

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 gives Notice of Appeal to the North Carolina Court of Appeals from the North Carolina Utilities Commission's ("Commission") Order Granting Application in Part, With Conditions, and Denying Application in Part issued on March 28, 2016 ("CPCN Order") and the Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) issued on May 10, 2016 ("Bond Order").

As set forth below, the Commission in its CPCN Order grants a certificate of public convenience and necessity (the "certificate") to Duke Energy Progress, LLC ("DEP") for its proposed natural gas-fired electric generation facility in Buncombe County (the "facility"). Contrary to North Carolina law, the CPCN Order fails to meet the standards for the issuance of a certificate, i.e., the project is both fair and reasonable, and the facility is in the public convenience and is necessary. The decision to issue the certificate was not based on a fair process

or a complete record. Moreover, the state statute, the Mountain Energy Act of 2015, Session Law 2015-110, under which the Commission granted the certificate, is unconstitutional on its face and as applied by the Commission.

As also set forth below, the Commission in its Bond Order required that NC WARN and The Climate Times post a \$10 million bond or undertaking as a condition of appealing the CPCN Order. Contrary to North Carolina law, the Bond Order was not supported by record evidence or adequate findings of fact, and the Bond Order is unconstitutional as applied.

On May 19, 2016, NC WARN and The Climate Times filed with the Court of Appeals a Petition for Writ of Certiorari and Petition for Writ of Supersedeas as to the Bond Order. Pending review by the Court of Appeals, and in an effort to ensure that all appellate deadlines are met, NC WARN and The Climate Times file without bond the present Notice of Appeal and Exceptions as to the Bond Order and the CPCN Order.

EXCEPTION NO. 1 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 8 and 43-44 of the CPCN Order, and supporting findings of fact, pages 29 and 39-43, based on an unfair process resulting in an incomplete record. As a result, 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.

In making its conclusions and findings, the Commission relied on a “paper record” based on an arbitrarily-limited opportunity for filing comments based on its interpretation of the Mountain Energy Act of 2015, Session Law 2015-110, that the decision had to be rendered within 45 days of the filing of the application. As a result, the Commission did not follow its normal hearing process of allowing intervention, modified discovery, the prefiling of expert testimony, an evidentiary hearing with cross examination and rebuttal witnesses, and submittal of proposed decisions and briefs. A single public hearing was held only 6 days after the application was filed. As a result, the record upon which the certificate was granted was incomplete and due process was violated.

As applied by the Commission, the Mountain Energy Act of 2015 was additionally in violation of North Carolina constitutional and statutory requirements prohibiting monopolies unless they are fairly regulated. N.C. Const. art. I, § 34.

EXCEPTION NO. 2 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 8 and 43-44 of the CPCN Order, and supporting findings of fact, pages 29 and 39-43, by following the provisions of the Mountain Energy Act of 2015, Session Law 2015-110, which is unconstitutional on its face in that it grants a private emolument to a public utility that is essentially unregulated due to the Mountain Energy Act of

2015. As a result, the grounds upon which the Commission determined 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 Mountain Energy Act of 2015 grants a single company, DEP, an exclusive emolument, i.e., an unreasonably expedited review period, in violation of the North Carolina Constitution. N.C. Const. art. I, § 32.

EXCEPTION NO. 3 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 7 and 43-44 of the CPCN Order, and supporting findings of fact, pages 35 and 37-38, regarding the devastating impacts of the methane vented and leaked from the fuel infrastructure from fracking gas wellhead to burn point, 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 Commission was required to support its conclusions of law with competent findings of fact. It has not done so regarding the climate impacts from methane venting and leakage. There are no facts or evidence in the entire record

supporting the Commission's conclusion, while there are dispositive statements by experts through affidavit that the proposed plants will have an adverse impact on the climate.

EXCEPTION NO. 4 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 7, 43-44 of the CPCN Order, and supporting findings of fact, pages 31-35, regarding the economic risks associated with the project's reliance on natural gas, 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 Commission was required to support its conclusions of law with competent findings of fact. It has not done so regarding the economic risks associated with fracking gas availability and price increases over the life of the facility. There are no facts or evidence in the entire record supporting the Commission's conclusion, while there are dispositive statements by experts through affidavit that the reliance on fracking gas is an unreasonable risk. In the CPCN Order, the Commission ignores the unrefuted testimony of experts on the risks of reliance on natural gas as the fuel source for its proposed generating plants because of the future reduced availability of natural gas and the predicted

price increases. This will result in unfair and unreasonable rate hikes for consumers from escalating fuel costs and stranded assets.

EXCEPTION NO. 5 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 7 and 43-44 of the CPCN Order, and supporting findings of fact, pages 29-37, regarding the need for the project 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 Commission was required to support its conclusions of law with competent findings of fact. It has not done so regarding the need for the project as it ignored evidence that the increased capacity is both unnecessary and cost ineffective. Part of the record was affidavit testimony from experts that the need for the project had not been adequately proved, yet the Commission failed to make findings of fact refuting this evidence.

EXCEPTION NO. 6 (as to the Bond Order):

The Commission erred in making its Conclusions of Law, page 7 of the Bond Order, and supporting findings of fact, pages 5-7, 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 such evidence was presented to the Commission, and the Commission failed to make such a finding of fact.

EXCEPTION NO. 7 (as to the Bond Order):

The Commission erred in making its Conclusions of Law, page 7 of the Bond Order, and supporting findings of fact, pages 5-7, regarding the bond or undertaking amount of \$10 million 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 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. Further, the Commission did not make findings of fact, and was not presented with evidence, as to why \$10 million was the appropriate amount for the bond or undertaking.

EXCEPTION NO. 8 (as to the Bond Order):

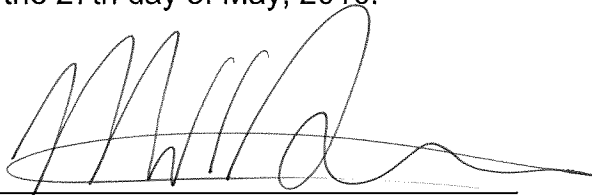
The Commission erred in making its Conclusions of Law, page 7 of the Bond Order, and supporting findings of fact, pages 5-7, regarding bond or undertaking amount of \$10 million on the grounds that this bond was beyond the Commission's statutory authority and jurisdiction; violates constitutional provisions; is affected by errors of law; is unsupported by competent, material and substantial evidence in light of the entire record; is arbitrary and capricious; and is not in the public interest.

The required \$10 million bond or undertaking is tantamount to preventing any appeal of the Commission's CPCN Order and thereby blocks access to the courts and due process for litigants in certificate of public convenience and necessity cases. For these reasons and others, the Bond Order violates N.C. Const. art. I §§ 18, 19; U.S. Const. amends. I, XIV.

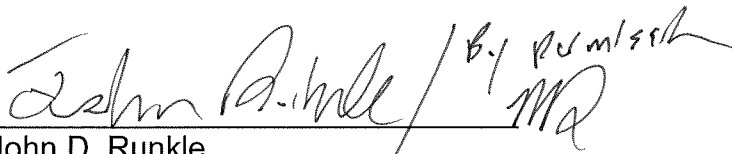
CONCLUSION

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

Respectfully submitted, this the 27th day of May, 2016.



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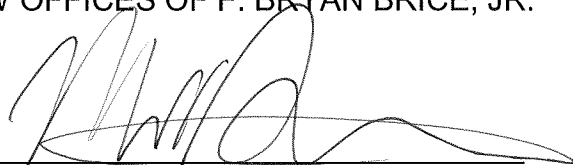
CERTIFICATE OF SERVICE

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 27th day of May, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: _____



Matthew D. Quinn