

**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 Certificate of Public Convenience)
and Necessity To Construct a 752-MW) **ORDER DISMISSING APPEALS**
Natural Gas-Fueled Electric Generation)
Facility in Buncombe County Near the)
City of Asheville)

BY THE COMMISSION: On March 28, 2016, the Commission issued an Order in the above-captioned docket (CPCN Order) which, among other things, granted Duke Energy Progress, LLC (DEP), a certificate of public convenience and necessity (CPCN) to construct two 280 MW combined-cycle natural gas-fired electric generating units in Buncombe County, North Carolina (the Project or Facility) in compliance with G.S. 62-110.1 and the Mountain Energy Act, Session Law 2015-110. This act required the Commission to issue its order on the CPCN application within 45 days of filing, indicating the General Assembly's desire for an expedited decision.

On April 25, 2016, the North Carolina Waste Awareness and Reduction Network and The Climate Times (collectively, NC WARN) filed a Motion To Set Bond Pursuant to G.S. 62-82(b), requesting that the Commission set a bond, a prerequisite for appeal of the Commission's CPCN Order, in an amount of \$250 and requesting an oral argument or evidentiary hearing on the bond requirement.

On May 10, 2016, after receiving a DEP response and NC WARN reply, the Commission issued its Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) (First Bond Order). The Commission required NC WARN to file an executed undertaking or a bond in the sum of \$10 million prior to filing a notice of appeal. Notice of appeal based on an extension of time granted to NC WARN was due May 27, 2016. The Commission established a procedure that potentially authorized NC WARN to be relieved of this requirement based on subsequent events or to conduct a hearing if DEP determined not to start construction in October 2016. NC WARN filed no bond by May 27, 2016, and has never sought or obtained an extension of time to file notice of appeal beyond May 27, 2016.

On May 19, 2016, NC WARN filed in the Court of Appeals a Petition for Writ of Certiorari, Petition for Writ of Supersedeas, and Motion for Temporary Stay of the Commission's First Bond Order. On May 24, 2016, the Court of Appeals denied NC WARN's Motion for Temporary Stay.

On May 27, 2016, NC WARN filed a Notice of Appeal and Exceptions in Docket No. E-2, Sub 1089 to the Commission's CPCN Order and the First Bond Order without filing the required undertaking or appeal bond as required by G.S. 62-82(b) and the First Bond Order.

On May 31, 2016, DEP filed a motion to dismiss the appeal of the Commission's CPCN Order and the First Bond Order for NC WARN's failure to file the statutorily required undertaking or appeal bond.

On June 7, 2016, the Court of Appeals allowed NC WARN's Petition for Writ of Certiorari for the limited purpose of vacating and remanding the Commission's First Bond Order. The Court of Appeals stated that on remand "the Commission shall, in its discretion, set bond in an amount that is in accordance with N.C. Gen. Stat. 62-82(b) and based upon competent evidence." The Commission interpreted this order as a requirement that the First Bond Order, modified as necessary and supported by competent evidence, relates back in time to May 10, 2016, prior to NC WARN's May 27, 2016 notice of appeal, as compliance with the requirements of G.S. 62-82(b) are a prerequisite to the filing of a valid notice of appeal.

After an evidentiary hearing conducted in response to the Court's June 7, 2016 order, on July 8, 2016, the Commission issued an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) (Second Bond Order) setting the bond or undertaking at \$98 million based upon the evidence presented at the evidentiary hearing. At the evidentiary hearing, DEP represented that it would delay beginning of construction of the Facility if a valid appeal was pending in October 2016.

NC WARN did not file a bond or undertaking by July 13, 2016, as required by the Second Bond Order and G.S. 62-82(b).

On July 20, 2016, DEP filed a renewed motion to dismiss NC WARN's appeal of the CPCN Order. In its motion, DEP argued that NC WARN failed to file the prerequisite undertaking or bond required by G.S. 62-82(b) and the Second Bond Order; therefore, NC WARN's appeal should be dismissed.

In response, on July 26, 2016, NC WARN admitted that it did not file a bond or undertaking as required by the Commission's Second Bond Order, but stated that as it was unsure how best to pursue its challenges to the orders, it would file both a notice of appeal to the Second Bond Order and a Petition for Writ of Certiorari for review of the Second Bond Order on or before August 8, 2016. NC WARN further asserted that G.S. 62-82(b) unconstitutionally deprives NC WARN of its right to court access.

On July 28, 2016, NC WARN filed a Notice of Appeal and Exceptions to the Second Bond Order.

On August 2, 2016, the Commission issued an order dismissing the appeal of the CPCN Order for failure to file a bond in compliance with the Second Bond Order (Dismissal Order).

On August 4, 2016, NC WARN filed a proposed Record on Appeal which included exceptions to two of the Commission's Orders: the CPCN Order dated March 28, 2016, the appeal of which the Commission dismissed on August 2, 2016, and the Second Bond Order dated July 8, 2016. NC WARN alleged constitutional violations with respect to the CPCN Order and the Second Bond Order.

On August 12, 2016, DEP filed a verified motion to dismiss NC WARN's appeal of the Second Bond Order. In its motion, DEP argued that the bond requirement of G.S. 62-82(b) is established to protect DEP's customers from increases in construction costs due to appeal-related delays. DEP argued that by appealing the Second Bond Order NC WARN is attempting to make an end run around the requirements, purpose and intent of G.S. 62-82(b). DEP alleged that the Commission dismissed NC WARN's appeal of the CPCN Order on August 2, 2016, and NC WARN continues to attempt to contest the CPCN Order by appealing the Second Bond Order. DEP argued that allowing NC WARN to proceed with an appeal of the Second Bond Order without filing a bond creates the same delay, the same cost increases, the same potential threat to reliability and would render the statute meaningless. DEP argued that "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."

DEP contended in its August 12, 2016 motion that dismissal of the appeal does not deprive NC WARN an avenue to seek review of the Second Bond Order. DEP stated that the appropriate mechanism would be for NC WARN to file a Petition for Writ of Certiorari with the Court of Appeals. DEP indicated that NC WARN argued in front of the Commission that it planned to file a Petition for Writ of Certiorari before August 8, 2016. DEP argued that in its view, NC WARN continues to attempt to delay the resolution of the Docket by filing invalid notices of appeal, unnecessary responses, oppositions to hearings and empty promises of future filings at the expense of DEP's customers which are facing potential increased construction costs due to appeal related delays of a generation facility that the Commission has determined to be required by the public convenience and necessity.

DEP argued that NC WARN's appeal should be dismissed pursuant to Rule 25(a) of the North Carolina Rules of Appellate Procedure for NC WARN's failure to take any action required to present the appeal for decision. DEP requested that the verified motion be treated as an affidavit.

On August 18, 2016, NC WARN filed a Notice of Appeal and Exceptions on the CPCN Order dated March 28, 2016, and the Dismissal Order dated August 2, 2016. NC WARN stated that this notice of appeal and exceptions is in addition to the notice of appeal filed on July 28, 2016 that challenged the Second Bond Order. NC WARN further

acknowledged that its first notice of appeal of the CPCN Order dated March 28, 2016, has been dismissed, but that the purpose of this filing was to preserve its rights in the event the N.C. Court of Appeals ruled in its favor on the Petition for Writ of Certiorari that it filed simultaneously at the Court of Appeals with the present Notice of Appeal.

In the Petition for Writ of Certiorari filed on August 18, 2016, with the N.C. Court of Appeals, NC WARN requested the Court to issue yet another writ of certiorari and review and reverse the CPCN Order, review and reverse the Second Bond Order, and review and reverse the Dismissal Order.¹ NC WARN indicates that it was unclear whether the correct appellate approach was to file another notice of appeal or to file a petition for a writ of certiorari, so it did both.

On August 23, 2016, NC WARN filed a response to DEP's motion to dismiss the Second Bond Order. In its response, NC WARN states that it has appealed this order by a notice of appeal and by a petition for writ of certiorari. NC WARN states that the bond requirement does not apply to an appeal of the Second Bond Order.

On September 2, 2016, DEP filed a Response to the Petition for Writ of Certiorari in the N.C. Court of Appeals. DEP requested that the Court find the appeal bond requirement and the Second Bond Order constitutional, find the Mountain Energy Act and CPCN Order constitutional and find no errors within the CPCN Order, and find the Dismissal Order was proper where NC WARN did not file the prerequisite bond to appeal.

On September 2, 2016, the Public Staff filed a Response to the Petition for Writ of Certiorari in the N.C. Court of Appeals. The Public Staff requested that the Court consolidate all of the notices of appeal into the writ of certiorari in the public interest and affirm the Second Bond Order and dismiss all of NC WARN's other remaining claims.

On September 6, 2016, the NC Court of Appeals denied NC WARN's August 18, 2016 petition for a writ of certiorari. The Commission interprets this order as the Court's determination not to review the Commission's CPCN Order, the Second Bond Order or the Commission's order dismissing NC WARN's appeal of the CPCN Order, all items of relief requested by NC WARN in its petition. At the very least, the Court's order constitutes a refusal to review through a certiorari writ the Commission's Second Bond Order. This Second Bond Order resulted from the Court's writ of June 7, 2016.

On September 9, 2016, DEP filed a verified Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal filed by NC WARN. DEP renews its motion to dismiss NC WARN's appeal of the Second Bond Order, which DEP filed on August 12, 2016. DEP also moves to dismiss the appeal filed by NC WARN on August 18, 2016, wherein NC WARN appealed the CPCN Order and the Dismissal Order which dismissed the CPCN Order appeal.² DEP argues that NC WARN is attempting to delay

¹ One of the arguments for reversing both the CPCN Order and the Second Bond Order is based upon the constitutionality of a statute.

² Again, NC WARN acknowledged that the appeal of CPCN Order had already been dismissed once by the Commission.

the construction of the Western Carolinas Modernization Project through this series of repeated appeals and petitions.

DEP argues that in its August 18, 2016 Petition for Writ of Certiorari to the Court of Appeals, NC WARN consolidated its arguments made over the course of many months and multiple filings. NC WARN argued that the CPCN Order is not supported by competent, material and substantial evidence, that the Mountain Energy Act is unconstitutional, that the Second Bond Order violates the Open Courts Clause of the NC Constitution and is not supported by competent, material and substantial evidence, and finally that the Dismissal Order should be reversed because it is based upon the legally deficient Second Bond Order. DEP argues that the Court of Appeals denied NC WARN's petition in its entirety, summarily rejecting each of the arguments raised by NC WARN. DEP cites that once an appellate court rules on a question, the decision of that court becomes the law of the case and governs the question not only when the case is remanded to the trial court, but on a subsequent appeal of the same case. North Carolina Nat'l Bank v. Virginia Carolina Builders, 307 N.C. 563, 566, 299 S.E2d 629, 631 (1983). DEP thereafter reiterates that NC WARN's notices of appeal should be dismissed pursuant to Rule 25(a) of the North Carolina Rules of Civil Procedure.

On September 13, 2016, DEP filed objections to the proposed record on appeal arguing that based upon correspondence DEP received, the Record on Appeal addresses the CPCN Order and related constitutional issues and not the Second Bond Order. Further, the Commission has pending motions before it that need to be resolved.

On September 14, 2016, NC WARN filed a response to DEP's motion to dismiss second notice of appeal and renewed motion to dismiss the notice of appeal. In its response, NC WARN contends that the appeal to the Second Bond Order should not be dismissed because the appeal presents an important issue such as whether the bond requirement of G.S. 62-82(b) violates the Open Courts Clause of the North Carolina Constitution. NC WARN argues that the bond requirement does not apply to the appeal from the Second Bond Order. NC WARN further argues that the appeal of the CPCN Order must remain part of the judicial review. Otherwise, if NC WARN prevailed on the bond issue, there would be no CPCN Order to review on the merits.

On September 15, 2016, NC WARN filed a response to DEP's objections to the proposed record on appeal. NC WARN argues DEP's objection to the proposed record on appeal is without merit and should be denied.

FINDINGS, DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to G.S. 62-2(a) the General Assembly has determined that "rates, services and operations of public utilities are affected with the public interest and that the availability of an adequate and reliable supply of electric power ... to the people, economy and government of North Carolina is a matter of public policy." Further, it is the policy of the State "to promote adequate, reliable and economical utility service to all the citizens and residents of the State." Thus, the resolution of this matter is of significant public interest.

Time is of the essence. The General Assembly has established an expedited timeline for Commission ruling. Appeal-related delays potentially will result in multi-million dollar cost increases.

The Commission has before it a motion to dismiss NC WARN's appeal of three orders that all relate to the Commission's grant of a certificate of public convenience and necessity to construct two 280 MW combined-cycle natural gas-fired electric generating units in Buncombe County, North Carolina. These three orders are the CPCN Order, which granted DEP the authority to construct the Facility, the Second Bond Order, which required NC WARN to file a bond or undertaking as a prerequisite to appeal the CPCN Order, and the Dismissal Order, which dismissed NC WARN's appeal of the CPCN Order for failure to file the required bond or undertaking pursuant to G.S. 62-82(b).

Many filings have taken place in this proceeding both with the Commission and with the N.C. Court of Appeals. The present status of the filings and rulings at the Court of Appeals is that on August 18, 2016, NC WARN filed a Petition for Writ of Certiorari to the Court of Appeals, consolidating all of its arguments made over the course of many months and multiple filings. NC WARN argued in its petition that the CPCN Order is not supported by competent, material and substantial evidence, that the Mountain Energy Act is unconstitutional, that the Second Bond Order violates the Open Courts Clause of the North Carolina Constitution and is not supported by competent, material and substantial evidence, and finally that the Dismissal Order should be reversed because it is based upon the legally deficient Second Bond Order. DEP and the Public Staff separately filed a response. On September 6, 2016, the N.C. Court of Appeals denied NC WARN's petition.

In response to the N.C. Court of Appeals' denial of NC WARN's petition for writ of certiorari, DEP filed a motion to dismiss NC WARN's appeals of the three orders relating to the grant of the CPCN to DEP. As support, DEP cited to legal precedent that once an appellate court rules on a question, the decision of that court becomes the law of the case and governs the question not only when the case is remanded to the trial court, but on a subsequent appeal of the same case. North Carolina Nat'l Bank v. Virginia Carolina Builders, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983).

The Commission will first address NC WARN's arguments to deny DEP's motion to dismiss the appeals. NC WARN argues that the bond requirement of G.S. 62-82(b) does not apply to the appeal from the Second Bond Order. Further, NC WARN argues that the appeal of the CPCN Order must remain part of the appeal of the Second Bond Order. Otherwise, if NC WARN prevailed on the bond issue, there would be no CPCN Order to review on the merits.

The Commission disagrees and finds that the opposite is true. The procedural issue in the present matter arises from the fact that NC WARN filed a notice of appeal without the prerequisite bond. After the notice had been filed, the matter of the amount of the bond was remanded back to the Commission, requiring that "the Commission shall, in its discretion, set bond in an amount that is in accordance with N.C. Gen. Stat. 62-82(b)

and based on competent evidence.” Thus, due to the unusual procedural posture of the present case, NC WARN attempts to separate the Second Bond Order from the CPCN Order to avoid the required bond to appeal. The issue of the proper amount of the bond is a determination that is part of the appeal of the CPCN Order. In the normal course, the bond order is a prerequisite to the filing of the Notice of Appeal; therefore, no appeal may be taken without security pursuant to G.S. 62-82(b). The CPCN Order was issued in compliance with the Mountain Energy Act, Session Law 2015-110, where the North Carolina General Assembly directed the Commission to render an expedited decision on an application for a certificate to build an electric generating facility that uses natural gas as a primary fuel if certain conditions are met. This legislation is further evidence that an expedited decision on this matter is needed. The Commission finds that to allow NC WARN’s appeal of the Second Bond Order to proceed on a normal appellate track without any bond, creates the same appellate-related delays, the same potential cost increases, and the same potential threat to reliability. Again, the Second Bond Order is part and parcel of the CPCN proceeding that requires a bond to appeal to provide protection to DEP’s customers for construction cost increases caused by the appeal-related delays. To allow an appeal of the Second Bond Order to move forward renders G.S. 62-82(a) meaningless and does not fit within the public policy goals set forth in G.S. 62-2.

With regard to DEP’s argument based upon North Carolina Nat’l Bank v. Virginia Carolina Builders, 307 N.C. 563, 566, 299 S.E2d 629, 631 (1983), DEP argues that the Court of Appeals’ denial of NC WARN’s petition for writ of certiorari is the law of the case and that the Commission should dismiss the appeals because one panel of the Court of Appeals cannot overrule another panel of the Court of Appeals.

Rule 25(a) of the North Carolina Rules of Appellate Procedure states:

(a) Failure of Appellant to Take Timely Action. 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.

North Carolina General Statute 62-82(b) states that “no appeal from an order of the Commission which awards any certificate may be taken by any party opposing such award unless, within the time limit for filing notice of appeal ... such party shall have filed with the Commission a bond”

NC WARN has refused to comply with the bond requirements. In its September 6, 2016 order, the Court refused to issue a writ to address NC WARN’s objections to the Second Bond Order. Thus, it is the case that NC WARN has failed to take action required by general statute, Commission order and now by Court order to present the appeal of the CPCN Order for decision to the Court of Appeals. Had NC WARN complied with the

Second Bond Order on or before July 13, 2016, as required, its compliance after its May 27, 2016 notice of appeal would have related back to allow its May 27, 2016 appeal to go forward. Having failed to comply and having lost in its bid to persuade the Court to address and vacate the Second Bond Order, its appeal of the CPCN Order and all other appeals of each subsequent Commission order in this docket are subject to dismissal and must be dismissed.

G.S. 62-82(b) requires that the bond be in such amount sufficient for the appellant to recompense the party awarded the certificate for damages from an unsuccessful appeal caused by appeal-related delays in beginning construction of the facility. The statute states the measure of damages is the increase in the cost of the facility. NC WARN has repeatedly failed to file the prerequisite bond required to present its appeal to an appellate court, and the N.C. Court of Appeals has denied NC WARN's writ for petition for certiorari.

In its notices of appeal and in its petition for writ of certiorari, NC WARN asserted that G.S. 62-82(b) unconstitutionally deprives NC WARN of its rights to court access. NC WARN also argued that the Mountain Energy Act was unconstitutional. As discussed above, the N.C. Court of Appeals denied review of these arguments in its order of September 6, 2016. In addition, NC WARN is prohibited at this stage of the proceedings to raise them through an appeal of the Commission's orders. Although acts of the General Assembly are presumed to be constitutional, State ex rel. Martin v. Preston, 325 N.C. 438, 382 S.E.2d 473 (1989), it is not within the Commission's jurisdiction as a quasi-judicial administrative agency to rule on the constitutionality of a statute. Great Am. Ins. Co. v. Gold, 254 N.C. 168, 173, 118 S.E.2d 792 (1961). The appellate court must resolve these constitutional issues. The Court of Appeals has stated that "where a party appeals a constitutional issue from the Commission³ and fails to file a petition for certiorari or fails to have the questions certified by the Commission, this Court is without jurisdiction." Myles v. Lucas & McCowan Masonry, 183 N.C. App. 665, 645 S.E.2d 143 (2007) (footnote not in original).

In the present case, NC WARN filed a petition for discretionary review of all issues, including the constitutional issues, and the N.C. Court of Appeals denied NC WARN's petition on September 6, 2016. Indeed, NC WARN cannot appeal based on constitutional issues except on a grant of certiorari which the Court has denied.

Furthermore, should NC WARN seek to request a third writ of certiorari to seek review of its constitutional assertions, it should be precluded from doing so. The September 6 denial of the petition for certiorari has become the law of the case. Estrada v. Jaques, 70 N.C. App. 627, 640-641, 321 S.E.2d 240, 249 (1984). In Estrada, the plaintiff-appellant in a medical malpractice action, filed a petition for writ of certiorari to review the trial court's order dismissing the appeal as to certain defendants (radiologists) as well as the underlying orders appealed from. Id. at 640-41. The plaintiff-appellant also

³ The Commission referred to in the case is the Industrial Commission; however, the underlying reasoning for the opinion is that the Industrial Commission is not a court of general jurisdiction, which is equally applicable to the Utilities Commission.

filed a notice of appeal on the same orders and filed the record on appeal on August 16, 1983. Id. at 637. A panel of the Court reviewing the petition for writ of certiorari denied the plaintiff-appellant's petition on August 18, 1983. The Estrada court held that because the plaintiff-appellant "unsuccessfully petitioned for certiorari to review the underlying orders from which he attempts to appeal," any decision by the court would effectively overrule the decision of the previous panel, which the North Carolina Supreme Court has firmly stated is not proper.

The N.C. Court of Appeals has denied NC WARN's petition for certiorari to review all of its exceptions relating to the CPCN Order, the Second Bond Order, and the Dismissal Order. This denial is the law of the case.

Therefore, based upon the affidavit filed by DEP and based upon the record as a whole, the Commission finds good cause to dismiss NC WARN's appeal of the Second Bond Order filed July 28, 2016, and NC WARN's notice of appeal filed August 18, 2016, appealing the CPCN Order and the Dismissal Order.

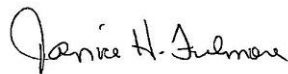
As the Commission has dismissed the appeals, issues raised regarding the record on appeal are now moot.

IT IS, THEREFORE, ORDERED that DEP's motion to dismiss NC WARN's appeal of the Second Bond Order filed July 28, 2016, and NC WARN's appeal of the CPCN Order and Dismissal Order filed August 18, 2016, shall be, and is hereby, granted, and that the proposed record on appeal filed on August 4, 2016, is not valid.

ISSUED BY ORDER OF THE COMMISSION.

This the 19th day of September, 2016.

NORTH CAROLINA UTILITIES COMMISSION



Janice H. Fulmore, Deputy Clerk