

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1089

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)
Application of Duke Energy Progress, LLC for a) NC WARN AND
Certificate of Public Convenience and Necessity) THE CLIMATE TIMES'
to Construct a 752 Megawatt Natural Gas-Fueled) RESPONSE TO
Electric Generation Facility in Buncombe County) MOTION TO DISMISS
Near the City of Asheville) APPEAL

NOW COME NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-90 and Rule 25 of the North Carolina Rules of Appellate Procedure, and serve the following Response to Duke Energy Progress LLC's ("DEP") Motion to Dismiss Appeal. In support of this Response, NC WARN and The Climate Times state as follows:

BACKGROUND

1. On March 28, 2016, the N.C. Utilities Commission ("Commission") entered an Order Granting Application in Part, with Conditions, and Denying Application in Part ("CPCN Order").

2. Appeals from orders granting certificates of public convenience and necessity are generally subject to the bond requirements described in N.C. Gen. Stat. § 62-82(b). Thus, on April 25, 2016, NC WARN and The Climate Times filed a Motion to Set Bond. To allow time for the Commission's ruling on the Motion to Set Bond, NC WARN and The Climate Times simultaneously filed a Motion for Extension of Time to

File Notice of Appeal and Exceptions, and the Commission extended the deadline for appeals to May 27, 2016.

3. On April 27, 2016, the Commission entered a Procedural Order providing DEP with an opportunity to file a Response to the Petitioners' Motion to Set Bond, and providing NC WARN and The Climate Times with an opportunity to file a Reply. Consistent with this Procedural Order, DEP filed a Response on May 2, 2016, and NC WARN and The Climate Times filed a Reply on May 5, 2016.

4. In its Response, DEP refused to state that an appeal would result in delays in the initiation of construction. *DEP's Response* ¶ 10. Instead, DEP provided general guesses, without any supporting documents or facts, at what a hypothetical delay might cost DEP. *Id.* ¶ 14. Despite a lack of evidence, DEP recommended an impossible \$50 million bond.

5. Among other things, NC WARN and The Climate Times' Reply of May 5 called the Commission's attention to the fact that DEP failed to substantiate any of its alleged damages estimates. *Reply* ¶¶ 5-6. The Reply again challenged DEP to state that an appeal would result in delays in the beginning of construction—which DEP still has not done—and noted that no public interest group, including NC WARN and The Climate Times, could ever post a \$50 million bond. *Id.* ¶¶ 11-12. Finally, the Reply emphasized that NC WARN and The Climate Times are not seeking an injunction or stay of the Commission's CPCN Order. *Id.* ¶ 3.

6. On May 10, 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Bond Order"). In its Bond Order, the Commission acknowledged that it was "not aware of any case in which the Commission has

determined the amount of a bond or undertaking pursuant to G.S. 62-82(b)." *Id.* at 4 n.1. Nonetheless, the Commission required a bond or undertaking of \$10,000,000.00. *Id.* at 7. However, it goes without saying that the Petitioners cannot afford a \$10,000,000.00 bond, and cannot honestly sign an undertaking representing the ability to pay \$10,000,000.00 in damages. Thus, the Commission's Bond Order is tantamount to dismissing any appeal of the CPCN Order.

7. As described herein, NC WARN and The Climate Times respectfully argue that the Bond Order was erroneous and should be reversed. Since the erroneous Bond Order is the obstacle to appealing the CPCN Order, NC WARN and The Climate Times should not be barred by the bond statute from pursuing an appeal of the CPCN Order.

8. There is no case law or rule describing whether the correct action is to file a notice of appeal from the Bond Order or, alternatively, a petition for writ of certiorari with the N.C. Court of Appeals. In an effort to be certain that all rules are complied with, on May 19, 2015, NC WARN and The Climate Times filed a Petition for Writ of Certiorari and Petition for Writ of Supersedeas with the N.C. Court of Appeals. The Petition for Writ of Certiorari asked the court of appeals to overturn the Bond Order, and the Petition for Writ of Supersedeas asked the court of appeals to stay enforcement of the Bond Order so that an appeal of the CPCN Order can proceed until such point as the court of appeals determines whether the Bond Order is appropriate. Because the court of appeals has not ruled upon these petitions, and in a further effort to ensure that all appellate rules are followed, on May 27, 2016, NC WARN and The Climate Times filed

a Notice of Appeal and Exceptions with the Commission concerning the CPCN Order and Bond Order.

9. On May 31, 2016, DEP filed a Motion to Dismiss the Notice of Appeal and Exceptions of NC WARN and The Climate Times. For the following reasons, the Motion to Dismiss should be denied.

ARGUMENT

10. DEP's Motion to Dismiss is premised upon the Bond Order, yet the Bond Order is presently the subject of a strong appellate challenge. If DEP's Motion to Dismiss is granted, it is quite realistic that the N.C. Court of Appeals reverses the Bond Order yet NC WARN and The Climate Times will have no recourse to challenge the CPCN Order because their appeal will have already been dismissed. Hence, NC WARN and The Climate Times respectfully request that judgement on the Motion to Dismiss be withheld until the N.C. Court of Appeals issues a ruling on the pending Petitions for Writ of Certiorari and Supersedeas. The remainder of this Response is dedicated to demonstrating the legitimacy of the challenge to the Bond Order.

11. Appeals from a certificate of public convenience and necessity are subject to the provisions of N.C. Gen. Stat. § 62-82(b). In relevant part, that statute states:

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.

N.C. Gen. Stat. § 62-82(b) (emphasis added).

12. To summarize, a party losing an appeal challenging a certificate of public convenience and necessity may be obligated to pay “damages, if any, which [the public utility] sustains.” However, the damages are explicitly limited to damages related to “delay in beginning the construction of the facility which is occasioned by the appeal,” and these damages cannot include “legal fees, court costs, and other expenses incurred in connection with the appeal.”

13. Therefore, any bond obligation is limited to damages caused by “delay in beginning the construction of the facility.” However, despite being invited to do so, DEP refused to state that an appeal will result in delay in the initiation of construction. *DEP’s Response ¶ 10*. Further, the Bond Order did not find that the appeal will cause a delay in beginning construction. The Bond Order’s only finding related to whether construction will be delayed is, “DEP indicates that it has not determined whether it will delay the beginning of construction of the facility if an appeal is filed.” *Bond Order p 5*. Therefore, the Bond Order is not supported by an essential factual finding necessary to support a bond under N.C. Gen. Stat. § 62-82(b), that construction will be delayed. As noted, NC WARN and The Climate Times are not requesting a stay, and therefore it is highly unlikely that DEP will delay anything as a result of the appeal. Accordingly, there should be no bond requirement.

14. Undersigned counsel is aware of no cases interpreting the bond statute, N.C. Gen. Stat. § 62-82(b), at issue presently. However, the N.C. Court of Appeals has

reversed bond requirements in other contexts where the bond was not supported by evidence. One example is *Currituck Assocs. Res. P'ship v. Hollowell*, 170 N.C. App. 399, 612 S.E.2d 386 (2005). In that case, the appellant asked for a stay pending appeal and accordingly requested a bond amount. In response, the appellee in *Hollowell* filed an affidavit stating that, if the stay is granted, it will be damaged by \$1,369,040 per year. *Id.* 401, 612 S.E.2d at 388. The trial court ordered a \$1 million bond and the appellant appealed. *Id.* The court of appeals held that, “While the amount of the bond lies within the discretion of the trial court, we must determine whether the record contains evidence to support the trial court’s decision.” *Id.* at 402, 612 S.E.2d at 388. Because the appellee’s affidavit in *Hollowell* did not provide sufficient evidence to support a \$1 million bond, the court of appeals reversed the trial court and remanded for further bond proceedings. *Id.* at 404, 612 S.E.2d at 389.

15. The same result should follow here, as DEP failed to provide any evidence or detail in support of its over-the-top damage estimates. For instance, DEP asserted that delay will result in “major equipment contracts cancellation costs of approximately \$40 million.” *Response ¶ 14.* Yet DEP did not reveal the identities of these major equipment contracts; the reasons why delay would require the cancellation of these contracts; or why the cancellation of these contracts would result in \$40 million in damages. Similarly, DEP claimed “an additional \$8 million in sunk development costs” from a delay, *id.*, but DEP supplied no evidence to support the allegation.

16. DEP also claimed that “if the project were delayed by two years pending completion of the appellate process,” then “the construction delay would amount to approximately \$50 million, assuming a 2.5% annual cost escalation rate.” *Id.* First, a

two-year appellate process is on the high end. Second, DEP provided no evidence to support its proffered “2.5% annual cost escalation rate.” *Id.* Third, DEP refused to explain the calculation resulting in a supposed \$50 million construction delay expense.

17. These are just a few examples. The point is that DEP baldly asserted, without any evidence or detail, that delay will result in millions of dollars in damages. But DEP’s bald assertions should not be accepted on blind faith—instead, these allegations must be supported by evidence.

18. Further, the Bond Order never cited to any facts to support why \$10 million is the proper bond amount, versus \$5 million or \$20 million or \$300,000 or any other amount. In the *Hollowell* case, this Court admonished the trial court for being presented with a damages estimate of \$1,369,040 yet somehow, without any supporting facts, rounding off the bond to \$1 million. *Hollowell*, 170 N.C. App. at 403, 612 S.E.2d at 403. The same applies here. Nothing in DEP’s submissions explains how \$10 million is the correct number. Again, the Bond Order is not supported by competent record evidence.

19. It follows that the Bond Order is defective. Yet it is the Bond Order that is the basis for DEP’s Motion to Dismiss. NC WARN and The Climate Times should not be barred from pursuing an appeal based on a defective Bond Order. Instead of dismissing this appeal, NC WARN and The Climate Times respectfully request that the Commission wait for the N.C. Court of Appeals to reach a decision on the Petitions for Writ of Certiorari and Supersedees.

20. Even if the Commission sees fit to dismiss the appeal of the CPCN Order for failure to post a bond, the appeal of the Bond Order should not be dismissed. In relevant part, the bond statute states,

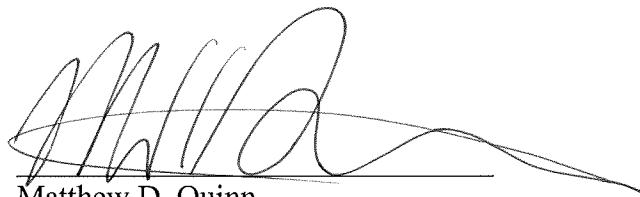
Any party or parties opposing, and appealing from, an order of the Commission which awards a certificate under G.S. 62-110.1 shall be obligated to recompense the party to whom the certificate is awarded No appeal from any order of the Commission which awards any such certificate may be taken by any party 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.

N.C. Gen. Stat. § 62-82(b). Thus, the requirement to post a bond arises for a “party or parties opposing, and appealing from, an order of the Commission which awards a certificate” of public convenience and necessity. *Id.* The appeal of the Bond Order is not itself a challenge to the CPCN Order and is therefore not subject to the requirement of a bond. Hence, the bond statute cannot justify DEP’s attempt to have the Notice of Appeal and Exceptions from the Bond Order dismissed.

CONCLUSION

For the reasons set forth above, NC WARN and The Climate Times respectfully request that DEP's Motion to Dismiss Appeal be denied or, in the alternative, a ruling on the Motion to Dismiss Appeal should be withheld until the N.C. Court of Appeals issues its decision on the Petitions for Writ of Certiorari and Supersedeas.

Respectfully submitted, this 3 day of June, 2016.



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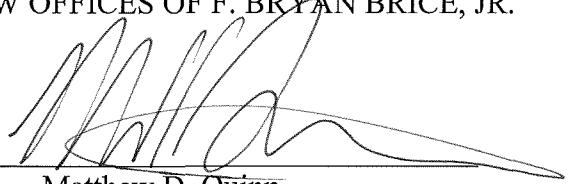
CERTIFICATE OF SERVICE

The undersigned certifies that on this day he served a copy of the foregoing NC WARN AND THE CLIMATE TIMES' RESPONSE TO MOTION TO DISMISS APPEAL upon each of the parties of record in this proceeding or their attorneys of record by electronic mail, or by hand delivery, or by depositing a copy of the same in the United States Mail, postage prepaid.

This the 3 day of June, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By:



Matthew D. Quinn