

FILED

STATE OF NORTH CAROLINA
COUNTY OF JACKSON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2009 AUG 17 7:50

09-CVS- 590

JACKSON CO., N.C.

COUNTY OF JACKSON, a body politic)
and corporate created and existing under)
the laws of North Carolina,)

Plaintiff,)

v.)

DUKE ENERGY CAROLINAS, LLC, a)
limited liability company organized)
and existing under the laws of North)
Carolina, and)
THE BANK OF NEW YORK MELLON)
TRUST COMPANY, N.A., as Successor)
Trustee)

**COMPLAINT FOR DECLARATORY,
CONDEMNATION
AND INJUNCTIVE RELIEF**

[COMP]

Defendants.

NOW COMES the Plaintiff, the County of Jackson (the "County"), by and through counsel, and complaining of the Defendants, Duke Energy Carolinas, LLC ("Duke") and The Bank of New York Mellon Trust Company, N.A., as Successor Trustee ("Trustee"), alleges, avers, and says:

NATURE OF ACTION

1. This is an action for declaratory judgment pursuant to N.C. Gen. Stat. § 1-253 *et seq.* and Rule 57 of the North Carolina Rules of Civil Procedure to obtain a declaration of the respective rights and obligations of the parties under various statutory provisions relating to the exercise of the power of eminent domain by the County to acquire property owned by Duke, and a condemnation action to acquire the said property pursuant to Chapter 40A of the North Carolina General Statutes (the "Act").

PARTIES

2. The County is a body politic and corporate, organized and existing under the laws of the State of North Carolina, governed by a duly elected Board of Commissioners (the “Board”). The County is also a local public condemnor possessing the power of eminent domain pursuant to the Act.

3. The County is informed and believes that the Duke is a limited liability company organized under the laws of the State of North Carolina with a principal place of business located at 526 South Church Street, Charlotte, NC 28202-1904. Duke is the successor to Nantahala Power & Light Company, Duke Energy Corporation (formerly known as Duke Power Company), which converted its form of organization to a North Carolina limited liability company named “Duke Power Company LLC”, which subsequently changed its name to Duke Energy Carolinas, LLC . Duke is also a private condemnor under the Act.

4. Based upon information and belief, Trustee is the successor trustee under that certain First and Refunding Mortgage dated as of December 1, 1927 (the “Original Indenture”), as supplemented from time to time on multiple occasions (the Original Indenture, as supplemented, shall hereinafter be referred to as the “Indenture”).

5. The Indenture encumbers property of Duke in favor of Trustee to secure indebtedness of Duke, as the successor to Duke Energy Corporation (formerly known as Duke Power Company), which converted its form of organization to a North Carolina limited liability company named “Duke Power Company LLC”, which subsequently changed its name to Duke Energy Carolinas, LLC, described in the Indenture.

6. The County is informed and believes that the Affected Property (hereinafter defined) is encumbered by the Indenture.

JURISDICTION AND VENUE

7. Jurisdiction hereof exists pursuant to N.C. Gen. Stat. § 1-75.4.
8. Venue is proper pursuant to N.C. Gen. Stat. § 1-82 and N.C. Gen. Stat. 40A-41.
9. All conditions precedent, if any, to the filing and maintenance of this action, and to the relief sought herein, have occurred, have been satisfied, have been met, or have been waived.

FACTS

10. Duke is the sole owner of those certain tracts or parcels of land together, with all improvements thereon and all appurtenances thereto, situated in Jackson County, North Carolina, and more particularly described as the “Dillsboro Hydro Project” on that certain map or plat thereof entitled “Dillsboro Hydro Project” dated May 27, 2009, prepared by R. Kirkland, Professional Land Surveyor, and recorded in Plat Cabinet 18, Slide 73, in the office of the Register of Deeds for Jackson County, North Carolina (the “Affected Property”).

11. A portion of the Affected Property is also described as the Dillsboro Project (the “Dillsboro Project”) in the recitals on pages 3 and 4 of that certain TCST Settlement Agreement dated the 29th day October, 2003 among Duke and various private parties, which agreement is incorporated herein by reference (the “Tuckasegee Settlement Agreement”).

12. The Affected Property includes, but is not limited to, all improvements, including, without limitation, the Dillsboro Pond (hereinafter defined), the Dillsboro Dam (hereinafter defined), and the Powerhouse (hereinafter defined), and any and all flooding rights, easements, shoreline buffer strips, tailrace, bypassed stream reaches, and rights-of-way located upon the Affected Property or appurtenant thereto.

13. The major components of the Affected Property are described in the Tuckasegee Settlement Agreement as follows:

(a) A 13.9-acre reservoir (the “Dillsboro Pond”), with negligible useful storage, located on the main stem of the Tuckasegee River in Dillsboro, North Carolina approximately 20 miles downstream from the confluence of the East and West Forks of the Tuckasegee River;

(b) A cyclopean and stone masonry dam (12 ft high x 310 ft long) (“Dillsboro Dam”) impounding water in the main stem of the Tuckasegee River; and

(c) A powerhouse (the “Powerhouse”) located at the dam site.

14. Duke owns the Affected Property in fee simple.

15. In 2005, the County adopted a Master Recreational Plan which envisioned a river-front, public park located along the Tuckasegee River between the towns of Dillsboro and Whittier.

16. At a duly noticed public meeting held on June 8, 2009, the Board adopted that certain “Dillsboro Heritage Park Master Plan-Jackson County, North Carolina, March 2009” prepared for Jackson County Recreation and Parks Department by Equinox Environmental Consultation & Design, Inc. (the “Dillsboro Heritage Park Plan”). The minutes of the June 8, 2009 public meeting of the Board approving the conceptual design for the Park as embodied in the Dillsboro Heritage Park Plan are incorporated herein by reference and made a part hereof.

17. N.C. Gen. Stat. § 40A-3(b)(3) authorizes the County to acquire property through the exercise of the power of eminent domain for the purpose of “(e)stablishing, enlarging, or improving parks, playgrounds, and other recreational facilities.

18. Pursuant to the authority granted to the County in the Act, the County, acting by and through the Board, has determined that it is necessary and in the public interest to acquire rights in the Affected Property through the exercise of the power of eminent domain.

19. The County, acting through the Board, has elected to acquire rights in the Affected Property in order to establish a park and recreational facilities to be known as the “Dillsboro Heritage Park” (the “Park”) in accordance with the Dillsboro Heritage Park Plan.

20. The public purposes or uses for which real property rights in property of Duke are taken are the establishment, enlargement or improvement of parks, playgrounds and other recreational facilities, and specifically the Park.

21. The Board also affirmatively voted at its meeting on June 8, 2009, to institute condemnation proceedings to acquire rights in and to the Affected Property in order to establish and operate the Park.

22. Notice of the County’s intent to acquire rights in and to the Affected Property by the exercise of its power of eminent domain was duly given to Duke in accordance with N.C. Gen. Stat. § 40A-40 on June 17, 2009.

23. Acquisition of the following described property of Duke is required to establish the Park:

(a) All of the right, title and interest of Duke in and to the following described property, free and clear of the lien of the Indenture: (the “Dillsboro Dam and Powerhouse Parcel”):

Begin at a point, said point being the Northeast corner of Thomas J. Walker Jr. (N/F DB 932, PG 713, the Southwest corner of Jerry and Marlon Clayton (N/F DB 612, PG 177) and the Northwest corner of the hereinbelow described property, and from said POINT OF BEGINNING proceed with the line of Clayton and the centerline of NCSR 1359 (North River Road), the following courses and distances: S 33-19-24 E 7.84 feet to a point, then S 35-00-44 E 15.63 feet to a point, then S 36-14-03 E 16.30 feet to a point, then S 37-27-52 E 21.48 feet to a point, then S 39-43-01 E 20.51 feet to a point, then S 41-43-55 E 25.17 feet to a point, then S 44-13-14 E 16.36 feet to a point, then S 46-17-34 E 13.23 feet to a point, and then S 48-52-55 E 6.58 feet to a point; and then leaving the line of Clayton and the centerline of North River Road, proceed S 21-00-28 W 42.99 feet to a point; then crossing the Tuckasegee River proceed S 46-17-28 W 89.78 feet and then S 44-27-44 W 256.58 feet to a point in the centerline of NCSR 1360 (Mockingbird Lane);

then proceed with the centerline of NCSR 1360 N 75-14-00 W 18.68 feet to a point; then leaving the centerline of NCSR 1360, proceed across the Tuckasegee River N 44-41-47 E 289.59 feet to a point in the river; then proceed N 68-34-55 W 79.92 feet to a point in the line of Walker; then proceed with the line of Walker N 25-40-58 E 56.99 feet and then N 17-22-17 E 108.37 feet to the POINT OF BEGINNING, said property being depicted on a plat prepared by Bobby H. Burns, PLS, entitled "Plat Prepared for County of Jackson", dated August 3, 2009, drawing number J-707.

Together with privileges, appurtenances, hereditaments, uses and benefits thereof, and improvements thereon, including, but not limited to, the Dillsboro Dam and the Powerhouse.

Said property is acquired subject to (i) the non-exclusive right-of-way over, through and across the lands of Duke as more particularly described in that certain Consent Judgment dated August 27, 1982, and recorded in Book 545, Page 327, Jackson County Registry and (ii) all easements and right of ways in favor of NCDOT of public record and affecting the Dillsboro Dam and Powerhouse Parcel.

(b) The following easement (the "Dillsboro Heritage Park Easement"; and, together with the Dillsboro Dam and Powerhouse Parcel, the "Acquired Property"):

The property to be acquired by the County includes an easement of the nature and character and to the extent hereinafter set forth, over the Affected Property LESS AND EXCEPT (i) the Dillsboro Dam and Powerhouse Parcel and (ii) the Disputed Parcel (hereinafter defined) (the "Easement Area"), for the benefit of the people of the County, and said Easement Area being more particularly described as the "Duke Hydro Project" as shown on a map of a survey entitled "Duke Energy Carolinas, LLC Dillsboro Hydro Dillsboro Project" dated May 27, 2009, prepared by R. Kirkland, Professional Land Surveyor, and recorded in Plat Cabinet 18, Slide 73, Jackson County Registry (the "Duke Survey"), LESS AND EXCEPT (i) the Dillsboro Dam and Powerhouse Parcel and (ii) the 0.027 acres of the Affected Property that potentially overlap with the lands of Richard and Joan Stillwell (N/F DB 769, PG 354) as shown in more particular detail in Inset "B" on the Duke Survey (the "Disputed Parcel").

The purposes of the Dillsboro Heritage Park Easement are to create, establish, maintain and operate the Park in accordance with the Dillsboro Heritage Park Plan and to maintain, restore, enhance, and create riparian resources in the Easement Area that contribute to the protection and improvement of water quality, flood prevention, fisheries, aquatic habitat, wildlife habitat, and recreational opportunities, including establishing, enlarging, or improving parks, playgrounds and other recreational facilities in accordance with the Dillsboro Heritage Park Plan; to maintain permanently the Easement Area in such condition as to permit it to be used as a park, playground or other recreational facility,

consistent with these purposes; and to prevent any use of the Easement Area that will adversely affect, impair or interfere with these purposes.

To achieve these purposes, the following conditions and restrictions are imposed on the Easement Area:

The Dillsboro Heritage Park Easement shall be a perpetual easement appurtenant to the Dillsboro Dam and Powerhouse Parcel, which runs with the land.

The Easement Area shall be restricted from any development or usage that would impair or interfere with the purposes of the Dillsboro Heritage Park Easement. Unless expressly permitted as a compatible use herein, any activity in, or use of, the Easement Area by Duke is prohibited as being inconsistent with the purposes of this Dillsboro Heritage Park Easement. Any rights that Duke is not expressly permitted to undertake hereunder have been acquired by the County.

The following specific uses (collectively, "Permitted Uses") are permitted and may be undertaken by Duke as indicated:

Public Use. Duke shall have the right to (i) continue using the Easement Area for the placement and operation of utility poles, electrical lines, settlement ponds, and other equipment to continue diligently until completion, the temporary dredging activities currently underway within the Easement Area, provided that all settling ponds shall be filled and graded following the completion of such activities, (ii) maintain any utility right of ways and associated equipment, including poles, transformers, and electrical lines, that are currently in place and that may be required by Duke to operate its business following the completion of the aforesaid dredging activities, and (iii) continue the use of that portion of the Pole Yard Parcel (hereinafter defined) that is currently fenced, as well as the current access thereto, to store wooden poles and equipment; provided that, to the extent that any right of ways, electric lines, utility poles, or equipment described in (ii) above have been installed solely for the purpose of completing the allowed dredging activities, Duke shall remove such electric lines, utility poles and equipment promptly following the completion of such dredging activities. Future dredging activities shall not be allowed. However, if the rights of way and equipment placed therein will, in the good faith opinion of Duke, be necessary for Duke to conduct its business following the completion of the allowed dredging activities, Duke shall be allowed to maintain, repair and replace (with comparable equipment in the then existing locations of the equipment to be replaced) such equipment. Duke shall use reasonable efforts to avoid any disruption of the Park's operations or use. Further, if Duke ceases using the portion of the Pole Yard Parcel currently under use by it for any continuous twelve (12) month period or if such property is no longer needed by Duke for its business, the use of such portion of the Pole Yard Parcel by Duke shall no longer be allowed. The right of Duke to use portions of the Pole Yard Parcel, as aforesaid, may not be assigned, sublet, loaned out or otherwise delegated to a third-party.

Recreational Uses. Duke shall have the right to recreational uses, including fishing, and access to the Easement Area for such purposes.

Educational Uses. Duke shall have the right to educational uses and the right of access to the Easement Area for such purposes including organized educational activities such as site visits, studies, and observations.

The following specific uses (collectively, “Prohibited or Restricted Uses”) may not be undertaken by Duke and are prohibited or restricted as indicated:

Vegetative Cutting. Cutting, removal, mowing, harming, or destruction of any vegetation in the Easement Area is prohibited, except as may be reasonably and legitimately, required to undertake a Permitted Use.

Industrial Use. Industrial activities in the Easement Area are prohibited.

Residential Use. Residential use of the Easement Area is prohibited.

Commercial Use. Commercial activities in the Easement Area are prohibited, except to the extent that they are Permitted Uses.

Agricultural Use. Agricultural use of the Easement Area including use for cropland, waste lagoons, or pastureland is prohibited.

New Construction. There shall be no building, facility, mobile home, or other structure constructed or placed in the Easement Area except (i) those ancillary to Permitted Uses and (ii) those constructed or placed in accord with the Dillsboro Heritage Park Plan, as it may be amended or supplemented from time to time by the County.

Signs. No signs shall be permitted in the Easement Area except for those contemplated by the Dillsboro Heritage Park Plan or otherwise approved by the County and interpretive signs describing restoration activities and the conservation values of the Easement Area, signs identifying the owner of the Affected Property and the holder of the Dillsboro Heritage Park Easement, and signs giving directions or proscribing rules and regulations for the use of the Easement Area.

Dumping. Dumping of soil, trash, ashes, garbage, waste, abandoned vehicles, appliance or machinery, or other material in the Easement Area is prohibited.

Grading, Mineral Use, Excavation, Dredging. There shall be no grading, filling, excavation, dredging, mining, or drilling; no removal of topsoil,

sand, gravel, rock, peat, minerals, or other materials, except as undertaken to accomplish or undertake Permitted Uses .

Water Quality and Drainage Patterns. Except to the extent required to undertake Permitted Uses, there shall be no diking, draining, dredging, channeling, filling, leveling, pumping, impounding or related activities, or altering or tampering with water control structures or devices, including, but not limited to, the Dillsboro Dam, or disruption or alteration of the restored, enhanced, or created drainage patterns. In addition, diverting or causing or permitting the diversion of surface or underground water into, within or out of the Easement Area by any means, removal of wetlands, polluting or discharging into waters, springs, seeps, or wetlands, or use of pesticide or biocides is prohibited.

Subdivision. Subdivision, partitioning, or dividing the Easement Area is prohibited.

Development Rights. No development rights which have been encumbered or extinguished by the Dillsboro Heritage Park Easement shall be transferred pursuant to a transferable development rights scheme or cluster development arrangement or otherwise.

24. The aforesaid Permitted Uses and Prohibited and Restricted Uses shall apply to Duke only. The County, and authorized representatives of the County, shall have the right to enter the Easement Area and shall have the right of reasonable ingress and egress to the Easement Area over the Affected Property, at all reasonable times to undertake any activities to restore, manage, maintain, enhance, and monitor the riparian resources of the Easement Area, and to establish, enlarge or improve parks, playgrounds, and other recreational facilities, specifically, the Park. These activities include planting of trees, shrubs and herbaceous vegetation, installation of monitoring wells, utilization of heavy equipment to grade, fill, and prepare the soil, modification of the hydrology of the site, and installation of natural and manmade materials as needed to direct in-stream, above ground, and subterraneous water flow and to establish, enlarge or improve parks, playgrounds and other recreational facilities, including, without limitation, the Park.

25. The easement rights acquired herein include public access rights and the right of the public to use the Park in accordance with rules and regulations established by the County.

26. The Dillsboro Heritage Park Easement shall be construed to promote the purposes of establishing, enlarging or improving parks, playgrounds and other recreational facilities in accordance with the Dillsboro Heritage Park Plan, which is incorporated herein by reference.

27. Duke shall retain all rights accruing from ownership of the underlying fee in the Easement Area, including the right to engage in or permit or invite others to engage in Permitted Uses and Prohibited or Restricted Uses to the extent allowed by the Dillsboro Heritage Park Easement only and then only to the extent not inconsistent with the purposes of the Dillsboro Heritage Park Easement. Without limiting the generality of the foregoing, Duke and its invitees and licensees, shall have the right of access to the Easement Area and the right to undertake any Permitted Uses thereon.

28. The Dillsboro Dam and Powerhouse Parcel and the Dillsboro Heritage Park Easement to be acquired by the County constitute "property" within the meaning of the Act and, in particular N.C. Gen. Stat. § 40A-2(7) thereof.

29. The County has the right to acquire the Dillsboro Dam and Powerhouse Parcel and the Dillsboro Heritage Park Easement pursuant to N.C. Gen. Stat. § 40A-3(b)(3) and § 40A-5(b).

30. The power generating facilities of the Dillsboro Project, specifically the Dillsboro Dam and the Powerhouse, were severely damaged by flooding in 2004 due to a storm event.

31. As a result, Duke has not used the Dillsboro Pond, the Dillsboro Dam or the Powerhouse or the Dillsboro Dam and Powerhouse Parcel for water control or power generation purposes or for any other public purpose since late 2004 and it does not now use the Dillsboro

Pond, the Dillsboro Dam or the Powerhouse, or the Dillsboro Dam and Powerhouse Parcel, for any of such purposes.

32. The license previously issued by the Federal Energy Regulatory Commission (“FERC”) to Duke to operate the Dillsboro Project, including the Dillsboro Dam and the Powerhouse, expired on July 31, 2005. In 2003, in anticipation of the expiration of its then current license for the Dillsboro Project, Duke filed an application with FERC for a subsequent license, and in the transmittal letter for that application Duke stated that it might file a surrender application for the project at a later date. In May of 2004, in accordance with the Tuckasegee Settlement Agreement and another settlement agreement relating to the licensing of other projects in the Nantahala watershed, Duke filed an application to surrender its license to operate the Dillsboro Dam and sought permission to demolish and remove the Dillsboro Dam and the Powerhouse.

33. As an unlicensed and non-exempt hydro-electric facility, the Dillsboro Project, including the Dillsboro Dam, the Powerhouse and the Dillsboro Pond, is no longer in public use or necessary for the business of Duke.

34. As stated in paragraphs 6.3 and 6.4 of the Tuckasegee Settlement Agreement, Duke agreed to obtain the necessary approvals to demolish and remove the Dillsboro Dam and Powerhouse.

35. The Acquired Property is not necessary to the operation of Duke’s business because the Dillsboro Project is no longer licensed by FERC to operate as a hydro-electric facility. Moreover, Duke sought and obtained an order from FERC to surrender its license for the Dillsboro Project, and to demolish and remove the Dillsboro Dam and the Powerhouse.

36. Duke also has submitted applications to the County for permits to demolish the Dillsboro Dam and the Powerhouse.

37. The submittal of these applications is clear evidence that neither the Dillsboro Dam nor the Powerhouse is necessary for Duke to conduct its business.

38. The Acquired Property also is not necessary for Duke to operate its business because Duke, pursuant to the Tuckasegee Settlement Agreement, has contractually agreed to demolish and remove the Dillsboro Dam and the Powerhouse, and convey the remaining Affected Property to the Town of Dillsboro or, in the alternative, the County.

39. The Town of Dillsboro, through its elected officials, has advised the County that it does not wish to acquire such Affected Property and that the County can do so. The County does wish to acquire the Affected Property, as well as the Dillsboro Dam and the Powerhouse.

40. Upon information and belief, Duke asserts that the Tuckasegee Settlement Agreement “contractually” obligates Duke to demolish and remove the Dillsboro Dam and the Powerhouse.

41. In fact, the Tuckasegee Settlement Agreement by its terms contemplates that the Dillsboro Dam and the Powerhouse may not be demolished and removed by Duke. Specifically, Section 6.0 of the Tuckasegee Settlement Agreement, and specifically Sections 6.4 through 6.11, provides that if the Dillsboro Dam and the Powerhouse are demolished and removed by Duke, certain enumerated additional undertakings by Duke will occur. Section 6.12 of the Tuckasegee Settlement Agreement, however, provides that “if for any reason the Dillsboro Dam is not removed then” certain other additional undertakings by Duke will occur”.

42. Accordingly, the Tuckasegee Settlement Agreement, by its terms, envisions a scenario in which neither the Dillsboro Dam nor the Powerhouse is demolished or removed.

43. The demolition of the Dillsboro Dam and the Powerhouse, therefore, is not necessary for Duke to fulfill its so called “contractual” obligations under the Tuckasegee Settlement Agreement.

44. Upon information and belief, Duke also maintains that the demolition and removal of the Dillsboro Dam and the Powerhouse must be undertaken pursuant to the Tuckasegee Settlement Agreement as “mitigation” for licenses that Duke is or will be seeking for other hydro-electric facilities owned and operated by Duke in Western North Carolina.

45. FERC, however, has held that the demolition and removal of the Dillsboro Dam and the Powerhouse is not mitigation for other project licenses. Specifically, in an Order on Rehearing and Clarification issued April 22, 2008, FERC stated:

As to the contention that the Commission considered the Dillsboro surrender as mitigation for the other projects in the river basin, the community parties are mistaken. Commission staff analyzed the potential environmental impacts, including cumulative impacts, of the Dillsboro surrender proposal and of each of the relicensing proposals for the six projects in the river basin. However, neither the EAs nor the Commission in its surrender order considered the Dillsboro surrender proposal as mitigation for continued operation of the other projects. Instead, mitigation for the other projects will be addressed in the respective proceedings.

(Emphasis added).

46. FERC stated in the aforesaid Order that the demolition and removal of the Dillsboro Dam and the Powerhouse will not constitute mitigation for the other hydro-electric facility licenses that Duke is or will be seeking for certain of its hydro-electric facilities located in Western North Carolina (See Section 6.12 of the Tuckasegee Settlement Agreement).

47. Such demolition and removal, therefore, is not necessary for the business of Duke.

48. Consequently, the County is empowered pursuant to N.C. Gen. Stat. § 40A-5(b) to condemn the Affected Property by the exercise of the power of eminent domain.

49. Notice of the County's intent to enter upon and survey the Affected Property was duly given pursuant to N.C. Gen Stat § 40A-11.

50. Duke, by letter to counsel for the County dated July 2, 2009 (the "Duke Letter"), the original of which is attached hereto as Exhibit A and by reference made a part hereof, has threatened to pursue criminal and civil actions for trespass against the County and its agents if such entry is made.

51. The County, therefore, has been unable to undertake its own survey of the Affected Property.

52. Further, Duke states in the Duke Letter that the County does not have the authority under the Act to condemn the Affected Property.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

53. The County incorporates by reference and re-alleges paragraphs 1 through 52 hereof.

54. An actual, genuine controversy exists between the County and Duke relative to the ability of the County to acquire the Acquired Property, including the Dillsboro Dam and Powerhouse Parcel and the Dillsboro Heritage Park Easement, by the exercise of the power of eminent domain and the ability of the County and its agents to enter upon and survey the Affected Property.

55. The County requests the Court to declare the rights of the parties under the Act with regard to the Acquired Property.

SECOND CLAIM FOR RELIEF
(Condemnation)

56. The County incorporates by reference and re-alleges paragraphs 1 through 55 hereof.

57. The County requests the Court to promptly conduct a hearing pursuant to N.C. Gen. Stat. § 40A-47 of the Act to determine all issues other than just compensation, including, but not limited to, the existing rights, if any, which are necessary to the operation of Duke's business and whether the County can acquire the rights in the Acquired Property that the County seeks to acquire and, in the alternative, to identify the rights in the Acquired Property that the County can acquire pursuant to this proceeding, it being the intent of the County to acquire the rights in the Acquired Property that it herein seeks to obtain or such lesser rights as this Honorable Court may determine are allowable for the County to acquire under the Act, and allow the parties to proceed with a trial by jury on the issue of the amount of just compensation for such rights.

NOTICE OF DEPOSIT

58. The County is informed and believes that its acquisition of the Dillsboro Dam and Powerhouse will relieve Duke of the obligation to demolish and remove the Dillsboro Dam and the Powerhouse, and thereby result in substantial benefits to Duke in excess of One Million Dollars (\$1,000,000). The said benefits greatly exceed the fair market value of the Acquired Property. Consequently, the County, in good faith, has estimated the sum of One Dollar (\$1.00) to be just compensation for the Acquired Property. With the filing of this Complaint, the County has deposited said sum with the Clerk of Superior Court of Jackson County. Following a determination by this Honorable Court of the rights in the Acquired Property that can be acquired by the County, if a valuation of such rights results in a determination by the County, in its good faith opinion, that just compensation for such rights is greater than the amount deposited by the County as aforesaid, the County will promptly supplement such deposit so that the aggregate deposit made is equal to the value of the rights that can be taken.

THIRD CLAIM FOR RELIEF

(MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION)

NOW COMES the County, pursuant to N. C. Gen. Stat. § 1-485 and N. C. Gen. Stat. § 1A-1, Rule 65 of the Rules of Civil Procedure, and moves the Court to issue a temporary restraining order and a preliminary injunction to enjoin Duke, *pendente lite*, from modifying, altering, damaging or removing the Dillsboro Dam or the Powerhouse, or any of the other Acquired Property, except to the extent undertaken with respect to Permitted Uses, and allow the County and its agents to enter upon and survey the Affected Property. In support of this motion, the County shows unto the Court as follows:

59. The County incorporates by reference as if fully set forth herein paragraphs 1 through 58 of this Complaint.

60. Duke has represented to FERC and to the other parties to the Tuckasegee Settlement Agreement that Duke will demolish and remove the Dillsboro Dam and the Powerhouse.

61. By separate letters each dated July 22, 2009, Duke submitted applications for demolition permits to the County seeking the approvals expressly required by various ordinances of the County and the Town of Dillsboro to demolish both the Dillsboro Dam and the Powerhouse.

62. Upon information and belief, Duke intends to immediately begin preparing the Dillsboro Dam and the Powerhouse for demolition and removal.

63. By written correspondence to counsel for the County, a copy of which is attached hereto as Exhibit A, Duke has threatened to pursue criminal and civil actions for trespass against the County and its agents if entry is made to survey the Affected Property as allowed by N.C. Gen. Stat. § 40A-11, and therefore the County has been unable to conduct its own survey.

64. The demolition and/or destruction of the Dillsboro Dam or the Powerhouse by Duke prior to a final determination in this action would cause irreparable harm to the County in its efforts to establish and maintain the Park and integrate the Dillsboro Dam and the Powerhouse as critical elements of the Park.

65. A Preliminary Final Environmental Assessment for Hydropower Licenses dated July 2006 (the “FEA”), which is part of the record in proceedings before FERC initiated by Duke, states that, after review, the North Carolina SHPO concluded that the Dillsboro Dam and the Powerhouse are eligible for listing on the National Register of Historic Sites (See, page 288 of FEA).

66. The demolition and removal of the Dillsboro Dam and the Powerhouse would cause the County irreparable harm as these historic structures cannot be replaced.

67. Failure to enjoin Duke from demolishing and removing the Dillsboro Dam and the Powerhouse would frustrate the County’s condemnation of the Acquired Property, and permanently eliminate the Dillsboro Dam and the Powerhouse as focal points of the Park as contemplated by the Dillsboro Heritage Park Plan and the County.

68. Failure to enter an injunction would allow Duke to irreparably alter and/or damage the property the County intends to condemn and preserve.

69. Duke’s attempt to prohibit the County from entering the Affected Property pursuant to N.C. Gen. Stat. § 40A-11 is contrary to North Carolina law. The County’s entry for survey purposes will not interfere or affect Duke’s sand mining operations as alleged in the Duke Letter because such activities only would require a surveyor’s presence on or about the boundaries of the Affected Property and not those portions of the Affected Property upon which Duke maintains that sand dredging activities are underway.

70. A temporary restraining order and preliminary injunction are necessary to (i) preserve the status quo until the rights of the parties can be fully adjudicated by this Honorable Court, and (ii) prevent the irreparable harm that the County will suffer if such an order is not entered.

71. The County will likely succeed on the merits hereof and be entitled to the relief demanded herein.

72. N.C. Gen. Stat. § 40A-5(b) provides that “(u)nless otherwise provided by statute, a condemnor listed in G.S. 40A-3(a), (b) or (c) may condemn the property of a private condemnor if such property is not in actual public use or not necessary to the operation of the business of the owner.”

73. The Dillsboro Dam and Powerhouse Parcel and the Dillsboro Heritage Park Easement to be acquired by the County constitute “property” within the meaning of the Act and, in particular N.C. Gen. Stat. § 40A-2(7) thereof.

74. The County is a public condemnor as provided in N.C. Gen. Stat. § 40A-3(a), (b) or (c).

75. Duke is a private condemnor under the Act.

76. The Acquired Property is not property that is in actual public use and it is not necessary to the operation of Duke’s business.

77. No statute or law prohibits the County from condemning the Acquired Property.

78. The County is informed, believes and therefore alleges that Duke contends that FERC has “ordered” Duke to demolish and remove the Dillsboro Dam and the Powerhouse, and that such order bars the County from condemning the Dillsboro Dam and Powerhouse Parcel or any of the other Acquired Property, pursuant to the Act. In its Order Denying Rehearing dated

January 23, 2008 issued in 122 FERC 61,053, FERC, discussing its jurisdiction under the Federal Power Act to adjudicate property rights under state law (under facts virtually identical to those in the principal situation-local authorities were attempting to acquire a dam and related property under the jurisdiction of FERC via eminent domain proceedings), stated that “(w)e have no authority over [a dam owner’s] property rights and lack the ability to prevent the taking of property rights by others” (Emphasis added).

79. Consequently, the assertion by Duke that a FERC order precludes condemnation of the Acquired Property by the County is legally baseless.

80. Accordingly, the County respectfully requests that this Honorable Court enter a temporary restraining order and preliminary injunction prohibiting Duke, its agents, affiliates or contractors, *pendente lite*, from altering, demolishing, altering or removing any part of the Dillsboro Dam or the Powerhouse, or any other part of the Affected Property, except to the extent that such activities are Permitted Uses, and allowing the County and its agents to enter upon and survey the Affected Property.

THE COUNTY DEMANDS TRIAL BY JURY AS TO ALL ISSUES SO TRIABLE

WHEREFORE, the County prays the Court to grant the following relief:

1. An order directing Duke to allow the County and its agents to enter upon the Affected Property and survey it pursuant to G.S. § 40A-11 without liability for any criminal or civil action in trespass;

2. A temporary restraining order and preliminary injunction prohibiting Duke *pendente lite* from demolishing, altering or removing any part of the Dillsboro Dam or the Powerhouse, or any part of the Acquired Property, except to the extent necessary to undertake a Permitted Use;

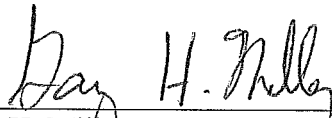
3. A declaratory judgment determining that the County has the power and authority under the Act to condemn the Acquired Property and acquire the rights therein that it seeks to acquire as aforesaid.

4. Promptly conduct a hearing pursuant to N.C. Gen. Stat. 40A-47 of the Act to determine all issues other than just compensation, including, but not limited to, the existing rights, if any, which are necessary to the operation of Duke's business and whether the County can acquire rights in the Acquired Property as sought herein and, in the alternative, to identify the rights in the Acquired Property that the County can acquire pursuant to this proceeding.

5. The Court allow the parties to proceed with a trial by jury on the issue of just compensation for such rights; and

6. Such other and further relief as may be appropriate.

This the 17th day of August, 2009.



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Attorneys for Plaintiff

VERIFICATION

STATE OF NORTH CAROLINA

COUNTY OF JACKSON

Kenneth L. Westmoreland, being first duly sworn, deposes and says:

That he is the County Manager for the Plaintiff, County of Jackson, in the foregoing Complaint for Declaratory, Condemnation and Injunctive Relief, that he has read the same and knows the contents thereof, that the same is true of his own knowledge except as to the matters and things therein alleged upon information and belief and as to those matters and things he verily believes it to be true.

Kenneth L. Westmoreland

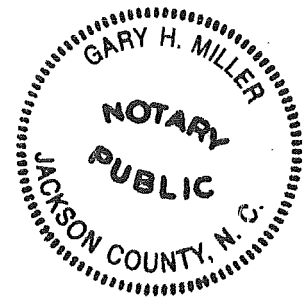
Kenneth L. Westmoreland

SWORN TO AND SUBSCRIBED before me this the 17th day of August, 2009.

My commission expires: 1/18/2012

Gary H. Miller

Notary Public





EXHIBITED

2009 AUG 17 PM 3:50

JACKSON CO., N.C.

BY _____

July 2, 2009

GARRY S. RICE
Associate General Counsel
Office of the General Counsel

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704-382-8111

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Garry.Rice@duke-energy.com

Via USPS First Class Mail

Gary H. Miller, Esq.
P.O. Box 2667
241 Bryson Walk
Bryson City, NC 28713

Re: N.C. Gen. Stat. §40A-40 – Notice of Condemnation Action
N.C. Gen. Stat. §40A-11 – Notice of Intent to Enter Property

Dear Gary:

I am in receipt of your letter providing notice of Jackson County's (the "County") intent to institute an action to condemn property owned by Duke Energy Carolinas, LLC ("Duke Energy Carolinas" or the "Company") located on the Tuckasegee River in Jackson County, North Carolina. The property you identify in your letter includes, among other things, the Dillsboro Dam, Powerhouse and all other features of the Dillsboro Hydroelectric Project, FERC Project No. 2602 (the "Dillsboro Project"). As you are well aware, the Federal Energy Regulatory Commission (the "FERC") has ordered Duke Energy Carolinas to surrender its license for the Dillsboro Project and to demolish the Dillsboro Dam and Powerhouse. It appears that the County, having been unsuccessful in both (a) the legal proceedings instituted to reverse the FERC order, and (b) its extra-legal attempts to interfere with and impede the implementation of that order, is attempting through the purported exercise of its eminent domain authority to obtain indirectly what it could not obtain directly from the FERC. This is a blatantly improper exercise of the power of condemnation.

As the Company and its counsel have emphasized to the County on a number of occasions, the County does not have the authority to undertake the proposed condemnation. More specifically, the County's stated public purpose for taking the Dillsboro Project – establishing the Dillsboro Heritage Park – is not a permissible purpose for taking a federally-licensed hydroelectric project. The Federal Power Act provides that a municipality may condemn a FERC-licensed hydroelectric project only for the purpose of taking over, maintaining and operating the facility. Conversely, North Carolina eminent domain law only allows public condemnors, including counties, the power of eminent domain to acquire property by condemnation for nine specific purposes, none of which includes taking over, maintaining and operating a power generation facility. In addition, North Carolina law renders it impossible for the County to condemn property of a private condemnor (such as Duke Energy Carolinas), except under certain conditions which do not apply in this situation.

Gary H. Miller, Esq.
July 2, 2009
Page 2 of 2

In your letter you also provide notice pursuant to N.C. Gen. Stat. §40A-11 of the County's intent to enter upon Duke Energy Carolinas' property prior to condemnation. Because the County does not have the authority to condemn the Dillsboro Project, it certainly cannot assert the right of entry prior to condemnation provided by §40A-11. Thus, any attempt to enter the project boundary for the Dillsboro Hydroelectric Project will be deemed a trespass and the Company reserves the right to take appropriate legal action. This letter is also notice pursuant to N.C. Gen. Stat. §14-159.13.

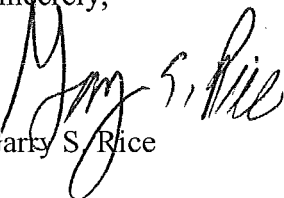
Even if the County did have a right to enter, which it clearly does not, it would be sending its surveyors and other representatives into an active sand mining operation which presents a number of safety and legal concerns. The Federal Mine Safety and Health Act of 1977 applies to the sand mining operation at the Dillsboro Project, and our contractor, Carolina Sand, Inc., is responsible for site access. Anyone not complying with the requirements of the Federal Mine Safety and Health Act of 1977 may not enter the site of an active mining operation. Regardless, under no circumstances does §40A-11 allow the County to interfere with the sand mining operation.

In sum, I urge the County to reconsider its decision to pursue condemnation due to the absence of legal support for this decision, and am putting the County and its contractors, agents or anyone else purporting to act through it on notice that any attempt to enter onto the property of Duke Energy Carolinas is a trespass that will subject the actor to damages (including, under these circumstances, in which the County is acting without appropriate authority, punitive damages) and any other sanctions permitted by law.

Please direct any further communication regarding this matter to our counsel, Kiran Mehta. His contact information is as follows:

Kiran H. Mehta, Esq.
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Hearst Tower, 47th Floor
214 North Tryon Street
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Fax: 704-353-3137
Email: kiran.mehta@klgates.com

Sincerely,



Gary S. Rice

GSR:pr

cc: Kiran H. Mehta