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July 20, 2016

VIA ELECTRONIC FILING

Gail L. Mount
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

**RE: Duke Energy Progress, LLC's Renewed Motion to Dismiss Appeal of
NC WARN and The Climate Times
Docket No. E-2, Sub 1089**

Dear Ms. Mount:

I enclose Duke Energy Progress, LLC's Renewed Motion to Dismiss Appeal of NC WARN and the Climate Times for filing in connection with the referenced matter.

Thank you for your attention to this matter. If you have any questions, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lawrence B. Somers', written over the word 'Sincerely,'.

Lawrence B. Somers

Enclosure

cc: Parties of Record

OFFICIAL COPY

Jul 20 2016

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)	RENEWED MOTION TO
To Construct a 752-MW Natural Gas-Fueled)	DISMISS APPEAL OF NC
Electric Generation Facility in Buncombe)	WARN AND THE CLIMATE
County Near the City of Asheville)	TIMES

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, North Carolina Rule of Appellate Procedure 25(a), and the Commission’s July 8, 2016 *Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)*, and hereby renews its motion to dismiss the Notice of Appeal and Exceptions by NC WARN and The Climate Times (collectively, “Potential Appellants”), filed on May 27, 2016 (“Notice of Appeal”).¹ In support of its Motion, the Company states 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

¹ DEP’s original Motion to Dismiss Appeal of NC WARN and The Climate Times was filed on May 31, 2016, because of Potential Appellants’ failure to file a bond or undertaking as required by statute and Commission Order. That Motion is still pending before the Commission. The Company’s original Motion is incorporated herein by reference.

Commission granted the motion, extending the period to file notice of appeal until May 27, 2016.²

3. On May 10, 2016, the Commission issued its *Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)* (“Original Appeal Bond Order”), which required Potential Appellants to file an executed undertaking or bond on or before May 27, 2016 as a condition of, 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 Original Appeal Bond Order. The Court of Appeals denied Potential Appellants’ Motion for a Temporary Stay on May 24, 2016.

5. On May 27, 2016, Potential Appellants filed their Notice of Appeal; however, they expressly noted they did so without filing the undertaking or appeal bond required by N.C. Gen. Stat. §62-81(b) and the Original Appeal Bond Order.³

6. 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 the Appeal with the Commission due to Potential Appellants’ failure to timely file the prerequisite appeal bond or undertaking with the Commission.

7. On June 3, 2016, Potential Appellants filed a response with the Commission in opposition to DEP’s Motion to Dismiss Appeal.

8. On June 7, 2016, the Court of Appeals allowed NC WARN’s petition for the limited purpose of vacating and remanding the Commission’s Original Appeal Bond

² Under N.C. Gen. Stat. §62-90(a), the Commission can only extend the time not to exceed 30 additional days.

³ Notice of Appeal, at p. 2.

Order, stating, “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.”⁴

9. In response, on June 8, 2016, the Commission issued its *Order Setting Hearing*, which scheduled an evidentiary hearing to receive competent evidence on the amount of the appeal bond or undertaking.

10. On June 14, 2016, Potential Appellants filed a response to the Commission’s Order, in which it moved that the Commission not allow additional evidence at the hearing, or in the alternative, to provide NC WARN at least ten additional days to submit additional testimony.

11. On June 17, 2016, the Commission denied the Motion of NC WARN and proceeded with the evidentiary hearing.

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

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

14. On July 8, the Commission issued its *Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)* (“Remand Bond Order”), setting the amount of the bond or undertaking at \$98 million and allowing NC WARN five calendar days (July 13, 2016) from the issuance of the order to file the bond or undertaking with the Commission.

15. NC WARN did not file a bond or undertaking with Commission within five days as required by the Commission’s Remand Bond Order and has to this point given no indication they plan to file a bond or undertaking.

ARGUMENT

Potential Appellants failed to timely file the prerequisite undertaking or appeal bond required by N.C. Gen. Stat. §62-82(b) and the Remand Bond Order, and their

⁴ The Court of Appeals Order was issued after the May 27, 2016 deadline for filing the Notice of Appeal.

appeal should be dismissed as a matter of law. N.C. Gen. Stat. §62-82(b) provides as follows:

(b) Compensation for Damages Sustained by Appeal from Award of Certificate under G.S. 62-110.1; *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).

In setting Potential Appellants' appeal bond or undertaking at \$98 million in the Remand Bond Order, the Commission determined that the only competent evidence in the record was that of DEP witness Mr. Mark Landseidel and ordered NC WARN to file a bond or undertaking of \$98 million within five days of its July 8, 2016 Order.⁵

Accordingly, because of their failure to take action to perfect their appeal on a timely basis by filing the required undertaking or bond - - twice now - - 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*

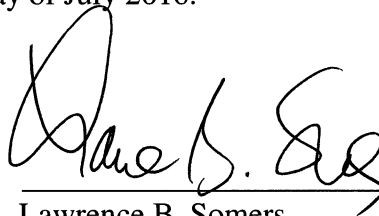
⁵ Remand Bond Order at pp. 16; 20-21. In its Remand Bond Order, the Commission held as follows, "The potential increase in the cost of generating facilities at issue due to an appeal-related construction delay beginning not earlier than October 1, 2016, is not less than \$98 million. The amount of \$98 million represents \$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." (See page. 9, emphasis in original).

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 Appellant's 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.

WHEREFORE, for all the foregoing reasons, and for the reasons outlined in the Motion to Dismiss Appeal filed on May 31, 2016, DEP respectfully requests that the Commission dismiss Potential Appellants' Notice of Appeal.

Respectfully submitted, this the 20th day of July 2016.



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ATTORNEYS FOR DUKE ENERGY
PROGRESS, LLC

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Progress, LLC's Renewed Motion to Dismiss Appeal of NC WARN and the Climate Times in Docket No. E-2, Sub 1089, has been served by electronic mail, hand delivery or by depositing a copy in the United States mail, postage prepaid to the following parties:

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This the 20th day of July, 2016



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