

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-2, SUB 1150

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Application of Duke Energy Progress, LLC,)
for a Certificate of Environmental Compatibility)
and Public Convenience and Necessity to)
Construct Approximately 11.5 Miles of New)
230-kV Transmission Line in Johnston County,)
North Carolina)
	ORDER DENYING
	MOTIONS FOR RELIEF

BY THE PRESIDING COMMISSIONER: On January 12, 2018, the Commission issued an Order Granting Certificate of Environmental Compatibility and Public Convenience and Necessity (CPCN) to Duke Energy Progress, LLC (DEP), for the construction of approximately 11.5 miles of new 230-kilovolt transmission line to provide power to the Cleveland-Matthews area of Johnston County, North Carolina. In that Order, the Commission carefully considered, but rejected, the allegations and legal arguments of pro se intervenor Oliver Canaday.

In response to Mr. Canaday's request for reconsideration of March 13, 2018, the Commission issued an Order Allowing Responses and Reply to Motion for Reconsideration, setting a schedule for DEP and the Public Staff to respond, and for Mr. Canaday to file a reply to any response.

On May 4, 2018, after considering comments from the parties, the Commission issued an Order denying Mr. Canaday's request for reconsideration.

On June 7, June 15, June 22, June 26, July 2, and July 12, 2018, Mr. Canaday filed various requests, motions, and objections. Construing these filings liberally, the Presiding Commissioner will treat these filings as a motion for further reconsideration of the Commission's January 12, 2018 Order; a motion to compel DEP and/or the Public Staff to provide certain documentation and/or information; a motion to postpone the effective date of the Commission's January 12, 2018 Order, pursuant to N.C.G.S. § 62-95; a motion for "review," in support of which Mr. Canaday cites to N.C.G.S. § 62-78; and a motion for "investigation," in support of which Mr. Canaday cites to N.C.G.S. §§ 62-37, 62-65, and 62-95.

On June 25, 2018, DEP responded to Mr. Canaday's June 7, June 15, and June 22, 2018 filings. DEP contends that Mr. Canaday's June 7, 2018 filing "appears to simply rehash Mr. Canaday's prior arguments." In addition, DEP argues that "Mr. Canaday does not credibly raise any change in circumstances or a misapprehension

or disregard of a fact that provides a basis for the Commission to rescind, alter, or amend a prior order as required under [N.C.G.S. §] 62-80.” As to Mr. Canaday’s June 15, 2018 filing, DEP contends that this filing

appears to move the Commission to rescind its [January 12, 2018] Order and, if this is an accurate reading of the filing, it is untimely and should be dismissed [on the grounds that the] Commission already considered and rejected Mr. Canaday’s arguments in the [January 12, 2018] Order and in the [May 4, 2018] Order, and Mr. Canaday has no valid legal basis for his requested relief from the Commission.

Finally, with respect to Mr. Canaday’s June 22, 2018 filing, DEP argues that

[t]he record in this matter is closed, and the Commission based its [January 12, 2018] Order upon careful consideration of the evidence submitted by DEP and Mr. Canaday, including detailed evidence supporting DEP’s selected transmission line route. As such, a motion to compel is untimely and improper at this stage of the proceeding. Furthermore, although this filings purports to be a motion to compel, it appears that Mr. Canaday’s motion is also another late attempt to have the Commission reconsider its [January 12, 2018] Order and/or [May 4, 2018] Order, and as such should be denied.

(footnote excluded).

DISCUSSION AND CONCLUSIONS

The Commission has gone to considerable lengths to accommodate Mr. Canaday’s participation in this proceeding, as is the Commission’s practice with pro se litigants. Mr. Canaday has now come to the point where the Commission can no longer address his concerns, and he must seek any further relief that may potentially be available to him by way of appeal to a higher court within the North Carolina General Court of Justice. The Presiding Commissioner expresses no view as to whether such an appeal would still be timely or otherwise properly preserved to afford appellate jurisdiction. Nonetheless, for the sake of finality in this proceeding and to clarify the record, the Presiding Commissioner addresses, to the extent reasonably possible and practicable, each of Mr. Canaday’s motions as follows:

Mr. Canaday’s Motion Pursuant to N.C.G.S. § 62-78

Although Mr. Canaday does not specifically request consideration and a ruling by the full Commission of the issues raised in his filings of June 7, June 15, June 22, June 26, July 2, and/or July 12, 2018 (together, Mr. Canaday’s filings), he does cite to N.C.G.S. § 62-78 in support of his myriad motions for relief. By its express language, N.C.G.S. § 62-78 does not apply to the instant proceeding because the provisions of that statute apply only to recommended decisions of the Commission and not to final orders

of the Commission. Pursuant to N.C.G.S. § 62-60.1(b), a unanimous decision by a panel of commissioners, as was the case here, is a final order of the Commission, and any aggrieved party has the right to seek review of the order under N.C.G.S. § 62-90. Pursuant to N.C.G.S. § 62-60.1(c), only if an order of a panel of three Commissioners is not unanimous would the order then be considered a recommended order subject to review by the full Commission in accordance with the procedures set forth in N.C.G.S. § 62-78. The Commission's January 12, 2018 Order in the present case was a unanimous order of the panel of three Commissioners and, thus, is a final order of the Commission. Therefore, in the context of N.C.G.S. § 62-60.1, any party aggrieved in the present case may seek review pursuant to N.C.G.S. § 62-90, not N.C.G.S. § 62-78. Nor may Mr. Canaday seek review of the panel's decision by the full Commission pursuant to the procedure set forth in N.C.G.S. § 62-60.1(b). Although applicable to a unanimous panel decision, as would be the case here, review by the full Commission may only be had upon "motion of any three commissioners not sitting on the panel, made within 10 days of issuance of such order or decision of the panel, with notice to parties of record." No such motion was made in the instant proceeding. For these reasons, the Presiding Commissioner concludes that Mr. Canaday's motion pursuant to N.C.G.S. § 62-78 should be denied.

Mr. Canaday's Motions for Further Reconsideration

An aggrieved party may also seek reconsideration of the Commission's order pursuant to N.C.G.S. § 62-80. The Commission's decision to rescind, alter, or amend an order upon reconsideration under N.C.G.S. § 62-80 is within the Commission's discretion, but cannot be arbitrary or capricious, and must be based on some change in circumstances or a misapprehension or disregard of a fact. E.g., State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 630, 514 S.E.2d 276, 280 (1999); State ex rel. Utilities Comm'n v. North Carolina Gas Service, 1280 N.C. App. 288, 293-94, 494 S.E.2d, 621, 626, rev. denied, 348 N.C. 78, 505 S.E.2d 886 (1998).

Although the outcome was not to his liking, Mr. Canaday already sought the relief available to him through his March 13, 2018 request for reconsideration. The Commission thoroughly considered all of Mr. Canaday's arguments and was correct in denying Mr. Canaday's initial Motion for Reconsideration for the reasons set forth in the Commission's May 7, 2018 order. The Presiding Commissioner concludes in the instant order, as the Commission did previously, that Mr. Canaday's filings do not present any change in circumstance or alleged disregard of a fact that would provide a basis for the Commission to rescind, alter, or amend its January 12, 2018 Order pursuant to N.C.G.S. § 62-80. The Presiding Commissioner further agrees with DEP that Mr. Canaday's filings present no new arguments. Rather, Mr. Canaday relies upon the arguments he previously made, either at the hearing during which he vigorously challenged DEP's application for a CPCN or through Mr. Canaday's initial Motion for Reconsideration and filings in support of that motion, or both. Therefore, the Commission fully considered all of Mr. Canaday's arguments in its January 12, 2018 Order and/or its May 4, 2018 Order, depending upon when each argument first was raised by Mr. Canaday. For these reasons, the Presiding Commissioner concludes that Mr. Canaday's

multiple motions for further reconsideration and/or rescission of the Commission's January 12, 2018 Order should be denied.

Motions to Compel Document Production/Investigation of DEP's Application

Mr. Canaday makes several motions to compel DEP and/or the Public Staff to produce various documents and/or information. In addition, Mr. Canaday moves that the Commission and/or the Public Staff investigate DEP's application for a CPCN. As an initial matter, the Presiding Commissioner reminds Mr. Canaday that the Public Staff

reviewed the application filed by [DEP for a CPCN in this proceeding]. As part of its review, the Public Staff met with impacted property owners and representatives of DEP, responded to phone calls from impacted residents, and reviewed responses to data requests submitted to the Company ... [and] [b]ased upon [the Public Staff's] investigation of the application, exhibits, and other matters of record, the Public Staff believes that [DEP] has complied with the requirements of G.S. 62-102, and has demonstrated as required by G.S. 62-105 that the proposed transmission line is necessary and that when compared with reasonable alternative courses of action, construction of the line in the proposed location is reasonable, that the estimated costs associated with the line are reasonable, that the impact of the line on the environment is justified considering the state of available technology, and that the environmental compatibility, public convenience, and necessity requires the transmission line.

Public Staff's October 16, 2017 Letter to Commission, Docket No. E-2, Sub 1150 (as also was cited to in the Commission's January 12, 2018 Order).

The Presiding Commissioner further notes that the hearing in this matter is closed, meaning that the record is closed to new evidence. The Presiding Commissioner concludes, therefore, that all of Mr. Canaday's motions to compel document production should be denied on the grounds that they were not timely raised. For this reason, and because the Public Staff already investigated DEP's application as discussed herein, the Presiding Commissioner also concludes that Mr. Canaday's motion that the Public Staff and/or the Commission should further investigate DEP's application also should be denied.

Motion for Relief Pending Review on Appeal Pursuant to N.C.G.S. § 62-95

Finally, Mr. Canaday requests postponement of the effective date of the Commission's January 12, 2018 Order, pursuant to N.C.G.S. § 62-95. Pursuant to N.C.G.S. § 62-95, the Commission has the authority to postpone the effective date of a Commission decision when an appeal is pending and justice so requires. Thus, a condition precedent for the availability of relief pursuant to N.C.G.S. § 62-95 is a pending appeal to the North Carolina Court of Appeals or the North Carolina Supreme Court, respectively. The Presiding Commissioner is not aware of any such case pending

appellate court review in this proceeding and, therefore, concludes that this motion is not ripe for consideration at this time. Consequently, Mr. Canaday's motion for relief pending review on appeal should be denied.

Mr. Canaday's Public Records Request

On July 3, 2018, Mr. Canaday filed a public records request addressed to the Custodian of Records of the North Carolina Utilities Commission, requesting copies of the following documents: (1) "the Public Staff investigation, exhibits, and other matters of Record"; and (2) "source document, copy, used to admit Exhibit No. 2 into the Record." The Commission's Custodian of Records responded to Mr. Canaday's request by letter dated July 16, 2018, stating in pertinent part as follows:

With respect to both of your requests, any potentially responsive documents in the NCUC's possession, custody, and control are located on the NCUC's online docket portal, to which you already have unrestricted access as a party to Docket No. E-2, Sub 1150. The NCUC does not have in its possession any records that are responsive to your request to which you do not already have immediate online access.

As you may be aware, the NCUC and the Public Staff of the NCUC (Public Staff) are separate, independent agencies that possess and maintain different records. As such, I suggest that you contact the records custodian of the Public Staff to request any potentially responsive documents that may be in the possession, custody, or control of the Public Staff.

On July 27, 2018, Mr. Canaday wrote directly to the Presiding Commissioner expressing his dissatisfaction with the Custodian of Records' response to his July 3, 2018 public records request.

The Presiding Commissioner, upon receiving Mr. Canaday's July 27, 2018 communication, directed that the letter be filed with the Chief Clerk and a copy provided to DEP. As to the substance of Mr. Canaday's letter, the Presiding Commissioner finds that the Custodian of Records' response to Mr. Canaday's initial public records request was complete and satisfactory pursuant to Chapter 132 of the North Carolina General Statutes, particularly N.C.G.S. § 132-6(a1). Therefore, the Presiding Commissioner concludes that no further response is necessary or appropriate. Nonetheless, the Presiding Commissioner reminds Mr. Canaday that the information submitted by DEP as a late-filed exhibit was at the instruction of the Presiding Commissioner during the course of the hearing in this matter, and no party objected either at the time of such instruction or within a reasonable amount of time following DEP's submission of the late-filed exhibit. Accordingly, Mr. Canaday may find responsive to his public records request some or all of the following records, all of which Mr. Canaday already has unrestricted access through the Commission's online docket portal: (1) Transcript of Testimony, Volume 2, Heard October 31, 2017; (2) the Commission's January 12, 2018 Order granting a CPCN to DEP; (3) the Commission's September 25, 2017 Order requiring DEP to provide

additional information; and (4) DEP's verified responses to the Commission's September 25, 2017 Order.

Based upon the foregoing and the entire record in this proceeding, the Presiding Commissioner denies all of Mr. Canaday's motions for relief. The Presiding Commissioner further notifies Mr. Canaday that he has exhausted all remedies and relief available to him that are within the jurisdiction of this Commission.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 3rd day of August, 2018.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in dark ink, appearing to read "Janice H. Fulmore". The signature is fluid and cursive, with the first name "Janice" being the most prominent part.

Janice H. Fulmore, Deputy Clerk