

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 DEP'S
Electric Generation Facility in Buncombe County)	OBJECTIONS TO PROPOSED
Near the City of Asheville)	RECORD ON APPEAL

NOW COME NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-82(b), N.C. Gen. Stat. § 62-90, and North Carolina Rules of Appellate Procedure 9 and 11, and serve the following Response to Duke Energy Progress LLC's ("DEP") Objection to Proposed Record on 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. On April 25, 2016, NC WARN and The Climate Times filed a Motion to Set Bond pursuant to N.C. Gen. Stat. § 62-82(b). 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 May 2, 2016, DEP filed a Response to the Motion to Set Bond. DEP recommended an impossible \$50 million bond.

4. 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 required a bond or undertaking of \$10,000,000.00. *Id.* at 7. It goes without saying that the Petitioners could not afford a \$10,000,000.00 bond. Thus, the First Bond Order was tantamount to dismissing any appeal of the CPCN Order.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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 NC WARN and The Climate Times 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.

11. On July 20, 2016, DEP filed a Renewed Motion to Dismiss the May 27, 2016 Notice of Appeal and Exceptions that challenged the CPCN Order. NC WARN and The Climate Times filed their Response on July 26, 2016.

12. On July 29, 2016, NC WARN and The Climate Times filed a Notice of Appeal and Exceptions as to the Second Bond Order.

13. On August 1, 2016, NC WARN and The Climate Times served a proposed record on appeal as to the following two (2) appeals: (a) the Notice of Appeal and Exceptions, filed on May 27, 2016, which challenged the CPCN Order; and (b) the Notice of Appeal and Exceptions, filed on July 28, 2016, which challenged the Second Bond Order.

14. On August 2, 2016, the day following service of the proposed record on appeal, the Commission entered an Order Dismissing Appeal (“Dismissal Order”) as to the May 27, 2016 Notice of Appeal and Exceptions that challenged the CPCN Order. The Dismissal Order did not dismiss the July 28, 2016 Notice of Appeal and Exceptions as to the Second Bond Order.

15. On August 12, 2016, DEP filed a Motion to Dismiss the Appeal of the Second Bond Order. NC WARN and The Climate Times filed a Response on August 23, 2016.

16. Because the proposed record on appeal as to the Second Bond Order was served on August 1, 2016, pursuant to Appellate Rule 11, the deadline for DEP to object to the proposed record on appeal was September 6, 2016. After no objections were received, on September 8, 2016 counsel for NC WARN and The Climate Times contacted DEP and inquired whether DEP wanted to offer objections or proposed amendments to the proposed record on appeal. *Ex. A.* In a response dated September 8, 2016, DEP indicated that it contested the entire proposed record and therefore had no feedback to offer, at least until a ruling on its motions to dismiss. *Ex. B.*

17. On September 9, 2016, DEP filed a Renewed Motion to Dismiss the Appeal of the Second Bond Order, and NC WARN and The Climate Times filed a Response on September 14, 2016.

18. On September 13, 2016, DEP filed an Objection to Proposed Record on Appeal concerning the appeal of the Second Bond Order.

ARGUMENT

19. DEP appears to argue that NC WARN and The Climate Times never filed a proposed record on appeal as to the appeal of the Second Bond Order. DEP's Objection to Proposed Record on Appeal states, "NC WARN's Proposed Record on Appeal addresses the CPCN Order and related constitutional issues. Thus, the Proposed Record on Appeal is clearly addressed to the Notice of Appeal, which was dismissed by the Commission on August 2, 2016." *DEP's Objection* p 4.

20. DEP is clearly wrong that the proposed record on appeal challenges only the CPCN Order. Attached as Exhibit C are excerpts from the proposed record on appeal that demonstrate that the proposed record encompassed the Second Bond Order. For example, the proposed record on appeal stated, "Thus, there are two notices of appeal contained within this Record: (1) the Notice of Appeal and Exceptions filed on 27 May 2016 and challenging the First Bond Order and the CPCN Order, and (2) the *Notice of Appeal and Exceptions filed on 28 July 2016 and challenging the Second Bond Order.*" *Ex. C, Excerpts from Proposed Record* pp 3-4 (emphasis added).

21. Furthermore, in the section of the Proposed Record entitled "NC WARN's Proposed Issues on Appeal," the Proposed Record indicated that the following issues would be raised on appeal: "Was the Commission's Second Bond Order supported by

competent record evidence?"; "Was the Commission's Second Bond Order arbitrary and capricious?"; "Do the First and Second Bond Orders violate the North Carolina Constitution?" *Ex. C*, p 762.

22. DEP also argues that there should be no proposed record on appeal because the appeal of the CPCN Order was dismissed. However, the CPCN Order was dismissed because no bond was posted, and there is no bond requirement for appeals from a bond order. Instead, the bond statute by its express terms applies only to appeals from a certificate of public convenience and necessity. The bond statute states, in relevant part:

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 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).

23. Thus, the bond requirement exists only for an "appeal from any order of the Commission which awards any such certificate." *Id.* Yet NC WARN and The Climate Times' July 29, 2016 Notice of Appeal was related to only the Second Bond Order and not the CPCN Order. Hence, there is no bond requirement. As a result, the dismissal of the CPCN Order should have no impact upon the legitimacy of the appeal of the Second Bond Order. If the reviewing court determines the bond requirement is unconstitutional or otherwise an unlawful constraint on NC WARN and The Climate

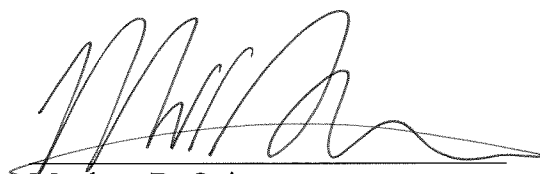
Times' access to the courts, it would be necessary to review the arguments on the merits of the CPCN Order and therefore relevant parts of the record reflecting the CPCN Order should be included.

24. Accordingly, DEP's Objection to Proposed Record on Appeal is without merit and should be denied.

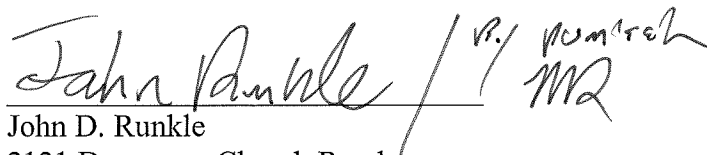
CONCLUSION

For the reasons set forth above, NC WARN and The Climate Times respectfully request that DEP's Objections to Proposed Record on Appeal be denied.

Respectfully submitted, this the 15th day of September, 2016.



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Counsel for NC WARN & The Climate Times

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 DEP'S OBJECTIONS TO PROPOSED RECORD ON 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 15th day of September, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

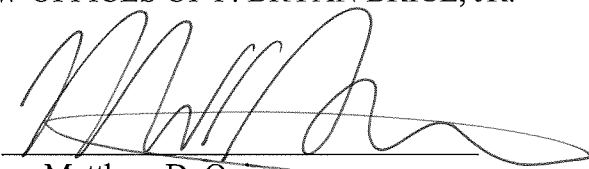
By: 
Matthew D. Quinn

EXHIBIT A

Matt Quinn

From: Matt Quinn
Sent: Thursday, September 08, 2016 9:59 AM
To: 'Wike, Antoinette' (antoinette.wike@psncuc.nc.gov); bo.somers@duke-energy.com; dallen@theallenlawoffices.com; rmcDonald@bdixon.com
Cc: jrunkle@pricecreek.com
Subject: State of N.C. ex rel. Util. Comm'n et al. v. NC WARN et al.; NCUC Docket No. E-2, Sub 1089

Counsel –

On 8/1/16, NC WARN and The Climate Times served a proposed record on appeal as to their Notice of Appeal (filed on 7/28/16) concerning the Second Bond Order. I believe that the deadline for objections to the proposed record on appeal was 9/6/16. To date, I have not received any objections or other feedback as to that proposed record on appeal. Do you intend to offer any? If yes, I'm certainly not going to be a stickler on the deadline, but please share your feedback ASAP. Otherwise, my understanding is that the record is considered settled as of 9/6/16, which triggers my 15-day deadline to file the record with the Court of Appeals.

Please let me know.

Thank you

Matt

--
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Condemnation, and Personal Injury Matters*

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EXHIBIT B

Matt Quinn

From: Dwight Allen <dallen@theallenlawoffices.com>
Sent: Thursday, September 08, 2016 5:14 PM
To: Matt Quinn; antoinette.wike@psncuc.nc.gov; bo.somers@duke-energy.com; rmcDonald@bdixon.com
Cc: jrunkle@pricecreek.com
Subject: Re: State of N.C. ex rel. Util. Comm'n et al. v. NC WARN et al.; NCUC Docket No. E-2, Sub 1089

Good afternoon, Matt. First, thank you for agreeing not to be a "stickler" as to timing. We believe that we have also been flexible as to deadlines and timing issues. However, our position on the legal status of your record on appeal is unchanged from the email sent to you by Bo Somers on July 26, 2016. In that email, Bo agreed to be served by CD but did not agree that that your clients had perfected a valid appeal. The Record on Appeal that you reference addresses not just the appeal of the Second Bond Order but the CPCN Order, the constitutionality of the Mountain Energy Act, the First Bond order and G.S. 62-82(b). Thus, your Proposed Record on Appeal appears more addressed to the Notice of Appeal, which was dismissed by the Commission on August 2, 2016. In essence, the documents appear to have crossed in the mail. Further, the appeal of the Second Bond Order is pending before the Commission subject to a Motion to Dismiss filed by DEP on August 12, 2016. Thus, to the extent the proposed record on appeal referenced the Second Bond Order, the running of the clock stopped on the filing of the Motion to Dismiss the Appeal of the Second Bond Order. The Court of Appeals dismissing your client's Petition for Certiorari issued on September 6, 2016, supports this conclusion. As you know, that Petition also asked for review of the Second Bond Order and it was denied. Thus, it is our position that you do not have a valid appeal before the Commission and the status of the proposed record of appeal cannot be resolved until the Commission rules on the Motion to Dismiss. Once an order is issued we will respond expeditiously to the proposed record on appeal, if necessary.

Dwight Allen
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Raleigh, NC 27608
(919) 838-0529

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EXHIBIT C

No. _____

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)
EX REL. UTILITIES)
COMMISSION; PUBLIC STAFF –)
NORTH CAROLINA UTILITIES)
COMMISSION; DUKE ENERGY)
PROGRESS, LLC;)
MOUNTAINTRUE; SIERRA)
CLUB; and CAROLINA)
INDUSTRIAL GROUP FOR FAIR)
UTILITY RATES II,)

From the North Carolina
Utilities Commission
Docket No. E-2, Sub 1089

Appellees,)

v.)

N.C. WASTE AWARENESS AND)
REDUCTION NETWORK and)
THE CLIMATE TIMES,)

Appellants.)

(PROPOSED) RECORD ON APPEAL

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No. _____

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)
EX REL. UTILITIES)
COMMISSION; PUBLIC STAFF -)
NORTH CAROLINA UTILITIES)
COMMISSION; DUKE ENERGY)
PROGRESS, LLC;)
MOUNTAINTRUE; SIERRA)
CLUB; and CAROLINA)
INDUSTRIAL GROUP FOR FAIR)
UTILITY RATES II,)

From the North Carolina
Utilities Commission
Docket No. E-2, Sub 1089

Appellees,

v.

N.C. WASTE AWARENESS AND
REDUCTION NETWORK and
THE CLIMATE TIMES,

Appellants.

(PROPOSED) RECORD ON APPEAL

STATEMENT OF ORGANIZATION OF THE
NORTH CAROLINA UTILITIES COMMISSION

On 16 December 2016, this matter was initiated when Duke Energy
Progress, LLC ("DEP") filed a Notification of Intent to File for Western Carolinas
Modernization Project with the North Carolina Utilities Commission

(“Commission”). DEP’s Application for Certificate of Public Convenience and Necessity (“Application”) was filed with the Commission on 15 January 2016. The intervention of the Public Staff – North Carolina Utilities Commission was automatically recognized pursuant to N.C. Gen. Stat. § 62-15. Among other parties, the Commission granted petitions to intervene filed by NC WARN and The Climate Times; MountainTrue and the Sierra Club; and Carolina Industrial Group for Fair Utility Rates II (“CIGFUR II”).

A public hearing on the Application was held on 26 January 2016. On 28 March 2016, the Commission entered an Order Granting Application in Part, with Conditions, and Denying Application in Part (“CPCN Order”).

On 25 April 2016, NC WARN and The Climate Times filed a Motion to Set Bond for Appeal. To allow time for the Commission to rule on the Motion to Set Bond, NC WARN and The Climate Times also filed on 25 April 2016 a Motion for Extension of Time to File Notice of Appeal and Exceptions. The Motion for Extension of Time was granted on 26 April 2016. On 10 May 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) (“First Bond Order”).

NC WARN and The Climate Times filed a Petition for Writ of Certiorari with this Court on 23 May 2016, challenging the First Bond Order. On 27 May

2016, NC WARN and The Climate Times filed a Notice of Appeal and Exceptions as to the CPCN Order and the First Bond Order.

DEP, on 31 May 2016, filed a Motion to Dismiss Appeal of NC WARN and the Climate Times. The Motion to Dismiss was based on NC WARN and the Climate Times filing a Notice of Appeal without posting a bond per the First Bond Order. Before the Commission ruled upon the Motion to Dismiss Appeal, on 7 June 2016 this Court granted in part the Petition for Writ of Certiorari and remanded to the Commission for further fact finding on the bond issue.

A hearing was held on the bond issue on 17 June 2016. On 30 June 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Second Bond Order").

On 20 July 2016, DEP filed a Renewed Motion to Dismiss Appeal, again because no bond had been posted. At the time of the filing of this Record on Appeal, the Commission has not ruled upon DEP's Motion to Dismiss Appeal (31 May 2016) or Renewed Motion to Dismiss Appeal (20 July 2016).

Finally, on 28 July 2016, NC WARN and The Climate Times filed a Notice of Appeal and Exceptions as to the Second Bond Order. Thus, there are two notices of appeal contained within this Record: (1) the Notice of Appeal and Exceptions filed on 27 May 2016 and challenging the First Bond Order and the

CPCN Order, and (2) the Notice of Appeal and Exceptions filed on 28 July 2016 and challenging the Second Bond Order.

The record on appeal was filed in the Court of Appeals on

_____ and was docketed on _____.

NC WARN'S PROPOSED ISSUES ON APPEAL

Pursuant to Rule 10 of the North Carolina Rules of Appellate Procedure,

Appellant NC WARN intends to present the following proposed issues on appeal:

1. Must bond orders under N.C. Gen. Stat. § 62-82(b) be supported by competent record evidence?
2. Was the Commission's First Bond Order supported by competent record evidence?
3. Was the Commission's First Bond Order arbitrary and capricious?
4. Was the Commission's Second Bond Order supported by competent record evidence?
5. Was the Commission's Second Bond Order arbitrary and capricious?
6. Do the First and Second Bond Orders violate the North Carolina Constitution?
7. Was the CPCN Order arbitrary and capricious?
8. Was the CPCN Order supported by competent record evidence?
9. Is the Mountain Energy Act of 2016 unconstitutional?