

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1089

|   |   |                          |
|---|---|--------------------------|
| In the Matter of                                | ) |                          |
|   | ) |                          |
| Application of Duke Energy Progress, LLC for a  | ) | DUKE ENERGY PROGRESS'    |
| Certificate of Public Convenience and Necessity | ) | VERIFIED MOTION TO       |
| To Construct a 752-MW Natural Gas-Fueled        | ) | DISMISS APPEAL OF SECOND |
| Electric Generation Facility in Buncombe        | ) | BOND ORDER               |
| County Near the City of Asheville               | ) |                          |

---

NOW COMES Duke Energy Progress, LLC, (“DEP” or “the Company”) pursuant to N.C. Gen. Stat. §62-82(b), N.C. Gen. Stat. § 62-90, and North Carolina Rule of Appellate Procedure 25(a), and respectfully files this Motion to Dismiss Appeal of Second Bond Order filed by NC WARN and The Climate Times<sup>1</sup> (collectively, “Potential Appellants”) on July 28, 2016. In support thereof, DEP states specifically as follows:

1. On March 28, 2016, the Commission issued its *Order Granting Application in Part, with Conditions, and Denying Application in Part* (“CPCN Order”), holding that the public convenience and necessity require the construction of the two 280 MW combined cycle units proposed as part of DEP’s Western Carolinas Modernization Project.

2. On April 25, 2016, along with a Motion to Set Bond, Potential Appellants filed a Motion for an Extension of Time to File Notice of Appeal and Exceptions. The Commission granted the motion, extending the period to file notice of appeal until May 27, 2016.

---

<sup>1</sup> As explained herein, DEP submits that that NC WARN and The Climate Times do not have the status as Appellants because they have repeatedly ignored the North Carolina General Statutes, the Rules of Appellate Procedures, and this Commission’s Orders, and have therefore failed, on multiple occasions, to perfect an appeal as required by law.

3. On May 10, 2016, The Commission issued its *Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)* (“First Appeal Bond Order), which required Potential Appellants to file an executed undertaking or bond on or before May 27, 2016 and prior to filing their Notice of Appeal.

4. On May 19, 2016, Potential Appellants filed a Petition for a Writ of Certiorari, a Petition for a Writ of Supersedeas, and a Motion for Temporary Stay with the North Carolina Court of Appeals, seeking review of and temporary relief from the Commission’s Appeal Bond Order. On May 27, 2016, Potential Appellants filed a Notice of Appeal; without posting an appeal bond in violation of the N.C Gen. Stat. § 62-82(b) and the First Appeal Bond Order.

5. On May 31, 2016, DEP filed a Response to Petition for Writ of Certiorari and Petition for Writ of Supersedeas with the Court of Appeals and filed a Motion to Dismiss Potential Appellants’ Appeal of the CPCN Order for failure to file a bond with the Commission.

6. On June 3, 2016, Potential Appellants filed a response opposing the dismissal.

7. On June 7, 2016, the Court of Appeals allowed Potential Appellants’ Petition for Certiorari for the limited purpose of vacating and remanding the Commission’s Order setting bond, stating, “the Commission shall set the bond in an amount that is in accordance with N.C. Gen. Stat. § 62-82 (b) and based upon competent evidence.”<sup>2</sup>

---

<sup>2</sup> The Court of Appeals issued an Order Denying a Motion to Stay on May 24, 2016. The deadline for filing the Notice of Appeal expired on May 27, 2016, as extended by the Commission. Under N.C. Gen. Stat. §62-90 (a), the Commission could not extend the date for filing the Notice of Appeal beyond that date.

8. On June 8, 2016, the Commission issued an Order Setting Hearing on the issue of setting an undertaking or bond pursuant to N.C. Gen. Stat. § 62-82(b), requiring both Potential Appellants to sponsor witnesses to testify on the appropriate amount of the bond.

9. On June 14, 2016, Potential Appellants filed a response to the Commission's Order, moving the Commission not to allow additional evidence at the hearing or to provide Potential Appellants 10 additional days to submit additional evidence.<sup>3</sup>

10. On June 17, 2016, the Commission denied the Motion of Potential Appellants and proceeded with the evidentiary hearing. Despite the Commission Order requiring both DEP and Potential Appellants to sponsor witnesses on the bond issue, NC WARN failed to comply with the Commission's Order to present a witness, and even objected when DEP called NC WARN Executive Director, James Warren to testify at the hearing.

11. On June 27, 2016, NC WARN filed a late-filed exhibit, an affidavit from William E. Powers.

12. On June 29, 2016, DEP filed a response to that affidavit.

13. On July 8, 2016, the Commission issued an *Order Setting Undertaking or Bond Pursuant to N.C. Gen. Stat. § 62-82(b)* (Second Bond Order) setting the amount of the bond or undertaking at \$98 million and providing Potential Appellants until July 13,

---

The Court of Appeals Order granting the Petition for Certiorari was not issued until after the deadline for filing the Notice of Appeal. To a large extent, the timing of these Orders resulted in the procedural complexities of this docket.

<sup>3</sup> Incredibly, Potential Appellants asked the Commission not to hold the evidentiary hearing they had sought in their April 26, 2016 Motion to Set Bond and in their Petition filed with the Court of Appeals.

2016 to file the bond or undertaking with the Commission. As to affidavit of William Powers, the Commission stated in its Order, “The Commission assigns no weight to the limited evidence addressing the computation of appeal related damages in the late-filed affidavit because it is lacking in credibility.” Second Bond Order at p. 21 and n. 7.

14. On July 20, 2016, DEP filed a Renewed Motion to Dismiss the Appeal for Potential Appellants for failure to again file the appeal prerequisite bond with the Commission.

15. On July 28, 2016, Potential Appellants filed a Notice of Appeal and exceptions as to the Second Bond Order.

16. On August 4, 2016, the Commission issued its *Order Dismissing Appeal for Failure to Comply with Bond Prerequisite*, dismissing the Appeal of the CPCN Order.

17. Potential Appellants knowingly failed to take timely action to perfect their appeal of the Commission’s Second Bond Order, which required Potential Appellants to file the bond or undertaking within 5 days of the issuance of the July 8, 2016 Order. Potential Appellants failed to file a bond by July 13, 2016, as required and, as of this date, have still not filed a bond or undertaking and has demonstrated no intention of doing so.

#### ARGUMENT

It is undisputed that Potential Appellants have to file the necessary bond or undertaking as a condition to filing an appeal under N.C. Gen. Stat. § 62-82(b),

(b) Compensation for Damages Sustained by Appeal from Award of Certificate under G.S. 62-110. *Bond Prerequisite to Appeal*. - 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, which such party sustains by reason of the delay in beginning the construction of the facility which is occasioned by the appeal, such damages to be measured by the increase in the cost of such generating facility (excluding legal fees, court costs, and other expenses incurred in connection with the appeal). *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.* (Emphasis added)

As the Commission has held repeatedly, the purpose of the appeal bond requirement is to protect DEP's customers from increases in construction costs due to appeal-related delays. As the Commission held,

The statute plainly places on the appealing party the financial risk of what could be extensive additional costs. Otherwise, these costs would be added to the cost of the generating facility to be recovered from consumers through higher rates.<sup>4</sup>

With their appeal of the Second Bond Order, Potential Appellants seek to simply act as if they are above law and ignore the specific requirements of N.C. Gen. Stat. § 62-82(b). In determining the meaning of a statute, the court must ascertain the intention of the legislature and carry such intention into effect to the fullest degree. *Ballard v. City of Charlotte*, 235 N.C. 484, 487, 70 S.E.2d 575, 577 (1952). The General Assembly did not intend for the purpose of the statute to be avoided by permitting Potential Appellants to make an end run.<sup>5</sup> Potential Appellants' appeal challenging the CPCN Order was

---

<sup>4</sup> Second Bond Order at p. 27.

<sup>5</sup> N.C. Gen. Stat. § 62-82(b) is the only Chapter 62 statute with such a requirement. Clearly, the General Assembly knew the economic and reliability consequences of unnecessary appeals related to the construction of new generating capacity.

dismissed by the Commission Order dated August 4. Now they seek to challenge the CPCN Order by appealing the Second Bond Order. Potential Appellants cannot simply ignore the requirements of N.C. Gen Stat. § 62-82(b). Again, the intent of the statute is to protect customers from delay caused by failed appeals, which cause damages relating to increased costs, and potential threats to reliability. Allowing Potential Appellants' appeal of the Second Bond Order to proceed without the filing of a bond would cause the same delay, the same cost increases, the same potential threat to reliability and would render the statute meaningless. Most critically, however, *allowing Potential Appellants to appeal without filing the bond would provide no protection whatsoever for DEP's customers* for construction cost increases caused by the appeal-related delay.

This does not mean that NC WARN is deprived of a potential remedy. To the extent Potential Appellants seek a review of the Second Bond Order, the appropriate mechanism is to file a Petition for Writ of Certiorari with the Court of Appeals.<sup>6</sup> Potential Appellants are no doubt aware of the process because that is the action they took in appealing the First Bond Order on May 23. However, this time and for whatever reason, rather than properly filing a Petition for Writ of Certiorari, Potential Appellants filed a Notice of Appeal instead. It seems nonsensical that a party would contemplate filing both a Petition for Writ of Certiorari and a Notice of Appeal. However, Potential Appellants argued against the dismissal of their Appeal of the CPCN Order, partly by guaranteeing to this Commission, "On or before August 8 NC WARN and the Climate

---

<sup>6</sup> It was through the granting of a similar Writ that created the need for a Second Bond Order.

Times will file with the N.C. Court of Appeals a Petition for a Writ of Certiorari before August 8, 2016.”<sup>7</sup> Currently, no such Petition has been filed.

This is DEP’s third Motion to Dismiss filed in this Docket. In DEP’s view, Potential Appellants have attempted to delay resolution of this Docket by filing invalid notices of appeal, unnecessary responses, oppositions to hearings that it had requested and empty promises of future filings to come. In the meantime, DEP’s customers in Carolinas are facing potential increased construction costs due to appeal related delays of a new power plant the Commission has determined is required by the public convenience and necessity.

Potential Appellants’ Notice of Appeal should be dismissed pursuant to North Carolina Court of Appeals Rule 25(a). Rule 25(a) provides, in pertinent part, as follows,

*If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed.* Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court. . . . motions made under this rule to a commission may be heard and determined by the chair of the commission. (Emphasis added)

Because Potential Appellants’ Notice of Appeal has not yet been filed in the Court of Appeals (as the appeal has not yet been docketed), DEP’s motion to dismiss is properly before this Commission pursuant to Rule 25(a) and should be granted. To the extent required under Rule 25(a), DEP asks that this verified motion also be treated as an

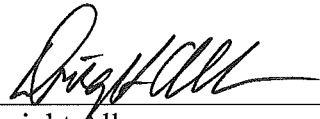
---

<sup>7</sup> NC WARN and The Climate Times’ *Response to Renewed Motion to Dismiss Appeal*, pg. 4, July 26, 2016

affidavit to show the failure of Potential Appellants to take timely action to perfect their appeal.

WHEREFORE, for all the foregoing reasons, DEP respectfully requests that the Commission dismiss NC WARN's Notice of Appeal of the Second Bond Order filed on July 28, 2016.

This 12<sup>th</sup> \_day of August, 2016.



\_\_\_\_\_  
Dwight Allen  
The Allen Law Offices  
1514 Glenwood Avenue, Suite 200  
Raleigh, North Carolina 27608  
Telephone: (919) 838-0529  
[dallen@theallenlawoffices.com](mailto:dallen@theallenlawoffices.com)

Lawrence B. Somers  
Deputy General Counsel  
Duke Energy Corporation  
Post Office Box 1551/NCRH 20  
Raleigh, North Carolina 27602  
Telephone: 919-546-6722  
[bo.somers@duke-energy.com](mailto:bo.somers@duke-energy.com)

ATTORNEYS FOR DUKE ENERGY  
PROGRESS, LLC



STATE OF NORTH CAROLINA )  
 )  
 )  
COUNTY OF WAKE )  
 )

VERIFICATION

Lawrence B. Somers, being first duly sworn, deposes and says:

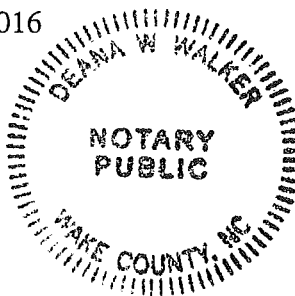
That he is the Deputy General Counsel of Duke Energy Corporation; that he has read the forgoing, Duke Energy Progress's Affidavit in Support of Motions to Dismiss and knows the contents thereof, that the same is true to the best of his knowledge information and belief.

*Lawrence B. Somers*  
\_\_\_\_\_  
Lawrence B. Somers

Sworn to and subscribed by me this 12<sup>th</sup> day of August, 2016

*Deana W. Walker*  
\_\_\_\_\_  
Notary Public

My Commission Expires: 3/28/2019



## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing VERIFIED MOTION TO DISMISS APPEAL OF SECOND BOND ORDER was served on the following parties to this matter by electronic service or by depositing the same, postage prepaid and properly addressed with the United States Postal Service. Department to:

Gail L. Mount  
Chief Clerk  
North Carolina Utilities Commission  
4325 Mail Service Center  
Raleigh, NC 27699-4300  
[mount@ncuc.net](mailto:mount@ncuc.net)

Matthew D. Quinn  
Law Offices of F. Bryan Brice, Jr.  
127 W. Hargett Street, Suite 600  
Raleigh, NC 27601  
[matt@attybryanbrice.com](mailto:matt@attybryanbrice.com)

John D. Runkle  
Attorney at Law  
2121 Damascus Church Road  
Chapel Hill, NC 27516  
[jrunkle@pricecreek.com](mailto:jrunkle@pricecreek.com)

Sam Watson  
General Counsel  
North Carolina Utilities Commission  
4325 Mail Service Center  
Raleigh, NC 27699-4300  
[swatson@ncuc.net](mailto:swatson@ncuc.net)

Antoinette R. Wike  
Chief Counsel, Public Staff  
4326 Mail Service Center  
Raleigh, NC 27699-4300  
[Antoinette.wike@psncuc.nc.gov](mailto:Antoinette.wike@psncuc.nc.gov)

Scott Carver  
Columbia Energy, LLC  
One Town Center, 21<sup>st</sup> Floor  
East Brunswick, NJ 08816  
[scarver@lspower.com](mailto:scarver@lspower.com)

Gudren Thompson  
Austin D. Gerken, Jr.  
Southern Environmental Law Center  
Suite 220  
601 West Rosemary Street  
Chapel Hill, NC 27516-2356  
[gthompson@selcnc.org](mailto:gthompson@selcnc.org)  
[djgerken@selcnc.org](mailto:djgerken@selcnc.org)

Peter H. Ledford  
NC Sustainable Energy Association  
4800 Six Forks Road  
Suite 300  
Raleigh, NC 27609  
[peter@energync.org](mailto:peter@energync.org)  
[Michael@energync.org](mailto:Michael@energync.org)

Ralph McDonald  
Adams Olls  
Bailey and Dixon, LLP  
Carolina Industrial Group for Fair Utility  
Rates II  
P.O. Box 1351  
Raleigh, NC 27602-1351  
[mcdonald@bdixon.com](mailto:mcdonald@bdixon.com)

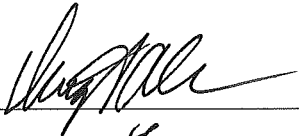
Daniel Higgins  
Burns Day & Presnell, P.A.  
Columbia Energy, LLC  
P.O. Box 10867  
Raleigh, NC 27605 [dhiggins@bdppa.com](mailto:dhiggins@bdppa.com)

Sharon Miller  
Carolina Utility Customer Association  
Suite 201 Trawick Professional Center  
1708 Trawick Road  
Raleigh, NC 27604  
[Smiller@cucainc.org](mailto:Smiller@cucainc.org)

Robert Page  
Crisp, Page & Currin, LLP  
Carolina Utility Customer Association  
Suite 205  
4010 Barrett Drive  
Raleigh, NC 27609-6622  
[rpage@cpclaw.com](mailto:rpage@cpclaw.com)

Grant Millin  
48 Riceville Road, B314  
Asheville, NC 28805  
[grantmillin@gmail.com](mailto:grantmillin@gmail.com)

Brad Rouse  
3 Stegall Lane  
Asheville, NC 28805  
[Brouse\\_invest@yahoo.com](mailto:Brouse_invest@yahoo.com)



---

This the 12<sup>th</sup> day of August, 2016