

**MEMORANDUM**

**April 26, 2019**



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**Whitepaper Proffer Concerning the Mitigation Fund, Permitting Process for the Atlantic Coast Pipeline (ACP), and Cooper Administration Contacts**

This Whitepaper/Proffer is intended to provide a factual background and summary concerning three of the subject areas set forth in the Proffer Topics requested on February 6, 2019. These topics are: (1) the Mitigation Memorandum of Understanding (“MOU”) or “Mitigation Fund,” (2) the Certification and Permitting process for the Atlantic Coast Pipeline in North Carolina and more particularly the process for the 401 water quality certification (“401 Permit”), and (3) Contacts between the Atlantic Coast Pipeline Partners (“ACP”) and the Office of the Governor of North Carolina. A fourth subject area concerning the “Nameplate” Dispute arising out of HB 589 was addressed in an earlier Whitepaper/Proffer dated March 14, 2019 and a follow-up email on March 27, 2019. To the extent that issues addressed in the Nameplate Whitepaper/Proffer are relevant and necessary to an understanding of the issues

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addressed in this Whitepaper/Proffer, they will be referred to here (though the fullest discussion of the dispute is contained in the Nameplate Whitepaper/Proffer). Neither this Whitepaper/Proffer, nor the Nameplate Whitepaper/Proffer, is intended to be an exhaustive discussion of every fact or meeting that may have occurred during the time period of these events. These Whitepapers/Proffers are intended to be an overall narrative summary of the critical events and central persons in these matters.

### *The Atlantic Coast Pipeline Project*

#### *Overview*

The ACP pipeline project was announced in the Fall of 2014. The Governors of North Carolina, Virginia, and West Virginia strongly supported the construction of the pipeline. As Governors of the States to be traversed by the pipeline, their ongoing endorsement of the project was crucial in the lengthy process to gain the necessary Federal Energy Regulatory Commission (“FERC”) approvals. In particular, the then-Governor of North Carolina, Patrick McCrory, sent a letter of support to FERC dated October 31, 2014, and stated that the pipeline would be a positive economic benefit to the Eastern portion of North Carolina where it would run, stating that “the project will create substantial jobs, economic activity, and tax revenue in the region.” Members of the North Carolina General Assembly also sent letters of support to the FERC. In his letter, Representative John Szoka emphasized the “substantial economic benefits” the ACP would bring to North Carolina and in particular Cumberland County because, for instance, “improved access to natural gas will help North Carolina recruit new manufacturing operations that use the low cost fuel ....”

Even before forming ACP, Dominion Energy (“Dominion”) and Duke Energy (“Duke”), who collectively own 85% of ACP, included environmental mitigation in early budget projections for the project. Thus for several years prior to the execution of the MOU, ACP knew that the pipeline would involve environmental mitigation costs and budgeted for them. Indeed, to achieve ACP’s stated goal of having a high-level of environmental stewardship, ACP worked cooperatively with federal and state authorities and demonstrated an open willingness to mitigate for the pipeline’s impacts. For example, negotiations began early between ACP and the U.S. Fish and Wildlife Service (“FWS”) to mitigate for “incidental takings” pursuant to the Migratory Bird Treaty Act (“MBTA”). During the Obama Administration, FWS required larger infrastructure projects such as the pipeline to mitigate their impacts on incidental takings. See Opinion M-37041, Memorandum from Hilary C. Tompkins, Solicitor, U.S. Dep’t of the Interior (Jan. 10, 2017) (“[T]he MBTA’s broad prohibition on taking and killing migratory birds by any means and in any manner includes incidental taking and killing”).

In February 2017, the Secretary of the Interior under the Trump Administration announced a review of the prior administration’s opinion on incidental taking. Memorandum from K. Jack Haugrud, Acting Secretary, U.S. Dep’t of the Interior (Feb. 6, 2017). As a result, the FWS withdrew from its negotiations with ACP, directing ACP instead to resolve any related mitigation with the states along the pipeline’s route. Ultimately, the Trump Administration replaced the incidental taking practice, but, by that time, ACP was heavily engaged in negotiating mitigation agreements with the states along the pipeline route with the expectation that ACP would mitigate the impacts of the pipeline project. See Opinion M-37050, Memorandum from Daniel H. Jorjani, Principal

Deputy Solicitor, U.S. Dep't of the Interior (Dec. 22, 2017) ("The [MBTA] Does Not Prohibit Incidental Take"). Moreover, ACP continued its negotiations with the states to account for the potential that a future administration could revert back to the Obama-era policy while the pipeline's construction impacts still fell within the statute of limitations for enforcement.

On September 18, 2015, the ACP filed its application with FERC pursuant to the National Gas Act ("NGA") and implementing regulations to be allowed to construct, maintain, and operate the proposed natural gas pipeline. The NGA prohibits this type of project absent "a certificate of public convenience and necessity [CPCN] issued by the Commission authorizing such acts or operations." 15 U.S.C. § 717f(c)(1). To obtain and maintain the required certificate, the ACP had to demonstrate to FERC that the pipeline project "is or will be required by the present or future public convenience and necessity." Any authorization by FERC could be made contingent upon "such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). FERC's consideration of the pipeline project also triggered an environmental review under the National Environmental Policy Act and implementing regulations. This review involved a publicly disclosed analysis of the environmental impacts of the ACP project through an Environmental Impact Statement ("EIS") published by FERC prior to the issuance of a CPCN.

FERC publicly disclosed a lengthy Draft EIS in December 2016 and, per procedure, invited comments. Shortly thereafter, then-Governor Patrick McCrory left office and was replaced by Governor Roy Cooper as a result of the 2016 election. After his inauguration, ACP requested Governor Cooper's support for the pipeline. On

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January 27, 2017, Governor Cooper, Ken Eudy and Kristi Jones met with Lynn Good, the President and Chief Executive Office for Duke Energy, Kathy Hawkins, the Vice-President of Governmental Affairs for Duke Energy, David Fountain, the North Carolina President of Duke Energy, and Lloyd Yates, the Executive Vice-President of Duke Energy. Governor Cooper received information about the project and other Duke initiatives but did not commit on sending a letter of support for the pipeline to FERC.<sup>1</sup> Subsequently, in the Spring (April-May), Mr. Fountain (Duke), Mr. Yoho (Duke), Diane Leopold (Dominion), and Bruce McKay (Dominion) met with Governor Cooper and Secretary Copeland, among others, to specifically discuss the pipeline and its economic benefits to North Carolina.

Under the EIS process, the North Carolina Department of Environmental Quality (“DEQ”) and the North Carolina Wildlife Resources Commission (“WRC”), provided FERC with comments. Among other points, DEQ argued that the environmental analysis should be broadened to include indirect effects from the economic development impacts expected to follow the pipeline. Similarly, WRC faulted the Draft EIS for “not adequately address[ing] the cumulative impacts” because it “does not consider the impacts associated with constructing new pipelines for distributing natural gas to residential customers once the ACP is complete.”

On April 5, 2017, Rep. Szoka also sent a letter to FERC commenting on the Draft EIS. Although supportive of the ACP, he asked for the planned route of the pipeline to be altered to avoid the Town of Wade in Cumberland County, North Carolina. Several

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<sup>1</sup> This meeting to discuss various Duke initiatives was part of a series of similar meetings by Duke with other newly-elected officials, such as the new Attorney-General, Josh Stein.

other members of the General Assembly also sent letters to FERC asking for this request by Rep. Szoka be granted.

Many local governments in Eastern North Carolina sent letters of support to FERC; these stressed the economic development opportunities of achieving convenient access to natural gas. For example, the Town of Pembroke believed the pipeline would provide “unprecedented direct access to affordable, abundant supplies of domestically produced natural gas” and that “such access is a key element in the decision-making process as businesses consider where to locate a new operation or expand existing ones.” A Halifax County Commissioner requested FERC require ACP to furnish “at least one tap for economic development to utilize in Halifax ... at no cost to [the] county & at a site to be determined on need in the future.”

#### *Permitting Process*

On May 8, 2017, ACP filed an application with the Director of the Division of Water Resources at DEQ requesting the issuance of a 401 water quality certification (“401 Permit”) pursuant to 15A N.C. Adm. Code §§ 2H.0501 *et seq.* implementing Section 401 of the Clean Water Act, 33 U.S.C. § 1344, and requesting riparian buffer authorizations for the Neuse and Tar-Pamlico River Basins pursuant to 15A N.C. Adm. Code §§ 2B.0233 and 2B.0259, respectively. Under the regulations, the 401 Permit “shall be issued where the Director determines water quality standards are met, including protection of existing uses.” 15A N.C. Adm. Code § 2H.0206(a). Specifically, ACP was required to satisfy the criteria described in § 2H.0206(b) for the issuance of a 401 Permit, including, for example, that the activity “has no practical alternative” and “provides for replacement of existing uses through mitigation.” 15A N.C. Adm. Code

§ 2H.0206(b). Similar criteria were required for riparian buffer authorizations for the Neuse and Tar-Pamlico River Basins pursuant to 15A N.C. Adm. Code §§ 2B.0233 and 2B.0259. As set forth in the timeline attached as **Exhibit 1**, Dominion personnel were primarily responsible for the 401 Permit and for responding to DEQ requests for additional information. In general, the written requests and responses occurred among, on one hand, Richard Gangle and Spencer Trichell on behalf of ACP, and on the other hand, Jeff Poupart, Jennifer Burdette, and Karen Higgins on behalf of DEQ.<sup>2</sup> Duke personnel were aware of and participated in the permitting process as set forth in **Exhibit 1**.

The process for obtaining 401 water quality certification depends upon the scope and specifications of the proposed project and upon the requests from DEQ as the permitting agency. Given the scale of the pipeline project proposed by ACP, the 401 certification and permitting process was more rigorous and detailed than prior, smaller projects. But ACP perceived nothing improper about the length of the process. Indeed, no one from DEQ ever discussed the anticipated payments under the MOU with Trichell or Gangle. Instead, as detailed in **Exhibit 1**, ACP engaged in rigorous and highly technical environmental discussions with career staff at DEQ throughout the 401 process. There was speculation by Dominion that the Cooper Administration took a more focused approach to the technical details of the 401 certification and permitting

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<sup>2</sup> Added to these written requests and responses, representatives of ACP and DEQ had a number of meetings and phone calls relating to the DEQ's continued requests for additional information. See **Exhibit 1**. For example, ACP and DEQ representatives met on September 29, 2017, after the second request, and had a telephonic meeting on December 14, 2017, after the sixth request.

process than the previous administration had taken and that this focus slowed the permitting process, to a degree. But ACP did not sign onto the MOU in exchange for the 401 Permit or any other permit.

During the course of the permitting process, DEQ sent ACP a number of requests for additional information. A fuller “Timeline of Relevant Permitting Events” is attached to this Whitepaper/Proffer as **Exhibit 1**. By way of summary, ACP received the following requests for additional information and responded as indicated:

Date	Action
June 27, 2017	Req. for Add. Info. (1) <sup>3</sup>
July 12, 2017	Add Info. Received (1)
September 14, 2017	Req. for Add Info. (2)
September 22, 2017	Add Info. Received (2)
September 29, 2017	Add. Info. Received (2)
October 13, 2017	Add Info. Received (2)
October 26, 2017	Req. for Add Info. (3)
November 4, 2017	Add Info. Received (3)
November 7, 2017	Req. for Add. Info. (4)
November 15, 2017	Add Info. Received (4)
November 28, 2017	Req. for Add Info. (5)
December 8, 2017	Add Info. Received (5)
December 14, 2017	Req. for Add. Info. (6)
December 20, 2017	Add Info. Received

<sup>3</sup> The number in parentheses corresponds to the order of the request (i.e., the June 27 request for additional information was the first request as indicated by (1)).



	(6)
January 16, 2018	Req. for Add. Info. (7)
January 17, 2018	Add Info. Received (7)
January 18, 2018	Req. for Add. Info. (8)
January 18, 2018	Add Info. Received (8)

DEQ held a public comment period from June 16 to August 19, 2017. DEQ also conducted public hearings on July 18 and 20, 2017; public listening sessions; and other public outreach to gather comments on the application. By the end of this process, DEQ received a substantial number of comments concerning ACP's applications. Many of the comments concerned the purpose and need behind the pipeline, the use of fossil fuels impacting climate change, whether the pipeline would bring about job creation and economic development as promised, the cumulative impacts analysis, concerns about environmental justice, potential impacts to water quality from erosion and sedimentation, potential impacts to wildlife, concerns over degradation of ground and surface waters, and the completeness of the application submitted by ACP.

Around this time period, in July 2017, FERC published the Final EIS and responded to the comments that had been made in connection with the Draft EIS. In response to DEQ and WRC, FERC refused to broaden its analysis of cumulative impacts beyond those "for a linear 'corridor-type' project" and thus declined to account for reasonably foreseeable environmental impacts caused by the future economic developments linked to the ACP. In the context of refusing one of the specific mitigations requested by DEQ, FERC explained: "State agencies would have the opportunity to review Atlantic's proposed facilities during their permitting processes,

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and, if necessary, identify additional mitigation measures beyond those currently proposed.” Effectively, while rejecting DEQ and WRC’s expansive approach to its permitting process, FERC invited both agencies to address these same issues as part of the required North Carolina permitting processes. As reflected by the submissions of DEQ and WRC and by FERC’s response in the Final EIS, the North Carolina agencies held a more expansive view of environmental impact analysis and mitigation than what was implemented by FERC, a more expansive view that FERC indicated should be part of the State permitting processes, rather than the CPCN process. The position taken by FERC applied as well to the concerns expressed by Halifax County over available infrastructure to access the pipeline: “Providing natural gas to Halifax, North Carolina is outside the scope of this project and environmental analysis.”

FERC issued a CPCN for the pipeline on October 13, 2017 - - the issuance was conditioned on several matters that ACP was required to complete (including the issuance of appropriate permits by the state agencies). Commissioner LaFleur wrote a brief dissent to the decision, indicating that ACP had failed to show that “the benefits of the project as proposed ... outweigh adverse effects on existing shippers, other pipelines and their captive customers, landowners, and surrounding communities.”

#### *The Pipeline’s Economic Impact*

In an effort to explain the economic benefits of this project to the communities directly affected by the construction and route of the pipeline, and in the process mobilize public support for the project, ACP through Dominion retained a public relations firm, Eckel & Vaughan, and conducted a media campaign in Eastern North Carolina during the last two quarters of 2017. This campaign consisted of television,

radio, print, and social and digital communication. These efforts included advertising that featured Durwood Stephenson, the Director of the US 70 Corridor Commission, Roy Bell, the Mayor of Garysburg (a small town in Northampton County), and Sarah Moses, a farmer and mother in Northampton County.<sup>4</sup>

The campaign and ACP's communications with North Carolina officials were focused on the pipeline's benefits. These included having a second interstate natural gas pipeline to continue the diversity in fuel sources and the energy grid and, given the price of natural gas, lowering energy costs throughout the region, and the fact that the availability of the natural gas from the pipeline would make it possible to support and recruit large manufacturers and industrial customers to the region - - businesses that would then contribute to the economy of the region through taxes and jobs. Specifically, ACP believed that Piedmont Natural Gas' subscription from the pipeline of roughly 10 percent of the capacity would provide transformative economic development for Eastern North Carolina and significant recruiting advantages for the region.<sup>5</sup> The Piedmont subscription was estimated to be sufficient to support 8 very large manufacturers (such as automobile manufacturers), or 16 large manufacturers, or 320 mid-size industrial customers, or 100,000 residents on a peak winter day. Absent the pipeline, Piedmont simply did not have the access to adequate capacity to support these incremental enterprises or customers.

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<sup>4</sup> Eventually a coalition named "Energy Sure" was formed consisting of the businesses and local governments who supported the ACP. A list of these businesses and local governments is available at <https://energysure.com/the-coalition/default.aspx>.

<sup>5</sup> In addition, the delivery pressure of ACP into Piedmont's pipeline system would effectively expand almost all of Piedmont's system in Eastern North Carolina to the benefit of current and potential customers.

The plans for the pipeline called for three interconnections with the Piedmont transmission and distribution system in Cumberland County, Johnston County, and Robeson County. No other interconnections were planned at that time, nor were additional taps or measuring stations planned - - ACP indicated that these would be considered on a "case-by-case" basis. These plans and the interconnection points were made publicly available in the latter half of 2017.

Beginning in September 2017, Duke began receiving comments and expressions of concern from both the Cooper administration and individuals in Eastern North Carolina over what was viewed as the lack of viable infrastructure planned for the pipeline. Specifically, William Miller of the North Carolina Department of Commerce contacted Bruce McKay of Dominion and questioned the viability of the stated economic benefits to Eastern North Carolina. On September 25, 2017, following an economic development meeting in Raleigh, Governor Cooper spoke with Lynn Good about his concerns over access to the pipeline and the tangible economic benefits of the pipeline. Ken Eudy, on behalf of the Governor, communicated similar concerns to Kathy Hawkins during September. The thrust of the criticism and concern stemmed from the fact that without adequate interconnection facilities to the pipeline, it would be difficult to recruit larger businesses into Eastern North Carolina because the businesses would be faced with the prospect of paying for the distribution infrastructure necessary to have access to the pipeline for industrial purposes.

These concerns culminated in a meeting between David Fountain (Duke Energy), Frank Yoho (Duke Energy), and Bruce McKay (Dominion) for ACP with the North Carolina Secretary of Commerce, Anthony Copeland, on October 25, 2017.

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During that meeting, ACP again presented its case that the pipeline would provide real and important economic benefits for Eastern North Carolina. The Secretary indicated that his office was receiving substantial criticism about the projected benefits and that much of the criticism dealt with the fact that, once constructed, the pipeline provided limited access to businesses because infrastructure for interconnection was not part of the pipeline plan and was not otherwise funded. The Secretary told ACP that it needed to make a more persuasive case for the economic benefits of the pipeline, while emphasizing that he continued to support the project. During that same time period, Rep. Szoka had a meeting with Mr. Fountain, Ms. Hawkins, Phil Grigsby, and a legislative staffer for Rep. Szoka, to discuss the ACP route, and during the meeting Rep. Szoka raised the issue of the lack of convenient access to the pipeline in Eastern North Carolina. Mr. Fountain had an additional conversation with Ken Eudy on November 1, 2017, about these concerns, and another phone conversation with Secretary Copeland on November 3, 2017.

In response to Secretary Copeland's concerns, on November 8, Mr. Fountain provided a follow-up letter to the Secretary, presenting ACP's case on the economic benefits that the pipeline would bring to Eastern North Carolina. A copy of this letter is attached as **Exhibit 2**. Shortly before this response, on November 1, Mr. Stephenson - - who was being featured in the various public education campaigns being conducted by ACP - - wrote to Mr. McKay and Rosemary Wyche (of Eckel & Vaughan) about the lack of access to the pipeline caused by the absence of infrastructure, and encouraged ACP to make arrangements so that access to the pipeline could be secured within a reasonable timeframe.

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*Permitting Requests for Information*

As Mr. Fountain was addressing the concerns about the projected economic benefit of the pipeline to Eastern North Carolina, he also became more involved in the permitting process beginning in September 2017. In particular, and in response to DEQ's second request for information, Mr. Fountain had a conversation with the Secretary of DEQ, Michael Regan, on September 25. During that conversation, Mr. Fountain questioned why an additional request for information had been issued on a permit that is typically issued within 15 days. Secretary Regan indicated that DEQ did not believe that it had the information necessary to approve the permits and that the issuance of permits for this project would undergo substantial scrutiny and would likely be challenged. As a consequence, before DEQ issued its permit, the Secretary indicated that DEQ wanted to ensure that the decision could withstand challenge or appeal.

During this time, Duke began working more closely with Dominion personnel to ensure that the information submitted to DEQ was complete and sufficient for permit issuance. Over the course of the next several months, Mr. Fountain saw Secretary Regan on a number of occasions and continued to raise with him the timeliness of permit issuance; the Secretary continued to indicate that DEQ wanted to ensure that its decision could withstand appeal and was simply attempting to gather all possible information. Mr. Fountain had calls or meetings with Secretary Regan on October 3 (with Secretary of Transportation Jim Trogdon and Lloyd Yates (Duke)), October 9, November 2, November 6, and December 19. On October 24, 2017, while at a reception in Raleigh with the then-Governor of Virginia, Terry McAuliffe, Mr. Fountain,

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Governor Cooper, and many others, Governor McAuliffe raised the issue of the length of the permitting process in Mr. Fountain's presence.

ACP's concerns about the length of the permitting process stemmed not from a concern that the permits would not be issued or were not warranted, but rather from the construction schedule for the pipeline. In order to construct the pipeline, the pipeline right-of-way needed to be cleared of trees. That process, however, could only take place during certain months of the year ("tree-felling season") and ACP believed that in order not to lose an additional calendar year for construction, tree clearing and related activities needed to begin no later than January 2018. Tree-felling season ended on March 31, 2018. However, no such tree clearing and related activities could begin until the permits were obtained and FERC issued a limited notice to proceed based upon the permits. ACP believed at that time that the permits needed to be issued no later than the end of December 2017 to meet this schedule.

On November 13, 2017, a number of requests for rehearing were filed before FERC as a prelude to future appeals filed in federal court. Multiple submissions contended FERC had not properly analyzed issues such as market demand, environmental justice, climate change, and cumulative impacts that would foreseeably be caused by the pipeline. In general, it was clear that FERC's CPCN for the ACP would be challenged on a number of grounds, including the issues of whether the pipeline would fulfill its promised economic benefits for Eastern North Carolina and whether all environmental impacts would be fully mitigated.

*Meetings of Late November*

As of late November 2017, Duke had a range of pending issues either involving the State of North Carolina or before agencies in which the State had an interest in the outcome. These included: (1) pending rate cases for Duke Energy Carolinas (“DEC”) and Duke Energy Progress (“DEP”), one of the elements of which was cost recovery for environmental compliance costs related to coal ash (before the NCUC); (2) continued oversight by DEQ of coal ash compliance throughout the State, including disposal options, and in particular the provision of water to homeowners near the coal ash basins; (3) potential proceedings in state court or before the NCUC involving the controversy over the interpretation to be applied to the “nameplate capacity” language of HB 589 to which the Public Staff was an interested party; (4) issues surrounding the economic benefits of the pipeline; (5) the pending 401 Permit application for the pipeline; and (6) Duke’s proposal for the Power/Forward Carolinas Grid Modernization Initiative to spend approximately \$13 Billion over 10 years to modernize and harden the grid, bury power lines, upgrade transmission facilities, retrofit transformers, increase automation, control, and enable renewables and distributed energy resources. In each of these matters, the Executive Branch had either a direct role (such as in the oversight of environmental matters relating to coal ash disposal and the issuance of permits for ACP), had a policy role and preference (such as in the nameplate capacity dispute involving HB 589), or would work in conjunction with the Attorney General on administrative matters (such as the pending rate requests and the grid rider). On November 21, 2017, Mr. Eudy contacted Ms. Hawkins. He noted the large number of issues that involved Duke Energy and the Executive Branch and suggested that in light



of those issues, a meeting should take place between Ms. Good and the Governor. The meeting was scheduled for November 30, 2017.

The next day, November 22, 2017, Mr. Fountain (Duke) and Mr. Yoho (Duke), and possibly others (including Dominion employees) met with Messrs. Stephenson, Norris Tolson, and Larry Wooten. Mr. Stephenson, as noted above, was both a public advocate for the pipeline and the Director of the US 70 Commission. Mr. Tolson is the President of the Carolinas Gateway Partnership economic development group and is a former North Carolina Cabinet Secretary in three departments. Mr. Wooten is the President of the North Carolina Farm Bureau. During the meeting, Messrs. Stephenson, Tolson, and Wooten, raised the issue of the lack of convenient access to the pipeline in Eastern North Carolina, a lack of access which they believed would undermine the economic promise of the pipeline. They proposed that a mitigation fund similar to the \$100 Million Clean Water Management Trust Fund (CWMTF) be established and funded to build-out the taps, stations, and other infrastructure necessary for businesses to connect with the pipeline. Mr. Fountain offered to explore and support a legislative solution to establish such a trust fund; Messrs. Stephenson, Tolson, and Wooten indicated that there would not be enough time to do so and requested that ACP fund the trust fund. Mr. Fountain indicated that the pipeline was a fundamentally sound project standing alone and did not require such a trust fund to realize the economic benefits. Similar conversations occurred between Ms. Hawkins and Mr. Eudy.

*The November 30 Meeting*

On the morning of November 30, and before Ms. Good's meeting with the Governor, Mr. Stephenson emailed Mr. Fountain and Mr. Yoho, thanking them for their time on November 22. He then summarized the request for Duke, Dominion, Piedmont, and the State of North Carolina to establish a fund modeled after the CWMTF and funded with \$100 Million. He also indicated that he had publicly and personally asked for the support of Governor Cooper for the ACP project, but had suggested that this support be contingent upon the ability to provide customers and businesses along the pipeline route with access to the pipeline.

On the afternoon of November 30, Ms. Good and Ms. Hawkins arrived at Governor Cooper's office for the scheduled meeting. They met briefly with Governor Cooper, and then Governor Cooper asked Ms. Hawkins to leave so that he could meet privately with Ms. Good.

Once Ms. Hawkins left, Governor Cooper and Ms. Good met for approximately an hour. Governor Cooper opened the meeting by observing that there were many issues that were creating a difficult environment for Duke's customers and his constituents and he wanted to share his perspective on these issues and understand Ms. Good's perspective. Ms. Good and Governor Cooper discussed the topics that were open between Duke and the State of North Carolina. By this time, Duke and the Public Staff had agreed upon a partial settlement of the DEP rate case and Ms. Good informed Governor Cooper of this fact. Governor Cooper indicated that he was not aware of the partial settlement. He observed that annual recovery of grid investments through a rider mechanism would put upward pressure on electric rates. Governor

Cooper asked how Duke intended to prioritize the investments, what type of risk-sharing would occur, and why the grid proposal was being made at this time. Ms. Good provided Governor Cooper with data on the grid and the necessity for its modernization and hardening.

Governor Cooper indicated to Ms. Good that there was “balking” at DEQ over the issuance of permits for the pipeline, and in particular over issues of environmental justice. Governor Cooper further indicated that his advisors in Eastern North Carolina believed that ACP was not doing enough to create the economic benefits and jobs that had been promised by the project, and in particular focused on the lack of infrastructure to enable businesses and farmers to access the pipeline once completed. Governor Cooper indicated that it was difficult to understand how the pipeline would provide a source of economic development when it would be difficult to access and that many of the businesses and farms in Eastern North Carolina simply could not afford to pay for the infrastructure necessary to access the pipeline. Ms. Good told Governor Cooper that the ability to have access to low-cost natural gas in an abundant supply in Eastern North Carolina would immediately benefit customers (including businesses and manufacturers) through the Piedmont distribution system which, in turn, would lead to economic development and necessarily attract other businesses. Governor Cooper indicated that he was relying on his advisors in Eastern North Carolina on this issue and that Duke needed to continue to deal with them. Governor Cooper indicated that ACP needed to do more to ensure that the pipeline provided the economic gains that were represented. Governor Cooper did not refer to or otherwise mention the email from Mr. Stephenson that day, nor did he mention the meeting between Messrs. Stephenson,

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Tolson, Wooten, Fountain, Yoho (and possibly others) a few days earlier. Governor Cooper indicated that Duke should focus its efforts in this regard in the East, confer with those of his advisors who had contacted Duke (and mentioned Mr. Tolson), and consider establishing a fund to ensure the benefits of the pipeline.

Governor Cooper also discussed the ongoing dispute over the interpretation of the meaning of “nameplate capacity” in HB 589. Governor Cooper indicated that he wanted Duke to resolve the dispute. Ms. Good responded that this was a technical dispute about the way in which nameplate capacity is understood and involved substantial transformer upgrades and other issues. Ms. Good offered to have the dispute mediated at a technical conference by a third-party to decide the issue and suggested that such a third-party should have some experience or knowledge concerning the interconnection issues that solar energy creates in the electrical grid. Governor Cooper told Ms. Good that if the dispute was not resolved, the developers were prepared to engage in litigation that could be “ugly” for the Company<sup>6</sup>, that he believed that the solar projects would create approximately 4,000 jobs, and that the projects should be connected to facilitate this. Ms. Good informed Governor Cooper that if all of the requested projects were provided the higher avoided cost, this could potentially decrease the savings created by HB 589 by \$180 Million.

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<sup>6</sup> The prediction that the litigation could potentially be “ugly” is consistent with the information provided in the Nameplate Dispute Whitepaper in which it was noted that the developers were portraying Duke’s position as “anti-solar” and were making a broader argument in the media that Duke was resistant or hostile to renewable energy generation in general (and solar energy in particular). See Nameplate Dispute Whitepaper at pp. 6-7.

Governor Cooper indicated that these were some of the issues before him and that he wanted to resolve these with Duke and to do so before the end of December if at all possible. No resolution of any of these issues was reached during the meeting. Ms. Good's understanding was that, from a timing perspective, the economic development issues associated with the pipeline and the nameplate dispute needed to be resolved within the same timeframe as a final decision on the issuance of the permits.<sup>7</sup>

### *The Evolution of the Agreement*

Ms. Good met by telephone with Ms. Hawkins, Mr. Fountain, Mr. Yoho, Paul Draovitch, Rob Caldwell, and Mr. Yates the next day (December 1) to discuss her conversation with Governor Cooper and determine the appropriate steps that needed to be taken in light of his request to resolve these pending issues.<sup>8</sup> Ms. Hawkins was designated as the lead person in dealing with the Office of the Governor and was to work with Mr. Yates and Mr. Fountain in an attempt to address the economic development issues surrounding the pipeline. Over the course of the next few days, Mr. Yates, Mr. Fountain, and Ms. Hawkins raised the idea of a \$50 Million economic development fund, with \$25 Million to be provided to the agricultural community and \$25 Million for economic development. This number was based on a quick analysis of the

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<sup>7</sup> Ms. Good had come prepared to discuss the provision of water to homeowners near the coal ash basins (and whether Duke would be paying to extend municipal water lines to these areas); but this topic was not explored in any depth and was not a significant topic of conversation during this meeting.

<sup>8</sup> Ms. Good also spoke with Ms. Hawkins late on November 30 following the meeting with the Governor to provide a brief update on the subjects discussed at the meeting.

cost of pipeline taps for the ten largest farming operations within the communities in Eastern North Carolina through which the pipeline would run.<sup>9</sup>

On December 5, 2017, Ms. Hawkins met with Mr. Eudy and discussed the concept of a fund. Ms. Hawkins communicated the proposal of \$50 Million to be split evenly between the agricultural community and economic development. The next day, December 6, 2017, and in response to a text from Ms. Hawkins, Mr. Eudy indicated that the proposal was well-received and that Mr. Fountain should meet with Mr. Stephenson, Mr. Tolson, and Mr. Wooten, while he would continue to communicate with Ms. Hawkins on this issue.

On December 8, 2017, Mr. Fountain, Mr. Yoho, Ms. Hawkins, and others, met by telephone with Mr. Stephenson, Mr. Tolson, Mr. Wooten, and Peter Barnes with the Farm Bureau. Duke communicated its commitment for a \$50 Million fund. Mr. Tolson, Mr. Wooten, and Mr. Stephenson were in broad agreement with this fund and the split between economic development and agricultural development.

Having taken the steps to address this issue, Ms. Hawkins and Mr. Fountain then consulted with Duke's partner in the ACP, Dominion, about this fund. Duke was informed that Dominion had established mitigation funds for both Virginia and West Virginia and requested that any such fund with North Carolina be established through a similar contract format. On December 11, 2017, Bruce McKay of Dominion sent the first email draft to Ms. Hawkins and Mr. Fountain showing an amount of \$40 Million for funding that was to be paid before the pipeline was placed into service. A couple of

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<sup>9</sup> As a result of Mr. Fountain's involvement in the pending rate cases before the NCUC, Mr. Fountain's involvement diminished significantly in December 2017 concerning this and other issues. See Nameplate Dispute Whitepaper at p. 9.

hours later, a revised version was sent to Mr. Fountain and Ms. Hawkins from Ann Loomis of Dominion, reflecting an amount of \$55 Million. This was the \$50 Million that Mr. Fountain, Mr. Yates, Mr. Yoho, and Ms. Hawkins had generated for economic development with an additional \$5 Million for environmental mitigation through loss of forest habitat. This reflected a similar offer to the Virginia mitigation agreement. This version was ultimately sent to the Office of the Governor on December 13, 2017.<sup>10</sup>

As noted in the Nameplate Whitepaper/Proffer, Duke met with the Public Staff concerning the nameplate dispute on December 12, and on December 14, at a meeting of the principals to that dispute (including the Public Staff), and an agreement in principle resolving the dispute was reached.

On December 18, Duke received via hand delivery additional materials requested by DEQ in relation to the 401 Permit. Duke sought to file these materials as quickly as possible so that the 15-day approval window would coincide with January 5, 2018.

Ms. Hawkins spoke with Mr. Eudy on December 19 and then met with him on December 20 concerning the terms of the MOU. Also on December 19, Mr. Fountain met with Secretary Regan at the Secretary's invitation. Secretary Regan discussed with Mr. Fountain the mitigation fund and indicated that he believed the total fund amount should be similar to the \$100 Million CWMTF. Following Ms. Hawkins' meeting with Mr. Eudy on December 20, Ms. Hawkins sought further internal - - including legal - - review of the proposed MOU. The Agreement was changed to a "Memorandum of

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<sup>10</sup> This document is labeled "First Draft" in the November 14, 2018, presentation by Representative Dean Arp ("Rep. Arp Presentation") to the Joint Legislative Commission on Governmental Operations Subcommittee on the Atlantic Coast Pipeline ("Subcommittee on ACP").

Understanding” and the counter-party was designated as “the State of North Carolina by and through the Office of the Governor.” The MOU was also revised to reflect that the funds provided thereunder would be designated for environmental mitigation, economic development, and renewable energy. Language was added concerning the local property tax revenue to be generated by the pipeline, the MOU was changed to provide that only half of the payment (designated for environmental mitigation) would be paid before the pipeline went into service (and upon the issuance of a Final Notice to Proceed by FERC), the Office of the Governor (at its request) was given the authority to designate a third party outside the State Treasury to hold the money, and new language describing an Executive Order directing disbursements was added (again at the request of the Office of the Governor). One issue about which Duke’s legal department spoke with the Office of the Governor was whether the Governor had the authority to bind the State of North Carolina. Specifically, Alex Glenn, an in-house counsel for Duke, spoke with William McKinney and others, including counsel for Dominion, about this issue. Mr. McKinney, the counsel to the Governor, indicated that he believed the applicable case law showed that the Governor could bind the State of North Carolina on a contractual matter. Duke also sought an opinion from outside counsel on this issue.

On December 22, 2017, Duke revised the MOU to provide for a repayment of monies should a Final Notice to Proceed be issued, but the pipeline not be placed into service. That day, Ms. Hawkins spoke with the Office of the Governor and confirmed this additional language. Duke sought to make arrangements for the MOU to be executed by December 26, 2017. The draft is identified as the “second” draft of the MOU in the Rep. Arp Presentation to the Subcommittee on ACP. A new draft was sent



to the Office of the Governor on December 29, 2017, adding a signature line for Leslie Hartz of Dominion as the signing party for ACP; this draft was executed by ACP.

In early January, Ms. Hawkins had a series of conversations with Mr. Eudy and Mr. McKinney. During this time, questions were raised about the amount of mitigation funds that were contained in the MOU and how these funds compared with the mitigation funds negotiated by West Virginia and Virginia.<sup>11</sup> Specifically, on January 11, 2018, Mr. Eudy and Mr. McKinney requested that the fund amount be increased to \$57.8 Million. Duke confirmed on January 12 that West Virginia would receive \$27,400,000 and Virginia would receive \$57,850,000 in their respective mitigation agreements. The proposed miles of pipeline in each state to be constructed were 196 miles in North Carolina, 99 miles in West Virginia, and 301 miles in Virginia (a fact that Ms. Hawkins passed along to Mr. Eudy on January 11). In addition, Duke discovered differences in the ways in which funds were to be paid under the Virginia agreement and the proposed North Carolina MOU, most regarding the payments to the Virginia Outdoors Foundation as a result of the public land easements required by the pipeline's route (which required replacement lands by ACP). Duke also discovered that a Programmatic Agreement involving the Department of Historic Resources would be required in North Carolina, and was to be filed with FERC. Unknown to both Mr. Eudy and Ms. Hawkins, this Programmatic Agreement had already been filed with FERC. Mr.

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<sup>11</sup> As noted in the follow-up email of March 27, 2019, the North Carolina Clean Energy Business Alliance and its members approved the nameplate dispute settlement on January 11, 2018.

Eudy contacted FERC and had the Programmatic Agreement returned for review by the Office of the Governor.

On January 17, 2018, Ms. Good and Governor Cooper met by telephone. This conversation had been arranged by Ms. Hawkins and Mr. Eudy. The call took place at approximately 8:00 am. Ms. Good was instructed to dial the Governor's mansion and she would be connected to the Governor by Security. Only Ms. Good and Governor Cooper participated in this call. At this time, the North Carolina Clean Energy Business Alliance ("NCCEBA") had approved the Nameplate Dispute Settlement, and Duke was finalizing its review of the projects to finalize the attachments to the Settlement.<sup>12</sup> Ms. Good and Governor Cooper discussed the status of information requests for the permits and the status of the MOU. During the course of that conversation, Governor Cooper asked why the mitigation amount to be paid to Virginia was more than the amount to be paid to North Carolina. At that time, subject to Dominion's agreement, Ms. Good agreed to increase the proposed MOU funding from \$55 Million to \$57.8 Million to match the mitigation funding provided to Virginia. Ms. Good does not recall discussing any other issues with Governor Cooper during this conversation.

On January 18, 2018, North Carolina delivered an executed (and unchanged) Programmatic Agreement to FERC reflecting the Historic Resources issue, and on January 19, FERC issued a limited Notice to Proceed.<sup>13</sup> That same day, a new version

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<sup>12</sup> These were transmitted from Duke to the attorney for NCCEBA on January 19, 2018.

<sup>13</sup> Also on January 19, 2018, a proposed nameplate settlement document with attachments began circulating among the nearly 30 counter-parties that would execute the agreement before submission to the NCUC.

of the MOU increasing the payment to \$57,800,000 was sent to the Office of the Governor, who returned it that day with minor revisions.<sup>14</sup> During this time, Duke worked with Dominion to coordinate the MOU agreement execution in West Virginia and North Carolina.

On January 22, 2018, and after ACP had responded to DEQ's eighth request for information, the hearing officer, Brian Wrenn (Ecosystem Branch Supervisor of the Division of Water Resources at DEQ) issued a Report and Recommendation on the 401 Permit to Linda Culpepper (Interim Director of the Division of Water Resources).

ACP was unable to coordinate the execution of the various state agreements and, on January 25, 2018, the MOU in its final version was signed by the Governor, before the execution of the West Virginia mitigation agreement. The next day, January 26, 2018, DEQ issued Certification No. WQC004162 to ACP for the 401 Permit and accompanying transmittal letter, entitled "Approval of Individual 401 Water Quality Certification and Tar-Pamlico/Neuse Riparian Buffer Impacts with Additional Conditions," from Ms. Culpepper to Ms. Hartz on behalf of ACP, copying Richard Gangle, Spencer Trichell, and government entities. That same day, the Raleigh Regional Office of DEQ requested additional information concerning ACP's pending erosion and sediment ("E&S") permit, to which ACP responded on January 29.<sup>15</sup> DEQ

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<sup>14</sup> This draft is labeled as the "Fourth Draft" in the Rep. Arp Presentation to the Subcommittee on the ACP.

<sup>15</sup> The E&S permit was required for the ACP project in addition to the 401 Permit. However, the E&S permitting process falls outside the scope of the Proffer Topics requested on February 6, 2019, and therefore is not addressed in detail within this Whitepaper/Proffer.

then issued its final E&S permits to ACP on February 1. On February 2, 2019, Duke submitted the Nameplate Settlement Agreement to NCUC for review and approval.

Conclusion

As noted at the outset, this Whitepaper, in conjunction with the Nameplate Dispute Whitepaper (and supplement) previously provided, is intended to provide a narrative factual summary. It is not intended to provide each and every factual detail, or conversation, or event, but is rather intended - - along with the Nameplate Dispute Whitepaper - - to summarize these events in a factual manner.