

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 RENEWED
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") Renewed 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 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) ("First Bond Order"). The First Bond Order 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 First Bond Order required a bond or undertaking of \$10,000,000.00. *Id.* at 7. However, it goes without saying that the Petitioners could not afford a \$10,000,000.00 bond, and could not honestly sign an undertaking representing the ability to pay \$10,000,000.00 in damages. Thus, the First Bond Order was tantamount to dismissing any appeal of the CPCN Order.

7. On May 19, 2015, NC WARN and The Climate Times filed a Petition for Writ of Certiorari with the N.C. Court of Appeals. The Petition for Writ of Certiorari asked the Court of Appeals to overturn the First Bond Order. Further, 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 First Bond Order.

8. Before the Court of Appeals ruled on the Petition for Writ of Certiorari, On May 31, 2016 DEP filed a Motion to Dismiss the Notice of Appeal and Exceptions of NC WARN and The Climate Times. The basis of DEP’s Motion to Dismiss was that NC WARN and The Climate Times did not post a \$10,000,000 bond or undertaking. NC WARN and The Climate Times filed a Response to the Motion to Dismiss on June 3, 2016, arguing that the bond amount was erroneous and that the appeal should not be dismissed while the Court of Appeals was reviewing the original Petition for Writ of Certiorari.

9. Before the Commission could rule on DEP’s Motion to Dismiss, the Court of Appeals, in an Order of June 7, 2016, allowed the Petition for Writ of Certiorari for the purpose of vacating and remanding the First Bond Order and requiring the Commission to set a bond based on competent evidence.

10. The Commission, on June 8, 2016, entered an Order that calendared a bond hearing for June 17, 2016. On June 14, 2016, NC WARN and The Climate Times filed a Response to Order Setting Hearing, in which they objected to the Commission's accepting evidence not previously submitted during its deliberation over the First Bond Order.

11. The bond hearing was held on June 17, 2016. Subsequently, on June 27, 2016, NC WARN and The Climate Times filed the Affidavit of William Powers concerning the bond issue.

12. On July 9, 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Second Bond Order"). The Second Bond Order required that NC WARN and The Climate Times, to appeal the CPCN Order, post a bond or undertaking of \$98 million within five (5) days. Obviously the Petitioners could not afford a \$98,000,000.00 bond, and could not honestly sign an undertaking representing the ability to pay \$98,000,000.00 in damages, so no bond or undertaking was filed within the 5-day deadline.

13. On July 20, 2016, DEP filed a Renewed Motion to Dismiss the Notice of Appeal and Exceptions of NC WARN and The Climate Times.

ARGUMENT

14. DEP's Renewed Motion to Dismiss is premised upon the Second Bond Order. However, on or before August 8, 2016, NC WARN and The Climate Times will be filing a Notice of Appeal and Exceptions as to the Second Bond Order; and also on or before August 8, 2016, NC WARN and The Climate Times will file with the N.C. Court of Appeals a Petition for Writ of Certiorari as to the Second Bond Order. Thus the

Second Bond Order is the subject of a strong appellate challenge. If DEP's Renewed Motion to Dismiss is granted, it is quite realistic that the Court of Appeals reverses the Second 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 Renewed Motion to Dismiss be deferred until the appellate process runs its course. The remainder of this Response is dedicated to demonstrating the legitimacy of the challenge to the Second Bond Order.

15. 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).

16. 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.”

17. The \$98 million bond required by the Second Bond Order was based upon the following damage estimates: “The amount of \$98 million represents \$40 million in potential damages related to the cancellation costs of three major equipment contracts, \$8 million in potential damages related to sunk development costs, and \$50 million in increased project costs for the increased cost of labor and materials.” *Second Bond Order* p 9. Yet each of these damage estimates is deficient and unsupported by record evidence.

18. Consider first the estimate of \$40 million in potential damages related to the cancellation of costs of three major equipment contracts. Neither DEP nor the Second Bond Order considered whether these contracts could be extended, or cancelled without penalty, or cancelled for damages amounting to less than \$40 million. Further, DEP signed these contracts on May 31, 2016, after NC WARN and The Climate Times filed the Notice of Appeal and Exceptions with the Commission in regards to the application and while the parties to this docket were still in the process of litigation over the bond amount. *See Powers Aff.* ¶ 5. Thus, when it signed these contracts, DEP was aware that NC WARN and The Climate Times had not yet exhausted their legal remedies and still assumed the risk that it would not receive a certificate of public convenience and necessity. The financial burden of such a decision should fall on the company and its shareholders, not on ratepayers or parties seeking appellate review of the application.

19. As to the \$8 million estimate for sunk development costs, DEP is exercising mere speculation unsupported by record evidence. DEP’s witness testified: “My estimate would be is that if we were to delay the project for two years, we would

have to rework a significant amount of this development effort” *Transcript of Bond Hearing* p 46. DEP did not testify, however, that all of these development costs would be sunk, or that development work to date could not be reused.

20. Also unsupported is the \$50 million estimate for increased project costs for the increased cost of labor and materials. DEP arrived at this number by assuming a 2.5 percent annual cost escalation over a 2-year appellate delay. *Id.* at 48-49. However, NC WARN and The Climate Times submitted an Affidavit from William E. Powers, a consulting and environmental engineer with over 30 years of experience in power plant operations and environmental engineering. *Powers Aff.* ¶ 1. Mr. Powers testified, citing industry statistics, that “industrial construction costs are lower in 2016 than they were in 2014,” and “[t]he current trend in plant construction costs . . . is negative.” *Id.* ¶ 7. Thus, “[a] 24-month delay may in fact save DEP substantial money.” *Id.* No evidence in the record contradicts Mr. Powers’s testimony.

21. Perhaps most importantly, requiring a \$98 million bond is completely prohibitive of appeals and is therefore unconstitutional. Article I, Section 35, of the North Carolina Constitution is an Open Courts provision which states that “[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.” Obviously no public interest group, including NC WARN and The Climate Times, could post a \$98 million bond. Hence the Second Bond Order deprives parties of the right to access this State’s appellate courts.

22. Undersigned counsel is aware of no case in this State addressing whether monetary fees (other than standard filing fees) violate the Open Courts provision of the

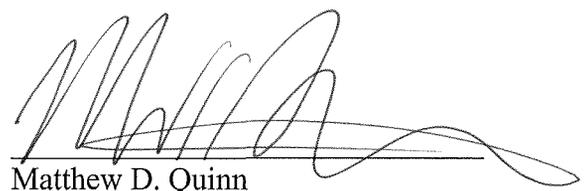
North Carolina Constitution. However, substantial case law throughout the nation provides that substantial monetary fees constitute a violation of open courts laws in numerous states. *E.g.*, *Fent v. State ex rel. Dept. of Human Servs.*, 236 P.3d 61 (OK 2010); *G.B.B. Invs. Inc. v. Hinterkopf*, 343 So. 2d 899 (Fla. Ct. App. 1977); *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419 (Fla. 1992); *In re Estate of Dionne*, 518 A.2d 178 (N.H. 1986); *R. Commc'ns Inc. v. Sharp*, 875 S.W.2d 314 (Tex. 1994); *Jensen v. State Tax Comm'n*, 835 P.2d 965 (Utah 1992). In its forthcoming appeals—which will be filed on or before August 8, 2016—NC WARN and The Climate Times will argue that, based on the North Carolina Constitution's Open Courts provision, the Second Bond Order is unconstitutional.

23. Therefore, the \$98 million bond is unsupported by record evidence or essential findings of fact, and furthermore, violates the Open Courts clause of the State Constitution. It follows that the Second Bond Order is defective. Yet it is the Second Bond Order that is the basis for DEP's Renewed Motion to Dismiss. NC WARN and The Climate Times should not be barred from pursuing an appeal based on a defective Second Bond Order. Instead of dismissing this appeal, NC WARN and The Climate Times respectfully request that the Commission wait for the forthcoming appellate process to run its course.

CONCLUSION

For the reasons set forth above, NC WARN and The Climate Times respectfully request that DEP's Renewed Motion to Dismiss Appeal be denied or, in the alternative, a ruling on the Renewed Motion to Dismiss Appeal should be withheld until the forthcoming appellate process runs its course.

Respectfully submitted, this the 26th day of July, 2016.



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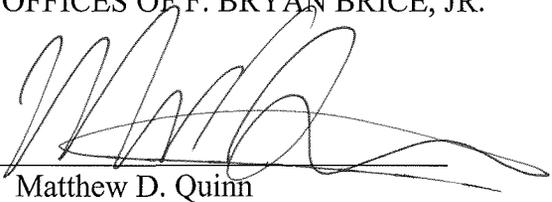
CERTIFICATE OF SERVICE

The undersigned certifies that on this day he served a copy of the foregoing NC WARN AND THE CLIMATE TIMES' RESPONSE TO RENEWED 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 26th day of July, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: _____



Matthew D. Quinn