

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 MOTION
Electric Generation Facility in Buncombe County)	TO DISMISS SECOND
Near the City of Asheville)	NOTICE OF APPEAL AND
)	RENEWED MOTION TO
)	DISMISS NOTICE OF APPEAL

NOW COME NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-90 and Rule 25 of the North Carolina Rules of Appellate Procedure, and serve the following Response to Duke Energy Progress LLC's ("DEP") Verified Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal filed September 9, 2016.¹ 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. Appeals from orders granting certificates of public convenience and necessity are generally subject to the bond requirements described in N.C. Gen. Stat. § 62-

¹ Verification of the motion by DEP counsel does not add substantive weight to the motion.

82(b). Thus, on April 25, 2016, NC WARN and The Climate Times filed a Motion to Set Bond. 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. In its Response, DEP refused to state that an appeal would result in delays in the initiation of construction. *DEP's Response* ¶ 10. Instead, DEP provided general guesses, without any supporting documents or facts, at what a hypothetical delay might cost DEP. *Id.* ¶ 14. Despite a lack of evidence, DEP recommended an impossible \$50 million bond.

4. Among other things, NC WARN and The Climate Times' Reply of May 5 called the Commission's attention to the fact that DEP failed to substantiate any of its alleged damages estimates. *Reply* ¶¶ 5-6. Also, the Reply emphasized that NC WARN and The Climate Times are not seeking an injunction or stay of the Commission's CPCN Order. *Id.* ¶ 3.

5. 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 acknowledged that it was "not aware of any case in which the Commission has determined the amount of a bond or undertaking pursuant to G.S. 62-82(b)." *Id.* at 4 n.1. Nonetheless, the First Bond Order required a bond or undertaking of \$10,000,000.00. *Id.* at 7. However, 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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 the Petitioners 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.

12. 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.

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

14. Shortly thereafter, on August 2, 2016, the Commission entered an Order Dismissing Appeal as to the May 27, 2016 Notice of Appeal and Exceptions that challenged the CPCN Order.

15. On August 12, 2016, DEP filed a Motion to Dismiss Appeal of Second Bond Order.

16. On August 18, 2016, NC WARN filed a subsequent Notice of Appeal and Exceptions as to the CPCN Order and Dismissal Order. In that Notice of Appeal, NC WARN and The Climate Times stated, “NC WARN acknowledges that an appeal of the CPCN Order has been dismissed before, however the present Notice of Appeals and Exception is designed to preserve appellate review in the event the Second Bond Order and Dismissal Order are reversed.”

17. On the August 19, 2016, NC WARN and The Climate Times also filed a Petition for Certiorari with the Court of Appeals, seeking review of the CPCN Order, the Second Bond Order, and the Dismissal Order. DEP and the Public Staff filed responses in opposition with the Court of Appeals on September 2, 2016. The Court of Appeals denied the Petition for Certiorari on September 6, 2016.

18. On September 9, 2016, DEP filed with the Commission the present motion to dismiss all matters raised in any and all of the notices of appeal filed by NC WARN and The Climate Times in this docket.

ARGUMENT

19. The fundamental legal theory used by DEP in each of its various motions to dismiss, including its present motion to dismiss, is that no bond was posted therefore NC WARN and The Climate Times cannot bring the decisions by the Commission to the Court of Appeals for judicial review. This argument fails in that 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).

20. Thus, the bond requirement exists only for an “appeal from any order of the Commission which awards any such certificate.” *Id.* NC WARN and The Climate Times’ August 18, 2016, Notice of Appeal related only to the Second Bond Order, not the CPCN Order. Hence, there is no bond requirement.

21. Additionally, the appeal of the Second Bond Order should not be dismissed because that appeal presents important legal issues to our State. By way of example but not limitation, the North Carolina Constitution, Article I, Section 35, contains an Open Courts Clause stating 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.” Obviously no public interest group, including NC WARN and The Climate Times, could post a \$98 million bond. Hence the Second Bond Order deprives NC WARN, The Climate Times, and other public interest groups in subsequent cases from accessing our State’s appellate courts in violation of the N.C. Constitution. This argument has been accepted by multiple courts throughout the country. *E.g., R. Commc’ns Inc. v. Sharp*, 875 S.E.2d 314 (Tex. 1994).

22. In one of its earlier Motions to Dismiss, DEP argued that the Second Bond Order should be challenged with a petition for writ of certiorari with the N.C. Court of Appeals, not a notice of appeal. In fact, NC WARN and The Climate Times have taken both tracks by filing both a petition with the Court of Appeals on August 17, 2016, and by filing the Notice of Appeal and Exceptions on July 29, 2016. These two paths were taken because the law is unclear on what is the correct approach. Consider, for example, *Currituck Assocs. Res. P’ship v. Hollowell*, 170 N.C. App. 399, 612 S.E.2d 386 (2005).

There, the trial court ordered a \$1 million appellate bond, and the defendant obtained appellate review of the bond amount by filing a notice of appeal, not a petition with the Court of Appeals. *Id.* at 401, 612 S.E.2d at 388.

23. The statement by NC WARN and The Climate Times in their latest Notice Appeal is not an idle phrase. *See paragraph 16 above.* A similar statement was included in the Petition for Writ of Certiorari to the Court of Appeals:

NC WARN and The Climate Times want to ensure appellate review of the CPCN Order and the Second Bond Order, but as a legal matter, it is unclear whether the correct approach is to file another notice of appeal as to the Dismissal Order, or to file a petition with this Court for writ of certiorari. In an abundance of caution, Petitioners have taken both routes—the present Petition challenges the CPCN Order, the Second Bond Order, and the Dismissal Order; and simultaneously, on 18 August 2016, the Petitioners filed a notice of Appeal as to the CPCN Order, the Second Bond Order, and the Dismissal Order.

Each of the parties involved in this matter will agree the procedures of seeking judicial review of the Commission's decisions are complex. The statutory requirement of posting a bond before judicial review, when no stay of the decision was ever requested, has made this complicated.

24. Even though the Court of Appeals denied NC WARN and The Climate Times's Petition for the Writ of certiorari, the Notice of Appeal remains. The bond requirement does not apply to the appeal of the Second Bond Order, and the challenge to the Second Bond Order is of paramount importance to our State's jurisprudence.

25. As stated in both the Notice of Appeal and the Petition for Writ of Certiorari, the challenge to the CPCN itself must remain part of the judicial review. If the reviewing court determines the bond requirement is unconstitutional or otherwise an unlawful constraint on a petitioner's access to the courts, it would then review the arguments on the

merits on the CPCN. If on the other hand, the reviewing court upholds the bond requirement and determines the \$98 million bond is adequately justified, it need not review the merits of the CPCN. The procedural issues relating to the bond cannot stand alone; otherwise the petitioners could be put in the position of prevailing on the bond issues without having raised the merits of the matter in a timely fashion allowing for review of the CPCN.

26. Lastly, DEP's motion to dismiss all of the matters at the Commission level is both inappropriate and overreaching. With all due respect to the Commission, review of its decisions are made by the Court of Appeals, and even if the Commission believes its decision has a sound legal basis, it cannot ultimately resolve issues clearly in the reviewing court's purview. DEP's Motion to Dismiss should therefore be denied.

CONCLUSION

For the reasons set forth above, NC WARN and The Climate Times respectfully request DEP's Verified Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal be denied.

Respectfully submitted, this the 14th day of September, 2016.

/s/ John D. Runkle

John D. Runkle
Attorney at Law
2121 Damascus Church Road
Chapel Hill, NC 27516
(919) 942-0600 – telephone

jrunkle@pricecreek.com

/s/ Matthew D. Quinn

Matthew D. Quinn
N.C. State Bar No. 40004
Law Offices of F. Bryan Brice, Jr.
127 W. Hargett Street, Suite 600
Raleigh, NC 27601
(919) 754-1600 – telephone
(919) 573-4252 – facsimile
matt@attybryanbrice.com

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 VERIFIED MOTION TO DISMISS SECOND NOTICE OF APPEAL AND RENEWED MOTION TO DISMISS NOTICE OF 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 14th day of September, 2016.

/s/ John D. Runkle

John D. Runkle, Attorney at Law