**STATE OF NORTH CAROLINA**
**UTILITIES COMMISSION**
**RALEIGH**

DOCKET NO. E-2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

| | | |
|---|---|---|
| In the Matter of<br>Application of Duke Energy Progress, LLC,<br>for a Certificate of Public Convenience and<br>Necessity to Construct a 752-MW Natural<br>Gas-Fueled Electric Generation Facility in<br>Buncombe County Near the City of Asheville | )<br>)<br>)<br>)<br>)<br>) | ORDER SETTING<br>UNDERTAKING OR BOND<br>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.

[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 | ) | UNDERTAKING PURSUANT TO |
| Necessity To Construct a 752-MW Natural | ) | G.S. 62-82(b) |
| Gas-Fueled Electric Generation Facility in | ) | |
| Buncombe County Near the City of Asheville | ) | |

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)