

and substantiate the amount of bond needed to secure against damages from appeal-related delays in beginning of construction of the Facility. NC WARN stated that DEP provided unsubstantiated and extravagant estimates of potential damages. NC WARN indicated that DEP's assertions of potential damages were not sufficiently documented, and that DEP did not provide an explanation or break-down of its ultimate \$50 million bond estimate.

On May 10, 2016, the Commission issued its Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) (First Bond Order). The Commission required NC WARN to file an executed undertaking or a bond in the sum of \$10 million prior to filing a notice of appeal. The Commission established a procedure that potentially authorized NC WARN to be relieved of this requirement based on subsequent events.

On May 19, 2016, NC WARN filed in the Court of Appeals a Petition for Writ of Certiorari, Petition for Writ of Supersedeas, and Motion for Temporary Stay of the Commission's First Bond Order. On May 24, 2016, the Court of Appeals denied NC WARN's Motion for Temporary Stay.

On May 27, 2016, NC WARN filed a Notice of Appeal and Exceptions in Docket No. E-2, Sub 1089 to the Commission's March 28 and May 10, 2016 orders without filing the required undertaking or appeal bond as required by G.S. 62-82(b) and the First Bond Order.

On May 31, 2016, in the Court of Appeals, DEP filed a Response to Petition for Writ of Certiorari and Petition for Writ of Supersedeas.

On May 31, 2016, DEP filed a Motion to Dismiss the Appeal for NC WARN's failure to file the required undertaking or appeal bond. On June 3, 2016, NC WARN filed a response opposing the dismissal.

On June 7, 2016, the Court of Appeals allowed NC WARN's Petition for Writ of Certiorari for the limited purpose of vacating and remanding the Commission's First Bond Order. The Court of Appeals stated that on remand "the Commission shall, in its discretion, set bond in an amount that is in accordance with N.C. Gen. Stat. 62-82(b) and based upon competent evidence."

On June 8, 2016, in response to the Court's order, the Commission issued an Order Setting Hearing, providing DEP and NC WARN an evidentiary hearing on the issue of setting an undertaking or bond pursuant to G.S. 62-82(b). The Commission ordered both DEP and NC WARN to sponsor witness(es) on the issue of the amount of the bond.

On June 14, 2016, NC WARN filed a Response to Order. In its response, NC WARN moved that the Commission not allow additional evidence on remand or, in the alternative, provide NC WARN at least ten additional days to submit additional testimony prior to an evidentiary hearing. On June 17, 2016, at the beginning of the evidentiary hearing, the Commission denied NC WARN's motion to exclude additional

testimony on remand. After denying NC WARN's motion, the Commission proceeded with the evidentiary hearing on the bond determination.

At the conclusion of the hearing, the Commission asked NC WARN about its motion for additional time to present a witness. NC WARN indicated it had not contacted any witnesses prior to the hearing and that NC WARN would let the Commission know on or before Wednesday, June 22, 2016, whether it would withdraw such motion to provide a witness on the issue. On June 22, 2016, NC WARN filed a Response indicating that NC WARN planned to confer with a potential witness on Friday, June 24, 2016, and, with the Commission's forbearance, would notify the Commission on Friday, June 24, 2016, whether the potential witness was available to provide an affidavit or testify at a hearing. On Friday, June 24, 2016, NC WARN filed an update indicating that NC WARN conferred with its witness, Bill Powers, and that NC WARN would be filing an affidavit from him on Monday, June 27, 2016. On June 27, 2016, NC WARN filed the Affidavit of William E. Powers. On June 29, 2016, DEP filed a response to the affidavit filed on NC WARN's behalf replying in opposition to the affidavit and requesting that the Commission deny further delay efforts by NC WARN.

On July 8, 2016, the Commission issued an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) (Second Bond Order) setting the bond or undertaking at \$98 million based upon the evidence presented to the Commission. The Commission provided NC WARN five days from the issuance of the Second Bond Order to file the bond or undertaking with the Commission.

NC WARN did not file a bond or undertaking within the five days as required by the Second Bond Order and G.S. 62-82(b).

On July 20, 2016, DEP filed a renewed motion to dismiss NC WARN's appeal. On July 26, 2016, NC WARN filed its response to DEP's renewed motion to dismiss the appeal.

On July 28, 2016, NC WARN filed notice of Appeal and Exceptions as to the Second Bond Order.

DEP'S RENEWED MOTION TO DISMISS APPEAL

In its motion, DEP argues that NC WARN has failed to file the prerequisite undertaking or bond required by G.S. 62-82(b) and the Second Bond Order and, therefore, NC WARN's appeal should be dismissed as a matter of law. DEP cites to G.S. 62-82(b), which provides, in part:

- (b) Compensation for Damages Sustained by Appeal from Award of Certificate under G.S. 62-110.1; Bond Prerequisite to Appeal. – Any party or parties opposing, and appealing from, an order of the Commission which awards a certificate under G.S. 62-110.1 shall be obligated to recompense the party to whom the certificate is awarded, if such award is affirmed upon appeal, for the damages, if any, which such party sustains by reason of the

delay in beginning the construction of the facility which is occasioned by the appeal, such damages to be measured by the increase in the cost of such generating facility (excluding legal fees, court costs, and other expenses incurred in connection with the appeal). No appeal from any order of the Commission which awards any such certificate may be taken by any party opposing such award unless, within the time limit for filing notice of appeal as provided for in G.S. 62-90, such party shall have filed with the Commission a bond with sureties approved by the Commission, or an undertaking approved by the Commission, in such amount as the Commission determines will be reasonably sufficient to discharge the obligation hereinabove imposed upon such appealing party. [Emphasis added.]

In the Second Bond Order, the Commission found that, based upon the competent evidence presented, the potential increase in the cost of the generating facility at issue due to an appeal-related construction delay is not less than \$98 million. DEP indicated that NC WARN has not perfected its appeal in a timely manner as required by Rule 25(a) of the North Carolina Rules of Appellate Procedure. Rule 25(a) provides:

If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court ... motions made under this rule to a commission may be heard and determined by the chair of the commission.

Based upon Rule 25(a), DEP moves that the Commission grant its motion to dismiss the appeal.

NC WARN'S RESPONSE TO RENEWED MOTION TO DISMISS APPEAL

In its response, NC WARN admits that it has not filed a bond or undertaking as required by the Commission's Second Bond Order. NC WARN argues that it plans to file a notice of appeal as to the Second Bond Order and a Petition for Writ of Certiorari requesting review of the Second Bond Order on or before August 8, 2016. NC WARN argues that, if the appellate court rules in its favor as to the Second Bond Order and the Commission has dismissed its appeal, it will have no recourse to challenge the CPCN Order because the appeal will have been dismissed. Therefore, NC WARN requests that the Commission defer judgment on DEP's motion to dismiss the appeal until the appellate process runs its course. The remainder of NC WARN's response is non-responsive to DEP's motion to dismiss, but, rather, outlines the arguments it plans to make to the appellate court regarding the Second Bond Order.

FINDINGS, DISCUSSION AND CONCLUSIONS OF LAW

The law is clear. Pursuant to Rule 25(a) of the Rules of Appellate Procedure, upon motion of any other party, an appeal may be dismissed if “the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision.” North Carolina General Statutes Section 62-82(b), entitled Compensation for Damages Sustained by Appeal from Award of Certificate under G.S. 62-110.1; Bond Prerequisite to Appeal, mandates that: “No appeal from any order of the Commission which awards any such certificate may be taken by any party opposing such award unless, within the time limit for filing notice of appeal as provided for in G.S. 62-90, such party shall have filed with the Commission a bond” in such amount sufficient for the appellant to recompense the party awarded the certificate for damages from an unsuccessful appeal caused by appeal-related delays in beginning construction of the facility. The statute states the measure of damages is the increase in the cost of the facility.

The Commission obtained competent evidence on the potential increase in the cost of the facility and within its discretion issued an order on July 8, 2016, setting a bond amount sufficient for NC WARN to satisfy its obligation to recompense DEP and, ultimately, North Carolina rate-paying citizens for damages in the event of an unsuccessful appeal. The Commission provided NC WARN five days from the date of the order to file such bond or undertaking. The order was in compliance with the Commission’s statutory duty under G.S. 62-82(a) requiring a bond as a prerequisite to any appeal from certificates to build certain generation facilities.

NC WARN requested the Commission to set bond by motion filed April 25, 2016. Much litigation has transpired in the meantime. On July 26, 2016, NC WARN asserts before the Commission that G.S. 62-82(b) unconstitutionally deprives NC WARN of its rights to court access. Acts of the General Assembly are presumed to be constitutional. State ex rel. Martin v. Preston, 325 N.C. 438, 382 S.E.2d 473 (1989). It is not within the Commission’s jurisdiction as a quasi-judicial administrative agency to rule on the constitutionality of a statute. Great Am. Ins. Co. v. Gold, 254 N.C. 168, 173, 118 S.E.2d 792 (1961).

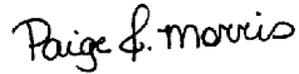
Based upon NC WARN’s own admission and certified copies of the Commission’s docket entries, which are attached hereto, the Commission finds that NC WARN has not posted the prerequisite bond to pursue its appeal. Accordingly, pursuant to Rule 25(a), NC WARN has failed to take the necessary actions to present the appeal.

IT IS, THEREFORE, ORDERED that DEP's Motion to Dismiss Appeal of North Carolina Waste Awareness and Reduction Network and The Climate Times shall be, and is hereby, granted.

ISSUED BY ORDER OF THE COMMISSION.

This the 2nd day of August, 2016.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink that reads "Paige J. Morris". The signature is written in a cursive style with a large initial "P" and "M".

Paige J. Morris, Deputy Clerk

State of North Carolina Utilities Commission Certification

*I, Julie Kennedy, Clerk of The North Carolina
Utilities Commission, do hereby certify the attached
(four 4 sheets) to be a true copy from the official records
of this office viz;*

*Duke Energy Progress, LLC
Docket Number E-2 Sub 1089
Table of Contents*

*In Witness Whereof, I have hereunto set my hand
and affixed the official seal of the Commission.*

This, the 1st day of August, 2016.



Julie Kennedy

Julie Kennedy, Clerk



North Carolina Utilities Commission

03-Docket Table of Contents ~ Docket # E-2 Sub 1089

PDT: 8/1/2016 10:03AM

Related Companies (Entities): **DUKE ENERGY PROGRESS, LLC**
 Docket Create Date: **09/16/2015**
 Docket Description: **Petition for CPCN to Construct a Combined Cycle Natural Gas Fueled Electric Generation Facility**

<u>Doc Date</u>	<u>Doc Class</u>	<u>Means Received</u>	<u>Doc Description</u>
12/16/2015	Filing	Internet	DEP's Notification of Intent to File for Western Carolinas Modernization Project
12/18/2015	Order		Order Scheduling Public Hearing and Requesting Investigation and Report by the Public Staff
12/21/2015	Filing	Internet	Motion to Intervene by NC WARN and The Climate Times and Motion for Evidentiary Hearing
12/22/2015	Filing	Internet	Petition to Intervene of MountainTrue and Sierra Club
12/29/2015	Filing	Internet	CIGFUR II's Petition to Intervene
12/30/2015	Order		Order Granting Petition to Intervene
12/31/2015	Filing	Regular Mail	Response to NCWarn's Motion to Intervene and Motion for Evidentiary Hearing
01/05/2016	Filing	Internet	Affidavit of Publication
01/06/2016	Filing	Internet	Reply by NC WARN and The Climate Times
01/06/2016	Filing	Staff	Courtroom Confirmation Letter for Hearing Scheduled on Tuesday, January 26, 2016 at Buncombe Co. Courthouse
01/14/2016	Filing	Hand Delivered	CUCA's Petition to Intervene
01/14/2016	Order		Order Granting Petition to Intervene
01/15/2016	Filing	E-Mail	Consumer Statement of Position (3)
01/15/2016	Filing	Internet	DEP Application for CPCN and Motion for Partial Waiver
01/15/2016	Filing	Internet	Confidential Petition for Certificate of Public Convenience for Partial Waiver of Commission Rule Re-61
01/15/2016	Order		Order Granting Petition to Intervene
01/15/2016	Order		Order Denying NC WARN and The Climate Times' Motion for an Evidentiary Hearing
01/19/2016	Filing	E-Mail	Consumer Statement of Position Emails (2)
01/20/2016	Filing	E-Mail	Consumer Statement of Position Emails (60)
01/20/2016	Filing	Hand Delivered	NCSEA's Petition to Intervene
01/20/2016	Order		Order Granting Petition to Intervene
01/20/2016	Order		Order Granting Petition to Intervene
01/21/2016	Filing	E-Mail	Consumer Statement of Position Emails (21)
01/22/2016	Filing	E-Mail	Consumer Statement of Position Emails (14)
01/22/2016	Filing	Regular Mail	Consumer Position (4)
01/22/2016	Order		Order on Procedure for Accepting Comments of the Parties
* 01/25/2016	Filing	Regular Mail	Consumer Statement of Position Emails (20)
01/25/2016	Filing	Internet	Motions to Compel by NC WARN and The Climate Times
01/26/2016	Filing	Internet	Petition to Intervene of Grant Millin
01/26/2016	Filing	Internet	Petition to Intervene of Grant Millin Docket - Truncated Version
01/26/2016	Filing	E-Mail	Consumers Statement of Position Emails (9)
* 01/26/2016	Filing	E-Mail	Consumer Statement of Position Emails (13)
01/26/2016	Order		Order Granting Petition to Intervene
01/27/2016	Filing	E-Mail	Consumer Statement of Position Emails (16)

Related Companies (Entities): DUKE ENERGY PROGRESS, LLC

Docket Create Date: 09/16/2015

Docket Description: Petition for CPCN to Construct a Combined Cycle Natural Gas Fueled Electric Generation Facility

<u>Doc Date</u>	<u>Doc Class</u>	<u>Means Received</u>	<u>Doc Description</u>
01/28/2016	Filing	E-Mail	Consumer Statement of Position Emails (19)
01/28/2016	Filing	E-Mail	Consumer Statement of Position Email (1)
01/29/2016	Filing	Regular Mail	Consumer Statement of Position Emails (6)
01/29/2016	Filing	Internet	DEP's Confidential Pages from Exhibit 1A
01/29/2016	Filing	Internet	DEP's Cover Letter Transmitting Confidential Pages
01/29/2016	Order		Order Granting Waiver of Prefiling and Testimony Requirements
02/01/2016	Filing	Staff	Click for Audio: E-2, Sub 1089, January 26, 2016
02/01/2016	Filing	Internet	DEP's Letter and Confidential Pages from Revised Exhibits to CPCN Application
02/01/2016	Filing	Internet	DEP's Letter and Revised Exhibits to CPCN Application
02/01/2016	Filing	Internet	DEP's Response to NC Warn and The Climate Times' Motions to Compel and Affidavit of Michael Delowery
02/01/2016	Filing	E-Mail	Consumers Statement of Position Emails (32)
02/02/2016	Filing	E-Mail	Consumer Statement of Position (13)
02/02/2016	Filing	Internet	Columbia Energy, LLC's Petition to Intervene
02/03/2016	Filing	E-Mail	Consumer Statement of Position Email (1)
* 02/04/2016	Filing	E-Mail	Consumer Statement of Position Emails and Letter (8)
02/04/2016	Order		Order Denying Motion to Compel
02/04/2016	Order		Order Granting Petition to Intervene
* 02/05/2016	Filing	E-Mail	Consumer Statement of Position (10)
02/05/2016	Filing	Internet	Petition to Intervene by Brad Rouse
02/05/2016	Filing	Internet	Petition to Intervene by Richard Fireman
02/08/2016	Filing	Internet	Brad Rouse's Certificate of Service to Petition to Intervene Filed on 2/5/2016
02/08/2016	Filing	Other	Consumer Statement of Position Emails/Letters (22)
02/08/2016	Order		Order Granting Petition to Intervene
02/08/2016	Order		Order Granting Petition to Intervene
02/09/2016	Filing	E-Mail	Consumer Statement of Position Email (1)
02/09/2016	Filing	Internet	Comments Intervener (Statement of Position)
02/09/2016	Filing	E-Mail	Consumers Statement of Position (2)
02/10/2016	Filing	E-Mail	Consumers Statement of Position Emails (3)
02/10/2016	Filing	Internet	Comments of Brad Rouse
02/10/2016	Filing	Hand Delivered	NCSEA's Comments
02/10/2016	Filing	Hand Delivered	NCSEA's Comments - Confidential Pages 11, 12 and 13
02/11/2016	Filing	E-Mail	Consumers Statement of Position Emails and Letters (4)
02/12/2016	Filing	Internet	NC WARN & The Climate Times Comments
02/12/2016	Filing	Internet	Comments of MountainTrue and the Sierra Club
02/12/2016	Filing	Internet	Comments of Columbia Energy, LLC
02/12/2016	Filing	Internet	Statement of Richard Fireman
* 02/15/2016	Filing	Staff	Transcript of Testimony - Heard: Tuesday, January 26, 2016 in Asheville, North Carolina
02/15/2016	Filing	E-Mail	Consumer Statement of Position Emails (8)
02/15/2016	Filing	Staff	Official Exhibits for 1-26-2016 Hearing (Asheville)
02/15/2016	Filing	E-Mail	Consumer Statement of Position Emails (11)
02/16/2016	Filing	E-Mail	Consumer Statement of Positions (8)

Related Companies (Entities): DUKE ENERGY PROGRESS, LLC
 Docket Create Date: 09/16/2015
 Docket Description: Petition for CPCN to Construct a Combined Cycle Natural Gas Fueled Electric Generation Facility

Doc Date	Doc Class	Means Received	Doc Description
* 02/17/2016	Filing	E-Mail	Consumer Statement of Position Emails (8)
02/18/2016	Filing	E-Mail	Consumer Statement of Position Email (3)
02/19/2016	Filing	E-Mail	Consumer Statement of Position Emails (5)
02/19/2016	Filing	Internet	NC WARN and Climate Time's Cover Letter and Affidavit for J. David Hughes
02/19/2016	Filing	Internet	NC WARN and The Climate Times' Response
02/22/2016	Filing	Regular Mail	Consumer Statement of Position Email (16)
02/23/2016	Filing	E-Mail	Consumer Statement of Positions (4)
02/24/2016	Filing	Internet	Additional Comments by Brad Rouse
02/25/2016	Filing	E-Mail	Consumer Statement of Position Email (1)
02/25/2016	Filing	Internet	DEP's Reply Comments to Additional Comments of Brad Rouse
02/26/2016	Filing	Internet	2nd Additional comments of Brad Rouse
02/26/2016	Filing	Regular Mail	Statement of Grant Millin
02/26/2016	Filing	Internet	NC WARN and TCL Additional Comments
02/29/2016	Filing	Regular Mail	Consumer Statement of Position (3)
02/29/2016	Filing	Regular Mail	Consumer Statement of Position (7)
02/29/2016	Order		Notice of Decision
03/01/2016	Filing	E-Mail	Consumer Statement of Position Email (1)
03/10/2016	Filing	Regular Mail	Consumer Statement of Position Letter (1)
03/28/2016	Filing	E-Mail	Consumer Statement of Position Email
03/28/2016	Order		Order Granting Application in Part, with Conditions, and Denying Application in Part
04/21/2016	Filing	Regular Mail	Consumer Statement of Position to AG's Office
04/25/2016	Filing	Internet	Motion for Extension of Time to File Notice of Appeal and Exceptions of NC WARN and The Climate Times
04/25/2016	Filing	Internet	Motion to Set Bond for Appeal of NC WARN and The Climate Times
04/25/2016	Filing	Internet	Notice of Appearance on Behalf of NC WARN and The Climate Times for Matthew D. Quinn
04/26/2016	Order		Order Extending Time to File Notice of Appeal and Exceptions
04/27/2016	Order		Procedural Order on Bond
05/02/2016	Filing	Internet	DEC's Verified Response to Motion to Set Bond of NC WARN and the Climate Times
05/05/2016	Filing	Internet	NC WARN and The Climate Times's Verified Reply to DEP's Response to Motion to Set Bond
05/10/2016	Order		Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)
05/23/2016	Filing	Regular Mail	Petition for Writ of Certiorari, Petition for Writ of Suerpsedeas, and Motion For Temporary Stay Filed in NC Court of Appeals
05/24/2016	Filing	Regular Mail	NC Court of Appeals Order
05/27/2016	Filing	Internet	Notice of Appeal and Exceptions of NC WARN and The Climate Times
05/31/2016	Filing	Internet	DEP's Motion to Dismiss Appeal of NC WARN and The Climate Times
06/03/2016	Filing	Internet	NC WARN and The Climate Times' Response to Motion to Dismiss Appeal
06/03/2016	Filing	Regular Mail	DEPS's Response Filed in NC Court of Appeals
06/07/2016	Filing	Regular Mail	North Carolina Court of Appeals Order

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Docket Create Date: 09/16/2015

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<u>Doc Date</u>	<u>Doc Class</u>	<u>Means Received</u>	<u>Doc Description</u>
06/08/2016	Order		Order Setting Hearing
06/14/2016	Filing	Internet	NC WARN / The Climate Times (TCT) Response to Order
06/20/2016	Filing	E-Mail	Click for Audio: E-2, Sub 1089, Volume 2, June 17, 2016
06/21/2016	Filing	Staff	Transcript of Testimony (Heard in Raleigh 6-17-2016) Volume 2
06/22/2016	Filing	Staff	Official Exhibits for June 17, 2016 Hearing
06/22/2016	Filing	Internet	NC WARN / TCT Response to Chairman's Inquiry
06/23/2016	Filing	Internet	DEP's Reply in Opposition to Response by NC WARN and The Climate Times
06/23/2016	Filing	Internet	NC WARN and The Climate Times' Motion for Extension of Time to Serve Proposed Record on Appeal
06/24/2016	Filing	Internet	Update by NC Warn and the Climate Times
06/27/2016	Filing	Internet	Response by NC WARN and The Climate Times and Affidavit of William Powers
06/29/2016	Filing	Internet	DEP's Reply to Response by NC WARN and The Climate Times and to Late-Filed Affidavit
06/30/2016	Order		Order Granting Motion for Extension of Time to File Proposed Record on Appeal
07/08/2016	Order		Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)
07/20/2016	Filing	Internet	DEP's Renewed Motion to Dismiss Appeal of NC WARN and The Climate Times
07/26/2016	Filing	Internet	NC WARN and The Climate Times' Response to Renewed Motion to Dismiss Appeal
07/28/2016	Filing	Internet	NC WARN and The Climate Times' Notice of Appeal and Exceptions as to the Second Bond Order

Count ALL Documents Listed: 127

End of Report