

NO. P16-368

N.C. UTILITIES COMMISSION

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA EX REL.)
UTILITIES COMMISSION; PUBLIC)
STAFF-NORTH CAROLINA UTILITIES)
COMMISSION; and DUKE ENERGY)
PROGRESS, LLC,)

Respondents,)

v.)

NC WARN and THE CLIMATE TIMES,)

Petitioners.)

FILED

NOV 02 2016

Clerk's Office
N.C. Utilities Commission

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

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

FILED
2016 NOV - 1 P 4:42
CLERK OF SUPERIOR COURT
OF NORTH CAROLINA

INDEX

TABLE OF CASES AND AUTHORITIES ii
RESTATEMENT OF THE FACTS2
REASONS WHY WRIT SHOULD NOT ISSUE.....14
CONCLUSION.....20
CERTIFICATE OF COMPLIANCE.....22
CERTIFICATE OF SERVICE.....23

TABLE OF CASES AND AUTHORITIES

Cases:

North Carolina Nat'l Bank v. Virginia Carolina Builders,
307 N.C. 563, 299 S.E.2d 629 (1983).....19

Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240
(1984).....19

Statutes:

N.C. Gen. Stat. § 62-15 (2015).....4

N.C. Gen. Stat. § 62-82(a) (2015).....15

N.C. Gen. Stat. § 62-82(b) (2015)7, 8, 9, 11, 12, 14, 17

N.C. Gen. Stat. § 62-110.1 (2015).....4, 15, 17

N.C. Gen. Stat. § 62-110.1(a) (2015).....5

N.C. Gen. Stat. § 132-1.2 (2015).....5

Session Laws:

2014 N.C. Sess. Laws 1223

2015 N.C. Sess. Laws 110 § 13

2015 N.C. Sess. Laws 110 § 23

Rules:

N.C. R. App. P. 25(a).....20

N.C. R. App. P. 28(j)22

N.C. Utils. Comm'n Rule R8-61(b).....5

N.C. Utils. Comm'n Rule R8-61(b)(1).....5

NO. P16-368

N.C. UTILITIES COMMISSION

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA EX REL.)
UTILITIES COMMISSION; PUBLIC)
STAFF-NORTH CAROLINA UTILITIES)
COMMISSION; and DUKE ENERGY)
PROGRESS, LLC,)

Respondents,)

v.)

NC WARN and THE CLIMATE TIMES,)

Petitioners.)

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

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

NOW COMES the Public Staff – North Carolina Utilities Commission, by and through its Executive Director, Christopher J. Ayers (“Public Staff”), and pursuant to Rule 21(d) of the North Carolina Rules of Appellate Procedure, respectfully files this Response to the Petition for Writ of Certiorari filed in this matter on 17 October 2016 by NC WARN and The Climate Times (“Petitioners”).

RESTATEMENT OF THE FACTS

Proceedings Prior to the Entry of the CPCN Order (i.e., the CPCN Proceedings)

1. On 16 December 2015, Duke Energy Progress, LLC ("DEP" or "Company"), filed a letter notifying the Commission of its intent to file an application on or after 15 January 2016 for a certificate of public convenience and necessity ("CPCN") to construct the Western Carolinas Modernization Project ("WCMP"), consisting of 752 megawatts ("MW") (winter rating) of natural gas-fired electric generation at the site of the Company's existing 379 MW (winter rating) Asheville 1 and 2 coal-fired units (the "Asheville Plant") in Buncombe County near the City of Asheville. (Pet. Ex. A)

2. The notice of intent was filed pursuant to Section 1 of North Carolina Session Law 2015-110 (the "Mountain Energy Act"), which provides as follows:

Notwithstanding G.S. 62-110.1, the Commission shall provide an expedited decision on an application for a certificate to construct a generating facility that uses natural gas as the primary fuel if the application meets the requirements of this section. A public utility shall provide written notice to the Commission of the date the utility intends to file an application under this section no less than 30 days prior to the submission of the application. When the public utility applies for a certificate as provided in this section, it shall submit to the Commission an estimate of the costs of construction of the gas-fired generating unit in such detail as the Commission may require. G.S. 62-110.1(e) and G.S. 62-82(a) shall not apply to a certificate applied for under this section. The Commission shall hold a single public hearing on the application applied for under

this section and require the applicant to publish a single notice of the public hearing in a newspaper of general circulation in Buncombe County. The Commission shall render its decision on an application for a certificate, including any related transmission line located on the site of the new generation facility, within 45 days of the date the application is filed if all of the following apply:

- (1) The application for a certificate is for a generating facility to be constructed at the site of the Asheville Steam Electric Generating Plant located in Buncombe County.
- (2) The public utility will permanently cease operations of all coal-fired generating units at the site on or before the commercial operation of the generating unit that is the subject of the certificate application.
- (3) The new natural gas-fired generating facility has no more than twice the generation capacity as the coal-fired generating units to be retired.

2015 N.C. Sess. Laws 110 § 1.

3. Section 2 of the Mountain Energy Act amended Section 3(b) of North Carolina Session Law 2014-122 (the "Coal Ash Management Act" or "CAMA") (2014 N.C. Sess. Laws 122) by extending the deadline for closing the coal combustion residual (coal ash) surface impoundments at the Asheville Plant by three years if, on or before 1 August 2016, the Commission issued a CPCN to DEP for a new natural gas-fired facility to replace the coal units at the Asheville Plant, based upon written notice by the Company to the Commission that it will permanently cease operations at the coal units no later than 31 January 2020.

2015 N.C. Sess. Laws 110 § 2. In addition, replacement of coal generation with

gas-fired generation within the deadlines set forth in the Mountain Energy Act exempted impoundments and electric generating facilities located at the Asheville Plant from the prohibitions in CAMA related to storm water discharge and the requirements for conversion to "dry" fly ash and bottom ash.

4. On 18 December 2015, the Commission issued an Order scheduling a hearing for public witness testimony on the application for 26 January 2016 in Asheville; setting a 12 February 2016 deadline for interested parties to intervene;¹ directing the Public Staff² to investigate the application when filed and present its findings, conclusions, and recommendations to the Commission at its Regular Staff Conference on 22 February 2016; and requiring DEP to publish notice of the proceeding. (Pet. Ex. B)

5. On 21 December 2015, Petitioners filed a motion requesting that the Commission hold an evidentiary hearing for expert witnesses or, in the alternative, deny the CPCN application as incomplete and insufficient until an evidentiary hearing could be held. (Pet. Ex. C) On 31 December 2015, DEP filed a response

¹ Petitions to intervene were timely filed by Carolina Industrial Group for Fair Utility Rates II ("CIGFUR II"), Carolina Utility Customers Association, Inc. ("CUCA"), Columbia Energy, LLC ("Columbia Energy"), Richard Fireman, Grant Millin, Mountain True and the Sierra Club ("Sierra Club"), North Carolina Sustainable Energy Association, Brad Rouse, and Petitioners. The Commission issued Orders granting the petitions.

² The Public Staff is charged with representing the interests of the using and consuming public in matters before the Commission and the courts. N.C. Gen. Stat. § 62-15. The Public Staff consists of accountants, financial analysts, engineers, and attorneys whose expertise includes resource planning to meet the long-term needs for electric generation in North Carolina. The Public Staff's duties include intervening on behalf of the using and consuming public in CPCN applications filed pursuant to N.C. Gen. Stat. § 62-110.1.

requesting that the Commission deny Petitioners' motion. On 6 January 2016, Petitioners filed a reply to DEP's response. On 15 January 2016, the Commission issued an Order denying Petitioners' motion. (Pet. Ex. D)

6. On 15 January 2016, DEP filed a verified application for a CPCN pursuant to the Mountain Energy Act, N.C. Gen. Stat. § 62-110.1(a), and Rule R8-61(b) of the Rules and Regulations of the Commission ("Commission Rules"). As set forth in the application, the proposed facility would consist of the following: two new 280 MW (expected winter rating) natural gas-fired combined cycle ("CC") units, with fuel oil backup; a contingent natural gas-fired 186 MW (expected winter rating) simple cycle combustion turbine ("CT") unit, with fuel oil back up, the need for which may be avoided or delayed due to the utilization of other technologies and programs to meet the future peak demand requirements of DEP customers in the region; and related on-site transmission facilities.

7. Attached to the application were four exhibits, portions of which were filed under seal on the grounds that they contained confidential information and were not subject to disclosure pursuant to N.C. Gen. Stat. § 132-1.2. These exhibits contained detailed information supporting the application. Exhibit 1A was the public version of DEP's 2015 Integrated Resource Plan ("IRP"). Exhibit 1B, which was a Statement of Need, contained additional resource planning information required by Commission Rule R8-61(b)(1). Exhibit 2 contained Plant

Description, Siting, and Permitting Information, Exhibit 3 contained Cost Information, and Exhibit 4 contained Construction Information.³

8. On 22 January 2016, the Commission issued an Order allowing any party to file a statement of position or other comments on or before the deadline for intervention, to present brief opening statements at the 26 January 2016 public hearing, and to make oral comments at the Commission's Regular Staff Conference on 22 February 2016.

9. On 26 January 2016 the public hearing was held in Asheville as scheduled. Fifty-one public witnesses testified.

10. On 12 February 2016, Petitioners filed a statement of position and comments. (Pet. Ex. E)

11. On 17 February 2016, the Public Staff submitted its agenda item for the Commission's 22 February 2016 Regular Staff Conference, setting forth the results of the Public Staff's investigation of DEP's application and its recommendations for Commission action.

12. On 19 February 2016, Petitioners filed the affidavit of J. David Hughes and a response to the Public Staff's agenda item.

³ The Company filed a Revised Exhibit 1B, Attachment A, Revised Exhibit 3 and a Revised Exhibit 4 on 1 February 2016 to remove the confidential designation on much of the information initially designated as a trade secret.

13. On 22 February 2016, the Public Staff presented the results of its investigation at the Commission's Regular Staff Conference, recommending issuance of a CPCN for the CC units but not for the CT unit. Intervenors Brad Rouse, Columbia Energy, Sierra Club, DEP, and Petitioners presented statements regarding their respective positions.

14. On 26 February 2016, Petitioners filed additional comments.

15. On 29 February 2016, the Commission issued a Notice of Decision, and on 28 March 2016, the Commission issued an Order granting a CPCN for the CC units ("CPCN Order"). (Pet. Ex. F)

Proceedings Post-Entry of the CPCN Order (the Appeals and Bond Orders)

16. On 25 April 2016, Petitioners filed a motion requesting an extension of time to file notice of appeal from the CPCN Order (Pet. Ex. G) and a separate motion requesting that the Commission set a bond for the anticipated appeal pursuant to the requirements of N.C. Gen. Stat. § 62-82(b), which provides, in pertinent part:

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) (2015). Petitioners suggested a nominal bond amount of \$250. Petitioners did not request a stay of the CPCN Order.

17. On 26 April 2016, the Commission issued an Order granting Petitioners an extension of time until 27 May 2016 to file notice of appeal from the CPCN Order. On 27 April 2016, the Commission issued an Order allowing DEP to file a response to Petitioners' motion to set the appeal bond on or before 2 May 2016 and allowing Petitioners to file a reply on or before 5 May 2016.

18. On 2 May 2016, DEP filed a verified response to Petitioners' motion to set the appeal bond. DEP stated that on-site earthworks construction of the CC units was scheduled to begin in October 2016 in order to comply with the deadlines of the Mountain Energy Act. DEP argued that Petitioner's proposed \$250 bond was grossly inadequate for the \$1 billion WCMP and recommended an appeal bond in a minimum amount of \$50 million. (Pet. Ex. H, pp 4, 8, 10) On 2 May 2016, Petitioners filed a verified reply to DEP's response, again requesting a \$250 bond. (Pet. Ex. I)

19. On 10 May 2016, the Commission issued an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("First Bond Order"), which required the Petitioners, as a condition of filing a notice of appeal, to file an executed undertaking in the amount of \$10 million. (Pet. Ex. J)

20. On 19 May 2016, Petitioners filed with this Court a Petition for Writ of Certiorari and Writ of Supersedeas requesting review of the First Bond Order, and a motion for a temporary stay of enforcement and execution of the First Bond Order ("First Petition"). On 24 May 2016, the Court entered an Order denying the motion for a temporary stay.

21. On 27 May 2016, Petitioners filed a notice of appeal from both the CPCN Order and the First Bond Order ("First Appeal") (Pet. Ex. K) but did not file a bond or undertaking as required by the First Bond Order and N.C. Gen. Stat. § 62-82(b).

22. On 31 May 31 2016, DEP filed a motion requesting that the Commission dismiss the First Appeal because of Petitioners' failure to file the required bond or undertaking. (Pet. Ex. L) On 3 June 2016, Petitioners filed a response to this motion. (Pet. Ex. M)

23. On 2 June 2016, DEP filed a response to the First Petition with this Court.

24. On 7 June 2016, the Court entered an Order allowing the Petition for Writ of Certiorari for the limited purpose of vacating and remanding the First Bond Order to the Commission with the directive, in its discretion, to set a bond amount in accordance with N.C. Gen. Stat. § 62-82(b) and based on competent evidence

("Remand Order"). Because the Court vacated the First Bond Order, it dismissed the Petition for Writ of Supersedeas as moot.

25. On 8 June 2016, pursuant to the Remand Order, the Commission issued an Order scheduling an evidentiary hearing on 17 June 2016 for the purpose of receiving evidence on the amount of the bond and allowing DEP to file additional evidence by 16 June 2016. (Pet. Ex. N)

26. On 14 June 2016, Petitioners filed a response to the Commission's Order scheduling an evidentiary hearing on the bond, objecting to the receipt of additional evidence on the amount of the bond, and requesting that the Commission either not allow additional evidence from DEP or allow Petitioners 10 days' additional time to file a response to such evidence. (Pet. Ex. O)

27. On 17 June 2017, the Commission held an evidentiary hearing on the amount of the bond. DEP presented the testimony of Mark Landseidel, who had verified DEP's 2 May 2016 response to Petitioners' motion to set the amount of the appeal bond. Witness Landseidel testified that if an appeal was pending in October 2016, DEP would delay construction of the WCMP. Petitioners' attorney cross-examined Mr. Landseidel but did not call any witnesses to rebut DEP's evidence. (Pet. Ex. P)

28. During the 17 June 2016 hearing, Petitioners indicated that they had not contacted any witnesses prior to the hearing and would let the Commission

know on or before 22 June 2016 whether they would like to present a witness. (Pet. Ex. P) On 22 June 2016, Petitioners filed a response indicating that they planned to confer with a potential witness on 24 June 2016. On 24 June 2016, Petitioners filed an update indicating that they had conferred with their witness and would be filing an affidavit. On 27 June 2016, Petitioners filed the affidavit of William E. Powers. (Pet. Ex. Q) On 29 June 2016, DEP filed a response to the affidavit.

29. On 23 June 2016, Petitioners filed a motion requesting an extension of time to serve their record on appeal from the CPCN Order and the First Bond Order. On 30 June 2016, the Commission issued an Order granting the motion.

30. On 8 July 2016, the Commission issued an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Second Bond Order"). In that Order, the Commission described in detail the evidence presented by DEP and Petitioners. After weighing the evidence, the Commission determined that a bond of \$98 million would be reasonably sufficient to discharge the obligation imposed on Petitioners by N.C. Gen. Stat. § 62-82(b). This amount represented \$40 million in potential damages related to the cancellation costs of three major equipment contracts, \$8 million in potential damages related to sunk development costs, and \$50 million in increased project costs for the increased cost of labor and materials to build the two CC units. The Order gave Petitioners five days from date of the

Order to file the required bond or undertaking. (Pet. Ex. R) No bond or undertaking was filed.

31. On 20 July 2016, DEP filed a renewed motion to dismiss Petitioners' appeal from the CPCN Order and the First Bond Order for failure to file a bond in compliance with N.C. Gen. Stat. § 62-82(b) and the Second Bond Order. (Pet. Ex. S) On 26 July 2016, Petitioners filed a response to the motion. (Pet. Ex. T)

32. On 28 July 2016, Petitioners filed notice of appeal from the Second Bond Order ("Second Appeal"). (Pet. Ex. U)

33. On 2 August 2016, the Commission issued an Order dismissing the Petitioners' appeal from the CPCN Order for failure to file the appeal bond required by N.C. Gen. Stat. § 62-82(b) ("First Dismissal Order"). (Pet. Ex. V)

34. On 4 August 2016, Petitioners served on counsel of record a proposed record on appeal purporting to relate to the CPCN Order, the First Bond Order, and the Second Bond Order.

35. On 12 August 2016, DEP filed a motion to dismiss Petitioners' appeal from the Second Bond Order. (Pet. Ex. W) Petitioners filed a response to the motion on 23 August 2016. (Pet. Ex. Y)

36. On 18 August 2016, Petitioners filed notice of appeal from the CPCN Order and the First Dismissal Order ("Third Appeal"). On that same date,

Petitioners filed with this Court a Petition for Writ of Certiorari with respect to the CPCN Order, the Second Bond Order, and the Dismissal Order ("Second Petition").

37. On 2 September 2016, DEP and the Public Staff filed responses to the Second Petition with this Court. On 6 September 2016, the Court entered an Order denying the Second Petition.

38. On 9 September 2016, DEP filed a motion to dismiss the Third Appeal and a renewed motion to dismiss the Second Appeal. (Pet. Ex. Z)

39. On 13 September 2016, DEP filed objections to the proposed record on appeal filed by Petitioners on 4 August 2016.

40. On 14 September 2016, Petitioners filed a response to DEP's motion to dismiss the Second and Third Appeals. (Pet. Ex. AA)

41. On 15 September 2016, Petitioners filed a response to DEP's objections to the proposed record on appeal, contending that the proposed record related to the appeal that was dismissed by the First Dismissal Order.

42. On 19 September 2016, the Commission issued an Order dismissing Petitioners' First, Second, and Third Appeals ("Second Dismissal Order"). (Pet. Ex. BB)

43. On 17 October 2016, Petitioners filed a Petition for Writ of Certiorari with respect to the CPCN Order, the Second Bond Order, and the First and Second Dismissal Orders ("Third Petition").

REASONS WHY WRIT SHOULD NOT ISSUE

Petitioners have filed a notice of appeal from the CPCN Order and the First Bond Order, a notice of appeal from the Second Bond Order, and a notice of appeal from the CPCN Order and the First Dismissal Order). All three appeals have been dismissed by the Commission for failure to post the bond required by N.C. Gen. Stat § 62-82(b). Petitioners have also filed three petitions with this Court for extraordinary writs. The First Petition was granted by the Court for the limited purpose of vacating and remanding the First Bond Order. The Second Petition was denied. The Third Petition is currently pending.

The Public Staff respectfully requests that this Court summarily deny the Third Petition and bring a final conclusion to Petitioners' redundant efforts to obtain appellate review of Commission Orders in this case. These efforts have thwarted judicial economy by consuming the time and resources of the parties, the Commission, and the Court. Moreover, by their repeated notices of appeal, with the bond required by N.C. Gen. Stat. § 62-82(b), and petitions for review by certiorari, Petitioners have attempted to undermine both the policy established by the General Assembly in the Mountain Energy Act (to encourage the retirement of

coal-fired generation) and the purpose of the bond requirement (to protect customers from increased construction costs caused by appeal-related delays).

Through the passage of the Mountain Energy Act, the General Assembly expressed, as a matter of public policy, its desire that the coal-fired generation at DEP's Asheville Plant be replaced with natural gas-fired generation. To this end, the General Assembly directed the Commission to conduct an expedited proceeding on an application for a CPCN to construct a natural gas-fired generating facility and to render a decision on the application provided certain requirements were met.

Having enacted general requirements for CPCN applications for electric generating facilities in N.C. Gen. Stat. § 62-110.1, and the special procedure for considering and ruling on such applications in N.C. Gen. Stat. § 62-82(a), the General Assembly acted well within its constitutional authority when it enacted a different procedure in the Mountain Energy Act. The Commission, which possesses only the authority granted to it by the General Assembly, was not free to disregard the procedure prescribed in the Mountain Energy Act, and any action to that effect would have been void as a matter of law.

Petitioners have objected to the Mountain Energy Act and the expedited process outlined therein and contended the Act prevented the Commission from exercising the scrutiny required in the regulation of monopolies. However,

Petitioners have failed to advance any argument with respect to a specific level of scrutiny that was required or how the Commission was prevented by the Mountain Energy Act from exercising it, and there is no indication in the CPCN Order or elsewhere in the record that the Commission was unable to make an informed decision based on competent and material evidence.

DEP's notice that it intended to file an application pursuant to the Mountain Energy Act was filed on 16 December 2015. DEP's voluminous, verified application was filed on 15 January 2016 and contained ample supporting evidence. A number of parties intervened, filed affidavits and verified comments, and presented their respective positions at the Commission's 22 February 2016 Staff Conference. The Public Staff conducted extensive discovery, had discussions and meetings with DEP representatives and with intervenors, visited the Asheville Plant, attended the 26 January 2016 public witness hearing, and reviewed the customer statements of position and intervenor comments. Petitioners had the opportunity to participate fully in every stage of the proceeding and did so. They filed comments, responsive comments, and additional comments and evidence; they also appeared at the 22 February 2016 Staff Conference and presented their position opposing the application. As set forth in the CPCN Order, the Commission considered and weighed all the evidence, including evidence

presented by Petitioners,⁴ before determining that the construction of the two proposed 280 MW CC units at the Asheville Plant is required by the public convenience and necessity.

Petitioners' First Appeal, filed on 27 May 2016, was dismissed by the Commission – twice – for failure to file the appeal bond required by N.C. Gen. Stat. § 62-82(b) as a prerequisite for an appeal from an order awarding a CPCN pursuant to N.C. Gen. Stat. § 62-110.1. After two bond orders from the Commission, Petitioners still have filed no bond or undertaking with any of their notices of appeal. Petitioners have also, unsuccessfully, sought appellate review via a writ of certiorari of the CPCN Order, the Second Bond Order, and the First Dismissal Order.

Petitioners contend that the Third Petition is distinguishable from the Second Petition because all of their notices of appeal have been dismissed by the Commission and they have no other path to appellate review without a writ of certiorari. Petitioners' list of issues to be briefed if the Court grants the Third Petition is as follows:

- I. Was the Commission's Second Bond Order supported by competent record evidence and sufficient findings of fact?
- II. Was the Commission's Second Bond Order arbitrary and capricious?

⁴ Petitioners' mere allegations did not constitute competent and material evidence.

- III. Does the Second Bond Order violate the North Carolina Constitution?
- IV. Is the Second Bond Order affected by errors of law?
- V. Was the Commission's CPCN Order supported by competent record evidence and sufficient findings of fact?
- VI. Was the Commission's CPCN Order arbitrary and capricious?
- VII. Is the CPCN Order affected by errors of law?
- VIII. Is the Mountain Energy Act of 2016 [sic] unconstitutional?
- IX. Were the Commission's First and Second Dismissal Orders supported by competent record evidence and sufficient findings of fact?
- X. Were the Commission's First and Second Dismissal Orders arbitrary and capricious?
- XI. Are the First and Second Dismissal Orders affected by errors of law?

(Pet. p 31) This list of issues is virtually identical to the list of issues to be briefed set forth in the Second Petition, the only difference being the addition of the Second Dismissal Order to issues IX through XI. Otherwise, Petitioners' arguments and lists of issues to be briefed in both petitions are the same.

By its Order denying the Second Petition, this Court decided not to review the CPCN Order, the Second Bond Order, and the First Dismissal Order, which included all substantive issues listed in Petitioners' newly filed Third Petition. As argued by DEP in its motion to dismiss all three of Petitioners' appeals with respect to the CPCN proceeding, and as concluded by the Commission in the Second Dismissal Order (Pet. Ex. BB, pp 6-9), this Court's decision not to allow the Second Petition is the law of the case with respect to both the issues presented

in that petition and the same issues in subsequent petitions in the same case. *See North Carolina Nat'l Bank v. Virginia Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983) ("Once an appellate court has ruled on a question, the 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.") *See also Estrada v. Jaques*, 70 N.C. App. 627, 641, 321 S.E.2d 240, 249 (1984) ("[A] second panel of this Court may not exercise its discretion in favor of reviewing an order of the trial division when a preceding panel has decided to the contrary.") Thus, the Court should deny the Third Petition as to all of the issues previously listed in the Second Petition.

As noted above, the only issues listed in the Third Petition that were not presented in the Second Petition are portions of three issues as to which the Second Dismissal Order has been added. But as explained by the Commission in the Second Dismissal Order, an order determining the amount of the bond was a prerequisite to the filing of the First Appeal. (Pet. Ex. BB, p 7) In this case, that determination was made in First Bond Order, as modified by the Second Bond Order on remand, which related back to the date of the First Bond Order. As the First Bond Order was issued prior to the filing of the First Appeal, the First Appeal could have been perfected had Petitioners complied with the Second Bond Order. (Pet. Ex. BB, p 8) However, Petitioners failed to comply with the Second Bond

Order by not filing the requisite bond, and the Commission issued the First Dismissal Order properly dismissing the First Appeal pursuant to N.C. R. App. P. 25(a) for failure to take timely action. Petitioners then failed in the Second Petition to persuade this Court to review the CPCN Order, the Second Bond Order, and the First Dismissal Order. Consequently, Petitioners' appeals from the CPCN Order, the Second Bond Order, and the First Dismissal Order were also properly dismissed by the Commission. (Pet. Ex. BB, pp 7-8) Petitioners' argument in the Third Petition as to the Second Dismissal Order merely repeats the argument put forth in the Second Petition as to the First Dismissal Order, namely, that the Second Bond Order is unsupported by record evidence and is unconstitutional. Inasmuch as this Court's denial of the Second Petition is the law of the case on these issues, the Court should dismiss the Third Petition as to Second Dismissal Order as well.

CONCLUSION

The Public Staff respectfully requests that the Court deny the Third Petition in its entirety and take such further action as may be necessary and appropriate to bring this matter to a definitive conclusion.

Respectfully submitted this the 1st day of November, 2016.

PUBLIC STAFF – NORTH CAROLINA
UTILITIES COMMISSION

Antoinette R. Wike

Antoinette R. Wike

Chief Counsel

N.C. State Bar No. 6446

4326 Mail Service Center

Raleigh, North Carolina 27699-4300

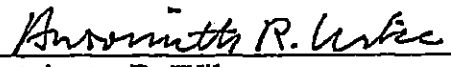
Telephone: (919) 733-6110

antoinette.wike@psncuc.nc.gov

Attorney for Respondent

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for the Respondent certifies that the foregoing response, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.



Antoinette R. Wike

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Response to Petition for Writ of Certiorari has been filed with the Court and has been served upon all parties to the appeal by electronic mail, addressed to counsel of record as follows:

Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300
pmorris@ncuc.net

Sam Watson
General Counsel
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300
swatson@ncuc.net

John Runkle
Attorney
2121 Damascus Church Road
Chapel Hill, North Carolina 27516
jrunkle@pricecreek.com

Gudrun Thompson
Southern Environmental Law Center
Suite 220
601 West Rosemary Street
Chapel Hill, North Carolina 27516-2356
gthompson@Selcnc.org

Austin D. Gerken, Jr.
Southern Environmental Law Center
Suite 700
22 S. Pack Square
Asheville, North Carolina 28801
djgerken@selcnc.org

Ralph McDonald
Bailey and Dixon, LLP
Post Office Box 1351
Raleigh, North Carolina 27602-1351
rmcdonald@bdixon.com

Richard Fireman
374 Laughing River Road
Mars Hill, North Carolina 28754
firepeople@main.nc.us

Peter H. Ledford
Regulatory Counsel
North Carolina Sustainable Energy Association
4800 Six Forks Road
Suite 300
Raleigh, North Carolina 27609
peter@energync.org

Robert Page
Crisp, Page & Currin, LLP
Suite 205
4010 Barrett Drive
Raleigh, North Carolina 27609-6622
rpage@cpclaw.com

Matthew D. Quinn
Law Offices of F. Bryan Brice, Jr.
Suite 600
127 West Hargett Street
Raleigh, North Carolina 27601
matt@attybryanbrice.com

Brad Rouse
3 Stegall Lane
Asheville, North Carolina 28805
brouse_invest@yahoo.com


Grant Millin
48 Riceville Road, B314
Asheville, North Carolina 28805
grantmillin@gmail.com

Daniel Higgins
Burns Day and Presnell, P.A.
Post Office Box 10867
Raleigh, North Carolina 27605
dhiggins@bdppa.com

Lawrence B. Somers
Deputy General Counsel
Duke Energy Corporation
P.O. Box 1551/NCRH20
Raleigh, North Carolina 27602-1551
bo.somers@duke-energy.com

Dwight W. Allen
Allen Law Offices, PLLC
Suite 200
1514 Glenwood Avenue
Raleigh, North Carolina 27608
dallen@theallenlawoffices.com

This the 1st day of November, 2016.



Antoinette R. Wike