 5-6. Also, the Reply emphasized that NC WARN and The Climate Times are not seeking an injunction or stay of the Commission's CPCN Order. *Id.* ¶ 3.

5. On May 10, 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("First Bond Order"). The First Bond Order 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 First Bond Order required a bond or undertaking of $10,000,000.00. *Id.* at 7. However, it goes without saying that the Petitioners could not afford a $10,000,000.00 bond. Thus, the First Bond Order was tantamount to dismissing any appeal of the CPCN Order.

6. On May 19, 2015, NC WARN and The Climate Times filed a Petition for Writ of Certiorari with the N.C. Court of Appeals. The Petition for Writ of Certiorari asked the Court of Appeals to overturn the First Bond Order. Further, on May 27, 2016, NC WARN and The Climate Times filed a Notice of Appeal and Exceptions with the Commission concerning the CPCN Order and First Bond Order.

7. Before the Court of Appeals ruled on the Petition for Writ of Certiorari, on May 31, 2016, DEP filed a Motion to Dismiss the Notice of Appeal and Exceptions of NC WARN and The Climate Times. The basis of DEP's Motion to Dismiss was that NC WARN and The Climate Times did not post a $10,000,000 bond or undertaking. NC WARN and The Climate Times filed a Response to the Motion to Dismiss on June 3, 2016, arguing that the bond amount was erroneous and that the appeal should not be dismissed while the Court of Appeals was reviewing the original Petition for Writ of Certiorari.

8. Before the Commission could rule on DEP's Motion to Dismiss, the Court of Appeals, in an Order of June 7, 2016, allowed the Petition for Writ of Certiorari for the purpose of vacating and remanding the First Bond Order and requiring the Commission to set a bond based on competent evidence.

9. The Commission, on June 8, 2016, entered an Order that calendared a bond hearing for June 17, 2016. On June 14, 2016, NC WARN and The Climate Times filed a Response to Order Setting Hearing, in which they objected to the Commission's accepting evidence not previously submitted during its deliberation over the First Bond Order.

10. The bond hearing was held on June 17, 2016. Subsequently, on June 27, 2016, NC WARN and The Climate Times filed the Affidavit of William Powers concerning the bond issue.

11. On July 9, 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Second Bond Order"). The Second Bond Order required that NC WARN and The Climate Times, to appeal the CPCN Order, post a bond or undertaking of $98 million within five (5) days. Obviously the Petitioners could not afford a $98,000,000.00 bond, and could not honestly sign an undertaking representing the ability to pay $98,000,000.00 in damages, so no bond or undertaking was filed within the 5-day deadline.

12. On July 20, 2016, DEP filed a Renewed Motion to Dismiss the May 27, 2016 Notice of Appeal and Exceptions that challenged the CPCN Order. NC WARN and The Climate Times filed their Response on July 26, 2016.

13. On July 29, 2016, NC WARN and The Climate Times filed a Notice of Appeal and Exceptions as to the Second Bond Order.

14. Shortly thereafter, on August 2, 2016, the Commission entered an Order Dismissing Appeal as to the May 27, 2016 Notice of Appeal and Exceptions that challenged the CPCN Order.

15. On August 12, 2016, DEP filed a Motion to Dismiss Appeal of Second Bond Order.

16. On August 18, 2016, NC WARN filed a subsequent Notice of Appeal and Exceptions as to the CPCN Order and Dismissal Order. In that Notice of Appeal, NC WARN and The Climate Times stated, "NC WARN acknowledges that an appeal of the CPCN Order has been dismissed before, however the present Notice of Appeals and Exception is designed to preserve appellate review in the event the Second Bond Order and Dismissal Order are reversed."

17. On the August 19, 2016, NC WARN and The Climate Times also filed a Petition for Certiorari with the Court of Appeals, seeking review of the CPCN Order, the Second Bond Order, and the Dismissal Order. DEP and the Public Staff filed responses in opposition with the Court of Appeals on September 2, 2016. The Court of Appeals denied the Petition for Certiorari on September 6, 2016.

18. On September 9, 2016, DEP filed with the Commission the present motion to dismiss all matters raised in any and all of the notices of appeal filed by NC WARN and The Climate Times in this docket.

ARGUMENT

19. The fundamental legal theory used by DEP in each of its various motions to dismiss, including its present motion to dismiss, is that no bond was posted therefore NC WARN and The Climate Times cannot bring the decisions by the Commission to the Court of Appeals for judicial review. This argument fails in that there is no bond requirement for appeals from a bond order. Instead, the bond statute by its express terms applies only to appeals from a certificate of public convenience and necessity. The bond statute states, in relevant part:

> 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 .... *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).

20. Thus, the bond requirement exists only for an "appeal from any order of the Commission which awards any such certificate." *Id.* NC WARN and The Climate Times' August 18, 2016, Notice of Appeal related only to the Second Bond Order, not the CPCN Order. Hence, there is no bond requirement.

21. Additionally, the appeal of the Second Bond Order should not be dismissed because that appeal presents important legal issues to our State. By way of example but not limitation, the North Carolina Constitution, Article I, Section 35, contains an Open Courts Clause stating that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." Obviously no public interest group, including NC WARN and The Climate Times, could post a $98 million bond. Hence the Second Bond Order deprives NC WARN, The Climate Times, and other public interest groups in subsequent cases from accessing our State's appellate courts in violation of the N.C. Constitution. This argument has been accepted by multiple courts throughout the country. *E.g.*, *R. Commc'ns Inc. v. Sharp*, 875 S.E.2d 314 (Tex. 1994).

22. In one of its earlier Motions to Dismiss, DEP argued that the Second Bond Order should be challenged with a petition for writ of certiorari with the N.C. Court of Appeals, not a notice of appeal. In fact, NC WARN and The Climate Times have taken both tracks by filing both a petition with the Court of Appeals on August 17, 2016, and by filing the Notice of Appeal and Exceptions on July 29, 2016. These two paths were taken because the law is unclear on what is the correct approach. Consider, for example, *Currituck Assocs. Res. P'ship v. Hollowell*, 170 N.C. App. 399, 612 S.E.2d 386 (2005).

There, the trial court ordered a $1 million appellate bond, and the defendant obtained appellate review of the bond amount by filing a notice of appeal, not a petition with the Court of Appeals. *Id.* at 401, 612 S.E.2d at 388.

23. The statement by NC WARN and The Climate Times in their latest Notice Appeal is not an idle phrase. *See paragraph 16 above.* A similar statement was included in the Petition for Writ of Certiorari to the Court of Appeals:

> NC WARN and The Climate Times want to ensure appellate review of the CPCN Order and the Second Bond Order, but as a legal matter, it is unclear whether the correct approach is to file another notice of appeal as to the Dismissal Order, or to file a petition with this Court for writ of certiorari. In an abundance of caution, Petitioners have taken both routes—the present Petition challenges the CPCN Order, the Second Bond Order, and the Dismissal Order; and simultaneously, on 18 August 2016, the Petitioners filed a notice of Appeal as to the CPCN Order, the Second Bond Order, and the Dismissal Order.

Each of the parties involved in this matter will agree the procedures of seeking judicial review of the Commission's decisions are complex. The statutory requirement of posting a bond before judicial review, when no stay of the decision was ever requested, has made this complicated.

24. Even though the Court of Appeals denied NC WARN and The Climate Times's Petition for the Writ of certiorari, the Notice of Appeal remains. The bond requirement does not apply to the appeal of the Second Bond Order, and the challenge to the Second Bond Order is of paramount importance to our State's jurisprudence.

25. As stated in both the Notice of Appeal and the Petition for Writ of Certiorari, the challenge to the CPCN itself must remain part of the judicial review. If the reviewing court determines the bond requirement is unconstitutional or otherwise an unlawful constraint on a petitioner's access to the courts, it would then review the arguments on the

merits on the CPCN. If on the other hand, the reviewing court upholds the bond requirement and determines the $98 million bond is adequately justified, it need not review the merits of the CPCN. The procedural issues relating to the bond cannot stand alone; otherwise the petitioners could be put in the position of prevailing on the bond issues without having raised the merits of the matter in a timely fashion allowing for review of the CPCN.

26. Lastly, DEP's motion to dismiss all of the matters at the Commission level is both inappropriate and overreaching. With all due respect to the Commission, review of its decisions are made by the Court of Appeals, and even if the Commission believes it's decision has a sound legal basis, it cannot ultimately resolve issues clearly in the reviewing court's purview. DEP's Motion to Dismiss should therefore be denied.

CONCLUSION

For the reasons set forth above, NC WARN and The Climate Times respectfully request DEP's Verified Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal be denied.

Respectfully submitted, this the 14th day of September, 2016.

/s/ John D. Runkle

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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 NC WARN AND THE CLIMATE TIMES' RESPONSE TO DEP'S VERIFIED MOTION TO DISMISS SECOND NOTICE OF APPEAL AND RENEWED MOTION TO DISMISS NOTICE OF APPEAL 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 14th day of September, 2016.

/s/ John D. Runkle

John D. Runkle, Attorney at Law

EXHIBIT BB

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 DISMISSING APPEALS

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 (CPCN) to construct two 280 MW combined-cycle natural gas-fired electric generating units in Buncombe County, North Carolina (the Project or Facility) in compliance with G.S. 62-110.1 and the Mountain Energy Act, Session Law 2015-110. This act required the Commission to issue its order on the CPCN application within 45 days of filing, indicating the General Assembly's desire for an expedited decision.

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 a bond, a prerequisite for appeal of the Commission's CPCN Order, in an amount of $250 and requesting an oral argument or evidentiary hearing on the bond requirement.

On May 10, 2016, after receiving a DEP response and NC WARN reply, the Commission issued its Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) (First Bond Order). The Commission required NC WARN to file an executed undertaking or a bond in the sum of $10 million prior to filing a notice of appeal. Notice of appeal based on an extension of time granted to NC WARN was due May 27, 2016. The Commission established a procedure that potentially authorized NC WARN to be relieved of this requirement based on subsequent events or to conduct a hearing if DEP determined not to start construction in October 2016. NC WARN filed no bond by May 27, 2016, and has never sought or obtained an extension of time to file notice of appeal beyond May 27, 2016.

On May 19, 2016, NC WARN filed in the Court of Appeals a Petition for Writ of Certiorari, Petition for Writ of Supersedeas, and Motion for Temporary Stay of the Commission's First Bond Order. On May 24, 2016, the Court of Appeals denied NC WARN's Motion for Temporary Stay.

On May 27, 2016, NC WARN filed a Notice of Appeal and Exceptions in Docket No. E-2, Sub 1089 to the Commission's CPCN Order and the First Bond Order without filing the required undertaking or appeal bond as required by G.S. 62-82(b) and the First Bond Order.

On May 31, 2016, DEP filed a motion to dismiss the appeal of the Commission's CPCN Order and the First Bond Order for NC WARN's failure to file the statutorily required undertaking or appeal bond.

On June 7, 2016, the Court of Appeals allowed NC WARN's Petition for Writ of Certiorari for the limited purpose of vacating and remanding the Commission's First Bond Order. The Court of Appeals stated that on remand "the Commission shall, in its discretion, set bond in an amount that is in accordance with N.C. Gen. Stat. 62-82(b) and based upon competent evidence." The Commission interpreted this order as a requirement that the First Bond Order, modified as necessary and supported by competent evidence, relates back in time to May 10, 2016, prior to NC WARN's May 27, 2016 notice of appeal, as compliance with the requirements of G.S. 62-82(b) are a prerequisite to the filing of a valid notice of appeal.

After an evidentiary hearing conducted in response to the Court's June 7, 2016 order, on July 8, 2016, the Commission issued an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) (Second Bond Order) setting the bond or undertaking at $98 million based upon the evidence presented at the evidentiary hearing. At the evidentiary hearing, DEP represented that it would delay beginning of construction of the Facility if a valid appeal was pending in October 2016.

NC WARN did not file a bond or undertaking by July 13, 2016, as required by the Second Bond Order and G.S. 62-82(b).

On July 20, 2016, DEP filed a renewed motion to dismiss NC WARN's appeal of the CPCN Order. In its motion, DEP argued that NC WARN failed to file the prerequisite undertaking or bond required by G.S. 62-82(b) and the Second Bond Order; therefore, NC WARN's appeal should be dismissed.

In response, on July 26, 2016, NC WARN admitted that it did not file a bond or undertaking as required by the Commission's Second Bond Order, but stated that as it was unsure how best to pursue its challenges to the orders, it would file both a notice of appeal to the Second Bond Order and a Petition for Writ of Certiorari for review of the Second Bond Order on or before August 8, 2016. NC WARN further asserted that G.S. 62-82(b) unconstitutionally deprives NC WARN of its right to court access.

On July 28, 2016, NC WARN filed a Notice of Appeal and Exceptions to the Second Bond Order.

On August 2, 2016, the Commission issued an order dismissing the appeal of the CPCN Order for failure to file a bond in compliance with the Second Bond Order (Dismissal Order).

On August 4, 2016, NC WARN filed a proposed Record on Appeal which included exceptions to two of the Commission's Orders: the CPCN Order dated March 28, 2016, the appeal of which the Commission dismissed on August 2, 2016, and the Second Bond Order dated July 8, 2016. NC WARN alleged constitutional violations with respect to the CPCN Order and the Second Bond Order.

On August 12, 2016, DEP filed a verified motion to dismiss NC WARN's appeal of the Second Bond Order. In its motion, DEP argued that the bond requirement of G.S. 62-82(b) is established to protect DEP's customers from increases in construction costs due to appeal-related delays. DEP argued that by appealing the Second Bond Order NC WARN is attempting to make an end run around the requirements, purpose and intent of G.S. 62-82(b). DEP alleged that the Commission dismissed NC WARN's appeal of the CPCN Order on August 2, 2016, and NC WARN continues to attempt to contest the CPCN Order by appealing the Second Bond Order. DEP argued that allowing NC WARN to proceed with an appeal of the Second Bond Order without filing a bond creates the same delay, the same cost increases, the same potential threat to reliability and would render the statute meaningless. DEP argued that "most critically, however, allowing Potential Appellants to appeal without filing the bond would provide no protection whatsoever for DEP's customers for construction cost increases caused by the appeal-related delay."

DEP contended in its August 12, 2016 motion that dismissal of the appeal does not deprive NC WARN an avenue to seek review of the Second Bond Order. DEP stated that the appropriate mechanism would be for NC WARN to file a Petition for Writ of Certiorari with the Court of Appeals. DEP indicated that NC WARN argued in front of the Commission that it planned to file a Petition for Writ of Certiorari before August 8, 2016. DEP argued that in its view, NC WARN continues to attempt to delay the resolution of the Docket by filing invalid notices of appeal, unnecessary responses, oppositions to hearings and empty promises of future filings at the expense of DEP's customers which are facing potential increased construction costs due to appeal related delays of a generation facility that the Commission has determined to be required by the public convenience and necessity.

DEP argued that NC WARN's appeal should be dismissed pursuant to Rule 25(a) of the North Carolina Rules of Appellate Procedure for NC WARN's failure to take any action required to present the appeal for decision. DEP requested that the verified motion be treated as an affidavit.

On August 18, 2016, NC WARN filed a Notice of Appeal and Exceptions on the CPCN Order dated March 28, 2016, and the Dismissal Order dated August 2, 2016. NC WARN stated that this notice of appeal and exceptions is in addition to the notice of appeal filed on July 28, 2016 that challenged the Second Bond Order. NC WARN further

acknowledged that its first notice of appeal of the CPCN Order dated March 28, 2016, has been dismissed, but that the purpose of this filing was to preserve its rights in the event the N.C. Court of Appeals ruled in its favor on the Petition for Writ of Certiorari that it filed simultaneously at the Court of Appeals with the present Notice of Appeal.

In the Petition for Writ of Certiorari filed on August 18, 2016, with the N.C. Court of Appeals, NC WARN requested the Court to issue yet another writ of certiorari and review and reverse the CPCN Order, review and reverse the Second Bond Order, and review and reverse the Dismissal Order.[1] NC WARN indicates that it was unclear whether the correct appellate approach was to file another notice of appeal or to file a petition for a writ of certiorari, so it did both.

On August 23, 2016, NC WARN filed a response to DEP's motion to dismiss the Second Bond Order. In its response, NC WARN states that it has appealed this order by a notice of appeal and by a petition for writ of certiorari. NC WARN states that the bond requirement does not apply to an appeal of the Second Bond Order.

On September 2, 2016, DEP filed a Response to the Petition for Writ of Certiorari in the N.C. Court of Appeals. DEP requested that the Court find the appeal bond requirement and the Second Bond Order constitutional, find the Mountain Energy Act and CPCN Order constitutional and find no errors within the CPCN Order, and find the Dismissal Order was proper where NC WARN did not file the prerequisite bond to appeal.

On September 2, 2016, the Public Staff filed a Response to the Petition for Writ of Certiorari in the N.C. Court of Appeals. The Public Staff requested that the Court consolidate all of the notices of appeal into the writ of certiorari in the public interest and affirm the Second Bond Order and dismiss all of NC WARN's other remaining claims.

On September 6, 2016, the NC Court of Appeals denied NC WARN's August 18, 2016 petition for a writ of certiorari. The Commission interprets this order as the Court's determination not to review the Commission's CPCN Order, the Second Bond Order or the Commission's order dismissing NC WARN's appeal of the CPCN Order, all items of relief requested by NC WARN in its petition. At the very least, the Court's order constitutes a refusal to review through a certiorari writ the Commission's Second Bond Order. This Second Bond Order resulted from the Court's writ of June 7, 2016.

On September 9, 2016, DEP filed a verified Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal filed by NC WARN. DEP renews its motion to dismiss NC WARN's appeal of the Second Bond Order, which DEP filed on August 12, 2016. DEP also moves to dismiss the appeal filed by NC WARN on August 18, 2016, wherein NC WARN appealed the CPCN Order and the Dismissal Order which dismissed the CPCN Order appeal.[2] DEP argues that NC WARN is attempting to delay

[1] One of the arguments for reversing both the CPCN Order and the Second Bond Order is based upon the constitutionality of a statute.

[2] Again, NC WARN acknowledged that the appeal of CPCN Order had already been dismissed once by the Commission.

the construction of the Western Carolinas Modernization Project through this series of repeated appeals and petitions.

DEP argues that in its August 18, 2016 Petition for Writ of Certiorari to the Court of Appeals, NC WARN consolidated its arguments made over the course of many months and multiple filings. NC WARN argued that the CPCN Order is not supported by competent, material and substantial evidence, that the Mountain Energy Act is unconstitutional, that the Second Bond Order violates the Open Courts Clause of the NC Constitution and is not supported by competent, material and substantial evidence, and finally that the Dismissal Order should be reversed because it is based upon the legally deficient Second Bond Order. DEP argues that the Court of Appeals denied NC WARN's petition in its entirety, summarily rejecting each of the arguments raised by NC WARN. DEP cites that once an appellate court rules on a question, the decision of that court becomes the law of the case and governs the question not only when the case is remanded to the trial court, but on a subsequent appeal of the same case. North Carolina Nat'l Bank v. Virginia Carolina Builders, 307 N.C. 563, 566, 299 S.E2d 629, 631 (1983). DEP thereafter reiterates that NC WARN's notices of appeal should be dismissed pursuant to Rule 25(a) of the North Carolina Rules of Civil Procedure.

On September 13, 2016, DEP filed objections to the proposed record on appeal arguing that based upon correspondence DEP received, the Record on Appeal addresses the CPCN Order and related constitutional issues and not the Second Bond Order. Further, the Commission has pending motions before it that need to be resolved.

On September 14, 2016, NC WARN filed a response to DEP's motion to dismiss second notice of appeal and renewed motion to dismiss the notice of appeal. In its response, NC WARN contends that the appeal to the Second Bond Order should not be dismissed because the appeal presents an important issue such as whether the bond requirement of G.S. 62-82(b) violates the Open Courts Clause of the North Carolina Constitution. NC WARN argues that the bond requirement does not apply to the appeal from the Second Bond Order. NC WARN further argues that the appeal of the CPCN Order must remain part of the judicial review. Otherwise, if NC WARN prevailed on the bond issue, there would be no CPCN Order to review on the merits.

On September 15, 2016, NC WARN filed a response to DEP's objections to the proposed record on appeal. NC WARN argues DEP's objection to the proposed record on appeal is without merit and should be denied.

FINDINGS, DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to G.S. 62-2(a) the General Assembly has determined that "rates, services and operations of public utilities are affected with the public interest and that the availability of an adequate and reliable supply of electric power ... to the people, economy and government of North Carolina is a matter of public policy." Further, it is the policy of the State "to promote adequate, reliable and economical utility service to all the citizens and residents of the State." Thus, the resolution of this matter is of significant public interest.

Time is of the essence. The General Assembly has established an expedited timeline for Commission ruling. Appeal-related delays potentially will result in multi-million dollar cost increases.

The Commission has before it a motion to dismiss NC WARN's appeal of three orders that all relate to the Commission's grant of 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. These three orders are the CPCN Order, which granted DEP the authority to construct the Facility, the Second Bond Order, which required NC WARN to file a bond or undertaking as a prerequisite to appeal the CPCN Order, and the Dismissal Order, which dismissed NC WARN's appeal of the CPCN Order for failure to file the required bond or undertaking pursuant to G.S. 62-82(b).

Many filings have taken place in this proceeding both with the Commission and with the N.C. Court of Appeals. The present status of the filings and rulings at the Court of Appeals is that on August 18, 2016, NC WARN filed a Petition for Writ of Certiorari to the Court of Appeals, consolidating all of its arguments made over the course of many months and multiple filings. NC WARN argued in its petition that the CPCN Order is not supported by competent, material and substantial evidence, that the Mountain Energy Act is unconstitutional, that the Second Bond Order violates the Open Courts Clause of the North Carolina Constitution and is not supported by competent, material and substantial evidence, and finally that the Dismissal Order should be reversed because it is based upon the legally deficient Second Bond Order. DEP and the Public Staff separately filed a response. On September 6, 2016, the N.C. Court of Appeals denied NC WARN's petition.

In response to the N.C. Court of Appeals' denial of NC WARN's petition for writ of certiorari, DEP filed a motion to dismiss NC WARN's appeals of the three orders relating to the grant of the CPCN to DEP. As support, DEP cited to legal precedent that once an appellate court rules on a question, the decision of that court becomes the law of the case and governs the question not only when the case is remanded to the trial court, but on a subsequent appeal of the same case. North Carolina Nat'l Bank v. Virginia Carolina Builders, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983).

The Commission will first address NC WARN's arguments to deny DEP's motion to dismiss the appeals. NC WARN argues that the bond requirement of G.S. 62-82(b) does not apply to the appeal from the Second Bond Order. Further, NC WARN argues that the appeal of the CPCN Order must remain part of the appeal of the Second Bond Order. Otherwise, if NC WARN prevailed on the bond issue, there would be no CPCN Order to review on the merits.

The Commission disagrees and finds that the opposite is true. The procedural issue in the present matter arises from the fact that NC WARN filed a notice of appeal without the prerequisite bond. After the notice had been filed, the matter of the amount of the bond was remanded back to the Commission, requiring that "the Commission shall, in its discretion, set bond in an amount that is in accordance with N.C. Gen. Stat. 62-82(b)

and based on competent evidence." Thus, due to the unusual procedural posture of the present case, NC WARN attempts to separate the Second Bond Order from the CPCN Order to avoid the required bond to appeal. The issue of the proper amount of the bond is a determination that is part of the appeal of the CPCN Order. In the normal course, the bond order is a prerequisite to the filing of the Notice of Appeal; therefore, no appeal may be taken without security pursuant to G.S. 62-82(b). The CPCN Order was issued in compliance with the Mountain Energy Act, Session Law 2015-110, where the North Carolina General Assembly directed the Commission to render an expedited decision on an application for a certificate to build an electric generating facility that uses natural gas as a primary fuel if certain conditions are met. This legislation is further evidence that an expedited decision on this matter is needed. The Commission finds that to allow NC WARN's appeal of the Second Bond Order to proceed on a normal appellate track without any bond, creates the same appellate-related delays, the same potential cost increases, and the same potential threat to reliability. Again, the Second Bond Order is part and parcel of the CPCN proceeding that requires a bond to appeal to provide protection to DEP's customers for construction cost increases caused by the appeal-related delays. To allow an appeal of the Second Bond Order to move forward renders G.S. 62-82(a) meaningless and does not fit within the public policy goals set forth in G.S. 62-2.

With regard to DEP's argument based upon North Carolina Nat'l Bank v. Virginia Carolina Builders, 307 N.C. 563, 566, 299 S.E2d 629, 631 (1983), DEP argues that the Court of Appeals' denial of NC WARN's petition for writ of certiorari is the law of the case and that the Commission should dismiss the appeals because one panel of the Court of Appeals cannot overrule another panel of the Court of Appeals.

Rule 25(a) of the North Carolina Rules of Appellate Procedure states:

> (a) Failure of Appellant to Take Timely Action. If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court, motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court, motions to dismiss are made to that court.

North Carolina General Statute 62-82(b) states that "no appeal from an order of the Commission which awards any certificate may be taken by any party opposing such award unless, within the time limit for filing notice of appeal ... such party shall have filed with the Commission a bond ...."

NC WARN has refused to comply with the bond requirements. In its September 6, 2016 order, the Court refused to issue a writ to address NC WARN's objections to the Second Bond Order. Thus, it is the case that NC WARN has failed to take action required by general statute, Commission order and now by Court order to present the appeal of the CPCN Order for decision to the Court of Appeals. Had NC WARN complied with the

Second Bond Order on or before July 13, 2016, as required, its compliance after its May 27, 2016 notice of appeal would have related back to allow its May 27, 2016 appeal to go forward. Having failed to comply and having lost in its bid to persuade the Court to address and vacate the Second Bond Order, its appeal of the CPCN Order and all other appeals of each subsequent Commission order in this docket are subject to dismissal and must be dismissed.

G.S. 62-82(b) requires that the bond be in such amount sufficient for the appellant to recompense the party awarded the certificate for damages from an unsuccessful appeal caused by appeal-related delays in beginning construction of the facility. The statute states the measure of damages is the increase in the cost of the facility. NC WARN has repeatedly failed to file the prerequisite bond required to present its appeal to an appellate court, and the N.C. Court of Appeals has denied NC WARN's writ for petition for certiorari.

In its notices of appeal and in its petition for writ of certiorari, NC WARN asserted that G.S. 62-82(b) unconstitutionally deprives NC WARN of its rights to court access. NC WARN also argued that the Mountain Energy Act was unconstitutional. As discussed above, the N.C. Court of Appeals denied review of these arguments in its order of September 6, 2016. In addition, NC WARN is prohibited at this stage of the proceedings to raise them through an appeal of the Commission's orders. Although acts of the General Assembly are presumed to be constitutional, State ex rel. Martin v. Preston, 325 N.C. 438, 382 S.E.2d 473 (1989), it is not within the Commission's jurisdiction as a quasi-judicial administrative agency to rule on the constitutionality of a statute. Great Am. Ins. Co. v. Gold, 254 N.C. 168, 173, 118 S.E.2d 792 (1961). The appellate court must resolve these constitutional issues. The Court of Appeals has stated that "where a party appeals a constitutional issue from the Commission[3] and fails to file a petition for certiorari or fails to have the questions certified by the Commission, this Court is without jurisdiction." Myles v. Lucas & McCowan Masonry, 183 N.C. App. 665, 645 S.E.2d 143 (2007) (footnote not in original).

In the present case, NC WARN filed a petition for discretionary review of all issues, including the constitutional issues, and the N.C. Court of Appeals denied NC WARN's petition on September 6, 2016. Indeed, NC WARN cannot appeal based on constitutional issues except on a grant of certiorari which the Court has denied.

Furthermore, should NC WARN seek to request a third writ of certiorari to seek review of its constitutional assertions, it should be precluded from doing so. The September 6 denial of the petition for certiorari has become the law of the case. Estrada v. Jaques, 70 N.C. App. 627, 640-641, 321 S.E.2d 240, 249 (1984). In Estrada, the plaintiff-appellant in a medical malpractice action, filed a petition for writ of certiorari to review the trial court's order dismissing the appeal as to certain defendants (radiologists) as well as the underlying orders appealed from. Id. at 640-41. The plaintiff-appellant also

[3] The Commission referred to in the case is the Industrial Commission; however, the underlying reasoning for the opinion is that the Industrial Commission is not a court of general jurisdiction, which is equally applicable to the Utilities Commission.

filed a notice of appeal on the same orders and filed the record on appeal on August 16, 1983. Id. at 637. A panel of the Court reviewing the petition for writ of certiorari denied the plaintiff-appellant's petition on August 18, 1983. The Estrada court held that because the plaintiff-appellant "unsuccessfully petitioned for certiorari to review the underlying orders from which he attempts to appeal," any decision by the court would effectively overrule the decision of the previous panel, which the North Carolina Supreme Court has firmly stated is not proper.

The N.C. Court of Appeals has denied NC WARN's petition for certiorari to review all of its exceptions relating to the CPCN Order, the Second Bond Order, and the Dismissal Order. This denial is the law of the case.

Therefore, based upon the affidavit filed by DEP and based upon the record as a whole, the Commission finds good cause to dismiss NC WARN's appeal of the Second Bond Order filed July 28, 2016, and NC WARN's notice of appeal filed August 18, 2016, appealing the CPCN Order and the Dismissal Order.

As the Commission has dismissed the appeals, issues raised regarding the record on appeal are now moot.

IT IS, THEREFORE, ORDERED that DEP's motion to dismiss NC WARN's appeal of the Second Bond Order filed July 28, 2016, and NC WARN's appeal of the CPCN Order and Dismissal Order filed August 18, 2016, shall be, and is hereby, granted, and that the proposed record on appeal filed on August 4, 2016, is not valid.

ISSUED BY ORDER OF THE COMMISSION.

This the 19th day of September, 2016.

NORTH CAROLINA UTILITIES COMMISSION

Janice H. Fulmore

Janice H. Fulmore, Deputy Clerk