



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)<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup>

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.

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<sup>2</sup> 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.<sup>3</sup> On

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<sup>3</sup> 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.<sup>4</sup>

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

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<sup>4</sup> 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.<sup>5</sup> 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

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<sup>5</sup> 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.<sup>6</sup> 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

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<sup>6</sup> "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 2<sup>nd</sup> 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.<sup>7</sup> 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

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<sup>7</sup> 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.<sup>8</sup>

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

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<sup>8</sup> “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.<sup>9</sup> (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.<sup>10</sup> 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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<sup>9</sup> 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)

<sup>10</sup> 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.

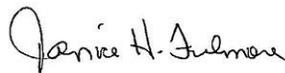
The Commission further determines that the only competent evidence regarding the amount of potential damages measured by the increase in the cost of the generation facility due to appeal-related delay of the beginning of construction upon which the Commission could rely to properly set a bond amount 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 8<sup>th</sup> day of July, 2016.

NORTH CAROLINA UTILITIES COMMISSION



Janice H. Fulmore, Deputy Clerk