

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	)	NOTICE OF APPEAL
Certificate of Public Convenience and Necessity	)	AND EXCEPTIONS
to Construct a 752 Megawatt Natural Gas-Fueled	)	BY NC WARN AND THE
Electric Generation Facility in Buncombe County	)	CLIMATE TIMES
Near the City of Asheville	)	

NOW COME NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-90 and Rule 18 of the North Carolina Rules of Appellate Procedure, and give Notice of Appeal to the North Carolina Court of Appeals from the North Carolina Utilities Commission’s (“Commission”) Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) issued on July 8, 2016 (“Second Bond Order”). The present Notice of Appeal and Exceptions is in addition to the previously filed Notice of Appeal and Exceptions (filed on May 27, 2016) that challenged the Order Granting Application in Part, With Conditions, and Denying Application in Part issued on March 28, 2016 (“CPCN Order”) and the First Bond Order of May 10, 2016.

As set forth below, the Commission in its Second Bond Order, required that NC WARN and The Climate Times post a \$98 million bond or undertaking as a condition of appealing the CPCN Order. Contrary to North Carolina law, the Second Bond Order was not supported by record evidence or adequate findings of fact, and the Second Bond Order is unconstitutional.

**EXCEPTION NO. 1:**

The Commission erred in making its Conclusions of Law, pages 14-28 of the Second Bond Order, and supporting findings of fact, pages 6-9, regarding the need for a bond or undertaking on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The relevant statute, N.C. Gen. Stat. § 62-82(b), requires a finding that an appeal will result in a delay in construction. No competent evidence to that effect was presented to the Commission. Instead, all evidence about delays from an appeal was speculative and contradicted by other portions of the record. In fact, the Commission committed error on pages 13-14 when it stated that DEP bears no burden to state that an appeal will result in delay.

**EXCEPTION NO. 2:**

The Commission erred in making its Conclusions of Law, pages 14-28 of the Second Bond Order, and supporting findings of fact, pages 6-9, regarding the need for a bond or undertaking on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are

unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

No competent evidence was submitted to the Commission in support of any bond amount whatsoever. Only conclusory, hypothetical damage amounts were provided by DEP for the Commission's consideration without supporting evidence. The Commission did not make adequate findings of fact, and was not presented with evidence, as to why \$98 million was the appropriate amount for the bond or undertaking.

**EXCEPTION NO. 3:**

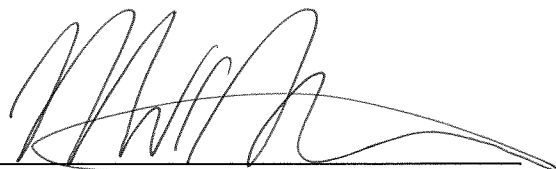
The Commission erred in making its Conclusions of Law, pages 14-28 of the Second Bond Order, and supporting findings of fact, pages 6-9, regarding the bond or undertaking amount of \$98 million on the grounds that this bond was beyond the Commission's statutory authority and jurisdiction; violates constitutional provisions; is affected by errors of law; and is not in the public interest.

In 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." No public interest group could post a \$98 million bond. Hence the Second Bond Order deprives NC WARN and The Climate Times of the right to access this State's appellate courts in violation of the State's Constitution.

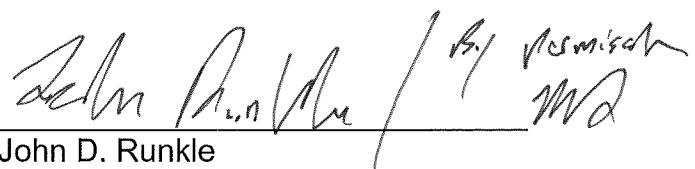
**CONCLUSION**

For the reasons set forth above, the Second Bond Order was arbitrary and capricious; affected by errors of law; unsupported by competent, material, and substantial evidence in light of the entire record; violates constitutional provisions; was beyond the Commission's statutory power and jurisdiction; and was not in the public interest.

Respectfully submitted, this the 28<sup>th</sup> day of July, 2016.



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***Counsel for NC WARN & The Climate Times***

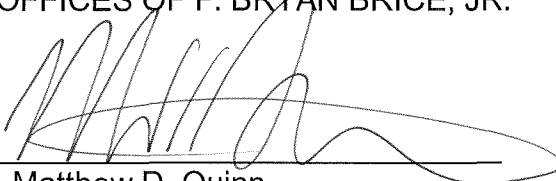
**CERTIFICATE OF SERVICE**

The undersigned certifies that on this day he served a copy of the foregoing NOTICE OF APPEAL AND EXCEPTIONS OF NC WARN AND THE CLIMATE TIMES 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 28<sup>th</sup> day of July, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: \_\_\_\_\_



Matthew D. Quinn