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September 9, 2016

VIA ELECTRONIC FILING

Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

**RE: Duke Energy Progress, LLC's Verified Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal Filed by NC WARN and the Climate Times
Docket No. E-2, Sub 1089**

Dear Chief Clerk:

I enclose Duke Energy Progress, LLC's Verified Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal Filed by NC WARN and the Climate Times for filing in connection with the referenced matter.

Thank you for your attention to this matter. If you have any questions, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lawrence B. Somers', written over a white background.

Lawrence B. Somers

Enclosures

cc: Parties of Record

OFFICIAL COPY

Sep 09 2016

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1089

In the Matter of)	
)	
Application of Duke Energy Progress, LLC for a)	DUKE ENERGY PROGRESS
Certificate of Public Convenience and Necessity)	LLC's VERIFIED MOTION TO
To Construct a 752-MW Natural Gas-Fueled)	DISMISS SECOND NOTICE OF
Electric Generation Facility in Buncombe)	APPEAL AND RENEWED
County Near the City of Asheville)	MOTION TO DISMISS NOTICE
)	OF APPEAL FILED BY NC
)	WARN AND THE CLIMATE
)	TIMES
)	

NOW COMES Duke Energy Progress, LLC (“DEP” or “the Company”), pursuant to N.C. Gen. Stat. §62-82(b), N.C. Gen. Stat. § 62-90, and North Carolina Rule of Appellate Procedure 25(a), and moves to dismiss the Notice of Appeal and Exceptions filed on August 18, 2016 by NC WARN and The Climate Times (collectively, “NC WARN”) and respectfully renews its Verified Motion to Dismiss the Appeal of the Second Bond Order filed on August 12, 2016. Although DEP has filed numerous pleadings outlining the history of this case and they have been outlined in multiple orders of the Commission, for ease of reference, relevant portions of the history of this case are, once again, stated as follows:

1. On March 28, 2016, the Commission issued its *Order Granting Application in Part, with Conditions, and Denying Application in Part* (“CPCN Order”), holding that the public convenience and necessity require the construction of the two 280 MW combined cycle units proposed as part of DEP’s Western Carolinas Modernization Project.

2. On April 25, 2016, along with a Motion to Set Bond, NC WARN filed a Motion for an Extension of Time to File Notice of Appeal and Exceptions. The Commission granted the motion, extending the period to file notice of appeal until May 27, 2016.

3. On May 10, 2016, The Commission issued its *Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)* (“First Appeal Bond Order), which required NC WARN to file an executed undertaking or bond on or before May 27, 2016 and prior to filing their Notice of Appeal.

4. On May 19, 2016, NC WARN filed a Petition for a Writ of Certiorari, a Petition for a Writ of Supersedeas, and a Motion for Temporary Stay with the North Carolina Court of Appeals, seeking review of and temporary relief from the Commission’s Appeal Bond Order. On May 27, 2016, NC WARN filed a Notice of Appeal, without posting an appeal bond in violation of the N.C. Gen. Stat. § 62-82(b) and the First Appeal Bond Order.

5. On May 31, 2016, DEP filed a Response to Petition for Writ of Certiorari and Petition for Writ of Supersedeas with the Court of Appeals and filed with the Commission a Motion to Dismiss NC WARN’s Appeal of the CPCN Order for failure to file a bond.

6. On June 3, 2016, NC WARN filed a response opposing the motion to dismiss.

7. On June 7, 2016, the Court of Appeals allowed NC WARN’s Petition for Certiorari for the limited purpose of vacating and remanding the Commission’s Order setting bond, stating, “the Commission shall set the bond in an amount that is in accordance with N.C. Gen. Stat. § 62-82 (b) and based upon competent evidence.”

8. On June 8, 2016, the Commission issued an Order Setting Hearing on the issue of setting an undertaking or bond pursuant to N.C. Gen. Stat. § 62-82(b), requiring both NC WARN and DEP to sponsor witnesses to testify on the appropriate amount of the bond.

9. On June 14, 2016, NC WARN filed a motion to prevent the Commission from allowing additional evidence at the hearing, or to provide NC WARN ten more days to submit additional evidence.

10. On June 17, 2016, the Commission denied the Motion of NC WARN and proceeded with the evidentiary hearing. Despite the Commission's Order that both DEP and NC WARN sponsor witnesses on the bond amount, NC WARN failed to present any witnesses, and even objected when DEP called NC WARN Executive Director James Warren to testify.

11. On July 8, 2016, the Commission issued an Order Setting Undertaking or Bond pursuant to N.C. Gen. Stat. § 62-82(b) ("Second Bond Order") setting the amount of the bond or undertaking at \$98 million and allowing NC WARN until July 13, 2016 to file the bond or undertaking with the Commission.

12. On July 20, 2016, DEP filed a Renewed Motion to Dismiss the Appeal for NC WARN for failure to perfect their appeal by not filing the prerequisite bond with the Commission.

13. On July 28, 2016, NC WARN filed a Notice of Appeal and exceptions as to the Second Bond Order.

14. On August 2, 2016, the Commission issued its *Order Dismissing Appeal for Failure to Comply with Bond Prerequisite*, which dismissed NC WARN's appeal of the CPCN Order ("Dismissal Order").

15. On August 4, 2016, NC WARN filed a Proposed Record on Appeal. The record on appeal addressed multiple issues, including NC WARN's appeal to the CPCN Order, which was dismissed by this Commission on August 2, 2016. On August 12, 2016, DEP filed a Verified Motion to Dismiss Appeal of Second Bond Order.

16. On August 23, 2016, NC WARN filed a response in opposition to DEP's Verified Motion to Dismiss Appeal of Second Bond Order.

17. On August 18, 2016, NC WARN filed yet another Notice of Appeal and Exceptions as to the CPCN Order and Dismissal Order, once again without posting a bond or undertaking in violation N.C. Gen. Stat. § 62-82(b) and the Orders of this Commission. NC WARN stated, "NC WARN acknowledges that an appeal of the CPCN Order has been dismissed once before, however the present Notice of Appeals and Exceptions is designed to preserve appellate review in the event the Second Bond Order and Dismissal Order are reversed."¹ NC WARN further stated it would file a Petition for Writ of Certiorari with N.C. Court of Appeals because it believed "the law is unclear on whether the correct route is to appeal though" a notice of appeal or a petition for certiorari.²

18. On August 18, 2016, NC WARN filed a Petition for Certiorari with the Court of Appeals, which sought to have the Court of Appeals review (1) the CPCN Order, (2) the Second Bond Order, and (3) the Dismissal Order. DEP and the Public Staff filed responses in opposition with the Court of Appeals on September 2, 2016.

19. On September 6, 2016, the North Carolina Court of Appeals issued its Order denying NC WARN's Petition for Writ of Certiorari in its entirety. As to the Court of Appeals, this ruling is final as to the issues in NC WARN's petition.³ Currently, NC WARN has two notices of appeal pending at the Commission, and neither has yet been docketed with the Court

¹ August 18, 2016 notice of appeal at pp. 1-2. Effectively, NC WARN was appealing the same Order that had previously been dismissed. Although the Second Bond Order was subsequently issued by the Commission, NC WARN still has failed to file a bond or undertaking.

² *Id.* at p. 1.

³ "Once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case." *North Carolina Nat. Bank v. Virginia Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983).

of Appeals. Those appeals are NC WARN's Notice of Appeal and Exceptions to the Second Bond Order filed July 28, 2016, and NC WARN'S Notice of Appeal and Exceptions filed August 18, 2016, which applies to the CPCN Order and the Dismissal Order. DEP currently has a Motion to Dismiss NC WARN'S July 28, 2016 Notice of Appeal and Exceptions as to the Second Bond Order pending before this Commission, and that Motion to Dismiss is incorporated herein by reference.

ARGUMENT

Through a series of repeated appeals and petitions, NC WARN is impermissibly and desperately attempting to delay the construction of the Western Carolinas Modernization Project, as approved by this Commission on March 28, 2016, and as affirmed by the Court of Appeals on September 6, 2016. NC WARN has once again failed to file the necessary bond or undertaking as a condition to filing an appeal under N.C. Gen. Stat. § 62-82(b),

(b) Compensation for Damages Sustained by Appeal from Award of Certificate under G.S. 62-110. *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 its most recent Notice of Appeal as to the CPCN Order, NC WARN acknowledged that “the appeal of the CPCN Order has been dismissed once before, however, the present Notice of Appeal is designed to preserve appellate review in the event the Second Bond Order and Dismissal Order are reversed.” Although NC WARN acknowledged the dismissal of its earlier

appeal on the same issues, it has nonetheless filed the same appeal again in defiance of Commission Orders and N.C. Gen. Stat. § 62-82(b).

In its August 18, 2016 Petition for Certiorari to the Court of Appeals, NC WARN consolidated its arguments made over the course of many months and multiple filings. It argued that the CPCN Order was not supported by competent, material and substantial evidence, that the Mountain Energy Act is unconstitutional, that the Second Bond Order violated the Open Courts Clause of the North Carolina Constitution and was similarly not supported by competent, material and substantial evidence, and finally that the Dismissal Order should be reversed because it was based on a legally deficient Second Bond Order. In its September 6, 2016 Order, the Court of Appeals denied NC WARN's petition in its entirety, summarily rejecting each of the arguments raised by NC WARN. The Court's decision effectively ends the issues that NC WARN has chosen to argue repeatedly. Once an appellate court rules on a question, the decision of that court becomes the law of the case and governs the question not only when the case is remanded to the trial court, but on a subsequent appeal of the same case. The seminal case for this principal is *North Carolina Nat. Bank v. Virginia Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983), which has been cited by the appellate courts in North Carolina almost 30 times.

This is DEP'S fourth motion to dismiss an appeal in this Docket. In this Motion, DEP is asking this Commission to dismiss NC WARN's appeal filed August 18, 2016 that includes an appeal of the CPCN Order⁴ (which this Commission has already dismissed once) and the Notice of Appeal of the Second Bond Order filed on July 28, 2016 (to which DEP has already filed a

⁴ This Commission dismissed a previous Appeal by NC WARN on this issue. *Order Dismissing Appeal for Failure to Comply with Bond Prerequisite*, August 8, 2016.

previous Motion to Dismiss). Further, DEP asks the Commission to order that the proposed record on Appeal filed by NC WARN on August 4, 2016 is invalid because it was filed in connection with the appeal of an Order that had been previously dismissed by the Commission.⁵ In DEP's view, NC WARN has deliberately attempted to delay resolution of this Docket by filing duplicative and frivolous appeals at the risk of severe economic consequences to DEP's customers. The Commission is well aware of the time sensitivity associated with the construction of the new gas-fired generation units in Asheville and the commensurate retirement of the existing Asheville coal units. DEP will not repeat the compelling reasons justifying a quick resolution of these pending issues because the Commission's CPCN Order details the time sensitivity of this project with particularity. NC WARN has engaged in a charade in this docket, and it is time for the charade to end.

NC WARN's Notices of Appeal should be dismissed pursuant to North Carolina Court of Appeals Rule 25(a). Rule 25(a) provides, in pertinent part, as follows:

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. (Emphasis added)

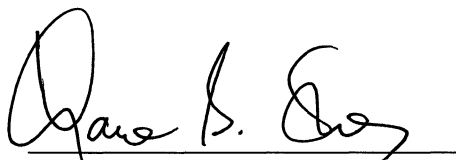
Because NC WARN's Notice of Appeal has not yet been filed in the Court of Appeals (as the appeals have not yet been docketed), DEP's motion to dismiss is properly before this Commission pursuant to Rule 25(a) and should be granted. To the extent required under Rule 25(a), DEP asks that this verified motion also be treated as an affidavit to show the failure of NC WARN to take timely action to perfect their appeal. DEP reiterates to the Commission that it

⁵ The record on appeal also addresses NC WARN's appeal of the Second Bond Order, which is still before the Commission subject to a Motion to Dismiss.

currently has pending a Motion to Dismiss of NC WARN's Notice of Appeal of the Second Bond Order. DEP again incorporates that motion by reference.

WHEREFORE, for all the foregoing reasons, DEP respectfully requests that the Commission dismiss NC WARN's Notice of Appeal and Exceptions filed August 18, 2016, NC WARN'S Notice of Appeal of the Second Bond Order filed July 28, 2016 and order that the Proposed Record on Appeal and Documentary Exhibits filed on August 4, 2016 are invalid because no valid appeals are currently pending.

Respectfully submitted, this 9th day of September, 2016.



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ATTORNEYS FOR DUKE ENERGY PROGRESS, LLC

State of North Carolina

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VERIFICATION

County of Wake

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The undersigned, Lawrence B. Somers, Deputy General Counsel for Duke Energy Corporation personally appeared before me who after first being duly sworn, said that he is authorized to make this verification, that he has read the foregoing motion, and knows the contents thereof; and that the same are true and correct to the best of his knowledge, information and belief.

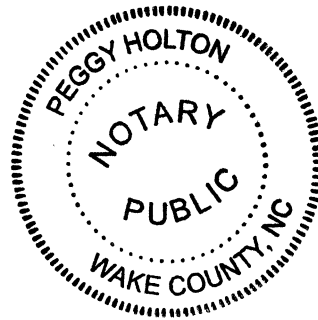
Lawrence B. Somers

Lawrence B. Somers

Sworn and subscribed to me this 9th day of September 2016.

Peggy Holton
Notary Public

Seal:



My Commission Expires
12/22/2016

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Progress, LLC's Verified Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal Filed by NC WARN and the Climate Times in Docket No. E-2, Sub 1089, has been served by electronic mail, hand delivery or by depositing a copy in the United States mail, postage prepaid to the following parties:

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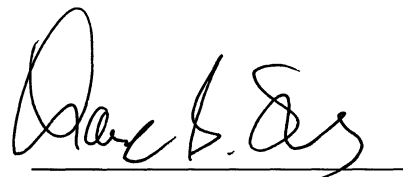
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This the 9th day of August, 2016



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