

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 THE CLIMATE
Certificate of Public Convenience and Necessity) TIMES'S VERIFIED REPLY TO
to Construct a 752 Megawatt Natural Gas-Fueled) DUKE ENERGY PROGRESS'S
Electric Generation Facility in Buncombe County) RESPONSE TO MOTION TO
Near the City of Asheville) SET BOND

NOW COMES NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-82(b) and the North Carolina Utilities Commission's ("Commission") April 27, 2016, *Procedural Order on Bond*, and file the present Verified Reply to Duke Energy Progress LLC's ("DEP") Response to Motion to Set Bond. NC WARN and The Climate Times respectfully show unto the Commission the following:

1. DEP's response is an attempt to bully NC WARN and The Climate Times away from an appeal. DEP has the burden to quantify and substantiate the bond amount necessary to secure against damages from appellate-related delays in the initiation of construction. Instead of meeting this burden, DEP is attempting to circumvent the appellate process by hinting that delay might occur and then throwing out unsubstantiated and extravagant estimates at the expense of such a delay.

2. The most striking thing about DEP's response is what is absent: an allegation that an appeal will cause a delay in the initiation of construction. On the one hand, DEP claims that it is "irrelevant" that NC WARN and The Climate Times have not

requested an injunction. *DEP's Response* ¶ 9. Yet on the other hand, DEP acknowledges that it does not know whether delay would result from an appeal by NC WARN and The Climate Times. *DEP's Response* ¶ 10. In other words, DEP wants things both ways—it intentionally declines to assert that an appeal will cause delay (because, as we are all aware, DEP will not delay the construction), yet DEP simultaneously wants the Commission to ignore that no injunction has been sought. DEP's failure to clearly state that an appeal will cause delay in the beginning of construction reveals its true purpose to use the bond requirement to close the courthouse doors.

3. In fact, it is quite important that NC WARN and The Climate Times seek no injunction. DEP mockingly states that “[o]f the seven Intervenors who opposed all or parts of DEP’s . . . application, Potential Appellants [NC WARN and The Climate Times] are the only two who . . . intend to potentially file a notice of appeal.” *DEP's Response* ¶ 2. The implication is that an appeal is doomed to failure. If DEP is so certain that an appeal will fail, then it has no grounds to delay construction in the absence of an injunction. Indeed, after a thorough case law review, undersigned counsel is aware of zero (0) instances where the Commission ordered a significant appellate bond without an injunction in an appeal from a certificate of public convenience and necessity. The lack of a motion for injunction makes DEP's request for a \$50,000,000.00 bond completely unprecedented and transparently an attempt to intimidate parties from filing an appeal.

4. DEP makes threatening claims that an appeal will put ratepayers at risk, and cites these claims as reason for setting a prohibitively high bond. However, without an injunction in place requiring that the company delay the start of construction, any decision by the company to delay (however unlikely) is simply a business decision. It

should be the responsibility of the company and its shareholders—not ratepayers—to absorb the cost of such business decisions.

5. In addition to DEP’s refusal to make the statement that an appeal will result in delays, DEP failed to provide any evidence or detail in support of its over-the-top damage estimates. For instance, DEP asserts that delay will result in “major equipment contracts cancellation costs of approximately \$40 million.” *DEP’s Response* ¶ 14. Yet DEP does 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 claims “an additional \$8 million in sunk development costs” from a delay, *id.*, but DEP supplies no evidence to support the allegation. Precisely which development costs would be sunk due to delay? What evidence supports the assertion that these costs would be completely sunk, as opposed to only partially sunk, because of a delay?

6. DEP also claims 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.

7. NC WARN and The Climate Times could, but will not, go on and on about the lack of evidence in DEP’s reply. 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. Indeed, in a recent rate-increase

proceeding, DEP's related entity, Duke Energy Carolinas LLC, committed significant "accounting errors" that rightly resulted in the Commission being "quite disturbed and concerned." *Order Granting General Rate Increase, E-7, Sub 1026, p 65*. This history shows that DEP's unsubstantiated damage estimates should be treated with extreme skepticism.

8. Further, there are many reasons why DEP will experience these same expenses from construction delays caused by issues other than an appeal. For example, the facility appears to plan construction of the natural gas units on top of an existing coal ash site. This creates uncertainty about the structural condition of the site and is therefore susceptible to delay. As another example, there is an extensive permitting process forthcoming that might cause delay, including air quality permitting. Prior to the issuance of an air quality permit, the potential permittee is limited on what types of construction can begin. N.C. Gen. Stat. § 143-215.108A(a). Any bond deliberation should recognize that significant construction delays happen with or without appeal, yet DEP does not typically claim such extensive delay expenses.

9. In addition to the above errors, DEP misstated several aspects of applicable law. For instance, DEP stated that "this statute [N.C. Gen. Stat. § 62-82(b)] provides for the bond to secure the payment of damages" from "any potential construction cost increases caused by unsuccessful appeal-related delays." *DEP's Response* ¶ 4 (emphasis added). This is inaccurate. The statute requires not just "appeal-related delays" resulting in "any potential construction cost increases"; instead, the statute requires an appeal-related delay specific to the initiation of construction:

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

N.C. Gen. Stat. § 62-82(b) (emphasis added). Since DEP did not represent to the Commission that an appeal will result in a “delay in beginning the construction of the facility,” no bond should be required.

10. DEP also misstated the terms of the Mountain Energy Act. DEP’s Response stated that “the Mountain Energy Act specifically provides that the appeal bond provisions of N.C. Gen. Stat. § 62-82(b) apply to any appeals from a CPCN order approving new gas-fired replacement generation at DEP’s Asheville Plant.” *DEP’s Response* ¶ 5. This is not correct. The Mountain Energy Act sets up a unique process for the Commission’s deliberation on the proposed Asheville facility, hence the Act exempts the Asheville project from the generally applicable process, described in N.C. Gen. Stat. § 62-82(a), for certificates of public convenience and necessity. The Act says nothing whatsoever about the generally applicable appellate guidelines of section 62-82(b). Hence it is wrong for DEP to state that the Act says anything “specifically” about subsection (b) when the only provision mentioned in the Act is subsection (a).

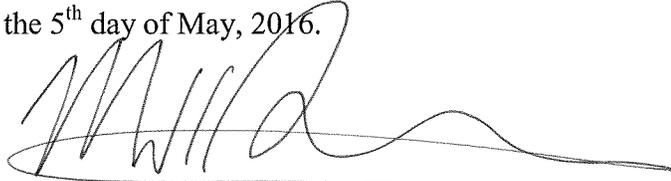
11. In its Response, DEP makes light of the fact that NC WARN and The Climate Times previously indicated that they only “may” file a notice of appeal. *DEP’s Response* ¶ 2. It is unfortunate that DEP takes such a flippant attitude to the use of the word “may,” because it is precisely the prospect of a huge bond requirement that required the use of that word. No public interest group can post the \$50 million bond proposed by DEP. DEP naturally knows this, and is angling for a bond that will make appellate review impossible. This is particularly unfortunate in the present case, as the process was

subject to the expedited timeline of the Mountain Energy Act. The combination of an expedited timeline and no appellate review not only creates the possibility of uncorrectable error, but also undermines transparency. DEP claims that NC WARN and The Climate Times are “ignor[ing] . . . that they control . . . whether they are ultimately required to pay damages pursuant to N.C. Gen. Stat. § 62-82(b).” *DEP’s Response* ¶ 8. This is exactly backwards—DEP is ignoring that there can be no appellate process if the bond is prohibitively high.

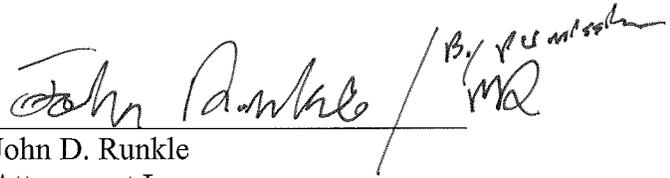
12. DEP refused to state that an appeal would result in the delay of the initiation of construction. Then, to scare off potential appellants, DEP articulated extravagant yet evidence-free guesses at potential damages from a delay that will not even happen. DEP should not be permitted to use these scare tactics to absolve itself of appellate review. DEP failed to meet its burden of proving that a bond is necessary to secure against damages flowing from appeal-related delays in the initiation of construction. For these reasons and others, the Commission should follow the example of N.C. Rule of Appellate Procedure 17(a) and order a \$250.00 bond.

THEREFORE, NC WARN and The Climate Times respectfully request a bond pursuant to N.C. Gen. Stat. § 62-82(b) of \$250.00, and such other and further relief as the Commission deems just and proper.

Respectfully submitted, this the 5th day of May, 2016.



Matthew D. Quinn
N.C. State Bar No.: 40004
Law Offices of F. Bryan Brice, Jr.
127 W. Hargett Street, Suite 600
Raleigh, NC 27601
(919) 754-1600 – telephone
(919) 573-4252 – facsimile
matt@attybryanbrice.com



John D. Runkle
Attorney at Law
2121 Damascus Church Road
Chapel Hill, NC 27516
(919) 942-0600 – telephone
jrunkle@pricecreek.com

Counsel for NC WARN & The Climate Times

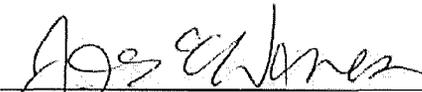
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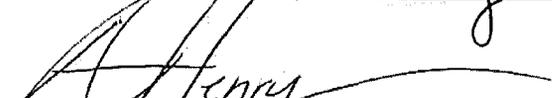
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Near the City of Asheville)

I, James Warren, Executive Director of NC WARN, verify that the contents of the above filing in this docket are true to the best of my knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.



James Warren
Date 5/4/16

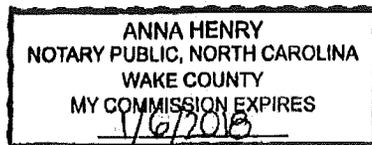
Sworn to and subscribed before me
This the 16th day of May, 2016



Notary Public

My commission expires: 1/6/2018

(seal)

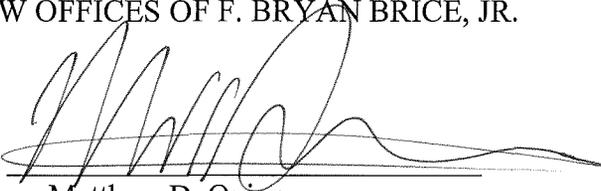


CERTIFICATE OF SERVICE

The undersigned certifies that on this day he served a copy of the foregoing NC WARN AND THE CLIMATE TIMES' VERIFIED REPLY TO DUKE ENERGY PROGRESS'S RESPONSE TO MOTION TO SET BOND 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 5th day of May, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: 

Matthew D. Quinn