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May 2, 2016

VIA ELECTRONIC FILING

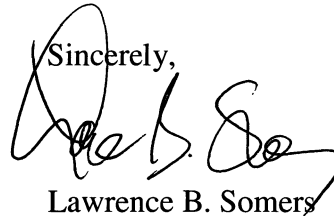
Gail L. Mount
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

**RE: Duke Energy Progress, LLC's 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

OFFICIAL COPY

May 02 2016

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 billion¹ 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 Intervenor 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 million¹⁵ 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

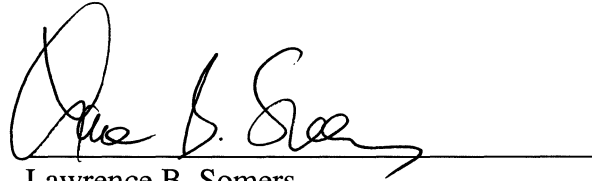
¹⁵ Approximately half of these estimated sunk development costs may need to be written off if the project were to be delayed.

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:

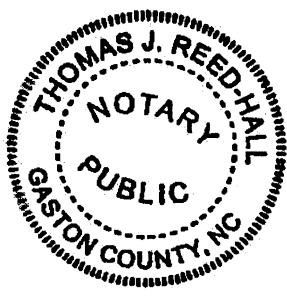
That he is Director of Project Development and Initiation in the Project Management and Construction Department of Duke Energy Corporation; that he has read the foregoing Duke Energy Progress' Verified Response to Motion to Set Bond of NC WARN and the Climate Times and knows the contents thereof; that 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



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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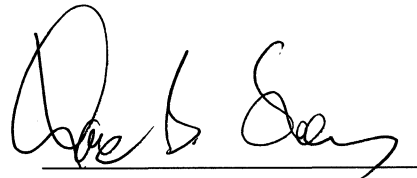
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This the 2nd day of May, 2016



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