NO. ________________

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA *EX REL.* UTILITIES COMMISSION; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION; and DUKE ENERGY PROGRESS, LLC,	)	
Respondents,	)	<u>FROM NC UTILITIES COMMISSION</u> <u>DOCKET NO. E-2, SUB 1089</u>
v.	)	
NC WARN and THE CLIMATE TIMES,	)	
Petitioners.	)	

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<u>PETITION FOR WRIT OF CERTIORARI,</u>
<u>PETITION FOR WRIT OF SUPERSEDEAS,</u>
<u>AND MOTION FOR TEMPORARY STAY</u>

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TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

NOW COME the Petitioners, NC WARN and The Climate Times, by and through undersigned counsel, and respectfully petition this Honorable Court, pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, to issue its writ of certiorari to review the Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) entered by the N.C. Utilities Commission on May 10, 2016 ("Bond Order").

Further, Petitioners respectfully petition this Honorable Court, pursuant to N.C. Rule of Appellate Procedure 23(a), to issue its Writ of Supersedeas to stay execution and enforcement of the N.C. Utilities Commission's Bond Order, pending review by this Court of said Bond Order.

Finally, Petitioners respectfully apply to this Court, pursuant to N.C. Rule of Appellate Procedure 23(e), for an order temporarily staying enforcement and execution of the Bond Order that is the subject of the present Petition for Writ of Supersedeas, such order to be in effect until determination by this Court whether it shall issue its Writ of Supersedeas.

In support of these petitions and motion, the Petitioners attach certified copies of all relevant pleadings and a verification of the facts as follows:

STATEMENT OF THE FACTS

1. This controversy surrounds whether the participants to Utilities Commission proceedings have a right to file appeals, or alternatively, whether appellate bond requirements can be set prohibitively high without any supporting evidence or findings of fact.

2. On December 16, 2015, Duke Energy Progress, LLC ("DEP") filed a Notice of Intent to File Application for Certificate of Public Convenience and Necessity for Western Carolinas Modernization Project. (Ex. A, p 1). In its notice, DEP sought permission to construct two (2) new natural gas-fired 280 MW

combined cycle units with fuel oil backup, and one (1) natural gas-fired 192 MW simple cycle combustion turbine unit with fuel oil backup. The actual Application for Certificate of Public Convenience and Necessity was filed on January 15, 2016.

3. On December 18, 2015, The Commission entered an Order Scheduling Public Hearing and Requesting Investigation and Report by the Public Staff. (Ex B, p 1).

4. The Petitioners filed a Motion to Intervene on December 21, 2015, and the Commission granted the Motion to Intervene on January 20, 2016.

5. The Petitioners opposed DEP's Application for Certificate of Public Convenience and Necessity for a number of reasons. For example, there was insufficient evidence to prove that DEP needs the extensive additional capacity requested by the Application. Also, DEP's reliance upon natural gas is problematic because of the volatility of the natural gas market, the risks of shale gas supply shortages, and because of natural gas's harmful impacts upon the environment.

6. The Commission, on March 28, 2016, entered an Order Granting Application in Part, with Conditions, and Denying Application in Part ("CPCN Order"). (Ex C, p 1). The Commission's CPCN Order granted DEP's Application for the two, 280 MW units but denied the request for the additional 192 MW unit. *Id.* at 43-44.

7. During their investigation of a potential appeal of the CPCN Order, the Petitioners discovered that there is a unique bond requirement for appeals from certificates of public convenience and necessity. That bond requirement is found in N.C. Gen. Stat. § 62-82(b), and requires appealing parties to post a bond sufficient to pay for damages incurred by a utility in the event that an unsuccessful appeal causes a delay in the initiation of construction, regardless whether a stay is requested or not.

8. Thus, on April 25, 2016, the Petitioners filed a Motion to Set Bond. (Ex. F, p 1). To allow time for the Commission's ruling on the Motion to Set Bond, the Petitioners simultaneously filed a Motion for Extension of Time to File Notice of Appeal and Exceptions. (Ex D, p 1). In an Order of April 26, 2016, the Commission extended the deadline for filing notices of appeal to May 27, 2016.

9. In the Motion to Set Bond, the Petitioners stated that they are not requesting an injunction or stay of the Commission's CPCN Order granting DEP's Application. (Ex E, ¶ 5). The Petitioners also challenged DEP to state that an appeal will result in delays in the initiation of construction. *Id.* Further, the Petitioners argued that appellate bonds should not be set in an amount so high that appeals become impossible. *Id.* ¶ 6.

10. On April 27, 2016, the Commission entered a Procedural Order providing DEP with an opportunity to file a Response to the Petitioners' Motion to

Set Bond, and providing the Petitioners with an opportunity to file a Reply. (Ex G, p 1). Consistent with this Procedural Order, DEP filed a Response on May 2, 2016, (Ex H, p 1), and the Petitioners filed a Reply on May 5, 2016, (Ex I, p 1).

11. In its Response, DEP refused to state that an appeal would result in delays in the initiation of construction. (Ex H, ¶ 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.

12. Among other things, the Petitioners' Reply of May 5 called the Commission's attention to the fact that DEP failed to substantiate any of its alleged damages estimates. (Ex I, ¶¶ 5-6). The Petitioners' Reply again challenged DEP to state that an appeal would result in delays in the beginning of construction—which DEP still has not done—and noted that no public interest group, including the Petitioners, could ever post a $50 million bond. *Id.* ¶¶ 11-12. Finally, the Reply reiterated that the Petitioners are not seeking an injunction or stay of the Commission's CPCN Order granting DEP's Application. *Id.* ¶ 3.

13. On May 10, 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Bond Order"). (Ex J, p 1). In its Bond Order, the Commission 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 Commission required a bond or undertaking of $10,000,000.00. *Id.* at 7. The Commission also stated that, by September 1, 2016, DEP must state whether an appeal will cause delays in the beginning of construction. *Id.* However, it goes without saying that the Petitioners cannot afford a $10,000,000.00 bond or undertaking. Thus, the Commission's Bond Order is tantamount to dismissing any appeal of the CPCN Order.

14. The present Petition for Writ of Certiorari is necessary because N.C. Gen. Stat. § 62-82 requires the Petitioners to post a bond ordered by the Commission, yet the Commission erroneously required a prohibitively high bond without any supporting evidence. Hence, the present Petition for Writ of Certiorari requests that this Court review and reverse the Bond Order. Further, the present Petition for Writ of Supersedeas and Motion for Temporary Stay request that the Bond Order be stayed so that the Petitioners can timely file their Notice of Appeal and Exceptions from the CPCN Order by the May 27, 2016 deadline without the need to post the prohibitive and erroneous bond.

REASONS WHY WRIT OF CERTIORARI, WRIT OF SUPERSEDEAS, AND TEMPORARY STAY SHOULD ISSUE

15. Appeals from a certificate of public convenience and necessity are subject to the provisions of N.C. Gen. Stat. § 62-82(b). In relevant part, that statute states:

> *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.

N.C. Gen. Stat. § 62-82(b) (emphasis added).

16. To summarize, a party losing an appeal challenging a certificate of public convenience and necessity may be obligated to pay "damages, if any, which [the public utility] sustains." However, the damages are explicitly limited to damages related to "delay in beginning the construction of the facility which is occasioned by the appeal," and these damages cannot include "legal fees, court costs, and other expenses incurred in connection with the appeal."

17. Therefore, any bond obligation is limited to damages caused by "delay in beginning the construction of the facility." However, despite being invited to do so, DEP refused to state that an appeal will result in delay in the initiation of construction. (Ex H, ¶ 10). Further, the Commission did not find that

the appeal will cause a delay in beginning construction. The Commission's only finding related to whether construction will be delayed is, "DEP indicates that it has not determined whether it will delay the beginning of construction of the facility if an appeal is filed." (Ex J, p 5). Therefore, the Bond Order is not supported by an essential factual finding necessary to support a bond under N.C. Gen. Stat. § 62-82(b), that construction will be delayed. As noted, the Petitioners are not requesting a stay, and therefore it is highly unlikely that DEP will delay anything. Accordingly, there should be no bond requirement.

18. Opposing counsel is aware of no cases interpreting the bond statute, N.C. Gen. Stat. § 62-82(b), at issue presently. However, this Court has reversed bond requirements in other contexts where the bond was not supported by evidence. For example, in *Currituck Assocs. Res. P'ship v. Hollowell*, 170 N.C. App. 399, 612 S.E.2d 386 (2005), the appellant asked for a stay pending appeal and accordingly requested a bond amount. In response, the appellee in *Hollowell* filed an affidavit stating that, if the stay is granted, it will be damaged by $1,369,040 per year. *Id.* 401, 612 S.E.2d at 388. The trial court ordered a $1 million bond and the appellant appealed. *Id.* This Court held that, "While the amount of the bond lies within the discretion of the trial court, we must determine whether the record contains evidence to support the trial court's decision." *Id.* at 402, 612 S.E.2d at 388. Because the appellee's affidavit in *Hollowell* did not

provide sufficient evidence to support a $1 million bond, this Court reversed the trial court and remanded for further bond proceedings. *Id.* at 404, 612 S.E.2d at 389.

19. The same result should follow here, as DEP failed to provide any evidence or detail in support of its over-the-top damage estimates. For instance, DEP asserted that delay will result in "major equipment contracts cancellation costs of approximately $40 million." (Ex H, ¶ 14). Yet DEP did not reveal the identities of these major equipment contracts; the reasons why delay would require the cancellation of these contracts; or why the cancellation of these contracts would result in $40 million in damages. Similarly, DEP claimed "an additional $8 million in sunk development costs" from a delay, *id.*, but DEP supplied no evidence to support the allegation. Precisely which development costs would be sunk due to delay? What evidence supports the assertion that these costs would be completely sunk, as opposed to only partially sunk, because of a delay?

20. DEP also claimed that "if the project were delayed by two years pending completion of the appellate process," then "the construction delay would amount to approximately $50 million, assuming a 2.5% annual cost escalation rate." *Id.* First, a two-year appellate process is on the high end. Second, DEP provided no evidence to support its proffered "2.5% annual cost escalation rate."

Id. Third, DEP refused to explain the calculation resulting in a supposed $50 million construction delay expense.

21. The Petitioners could, but will not, go on and on about the lack of evidence in DEP's reply. The point is that DEP baldly asserted, without any evidence or detail, that delay will result in millions of dollars in damages. But DEP's bald assertions should not be accepted on blind faith—instead, these allegations must be supported by evidence.

22. Further, the Commission's Bond Order never cited to any facts to support why $10 million is the proper bond amount, versus $5 million or $20 million or $300,000 or any other amount. In the *Hollowell* case, this Court admonished the trial court for being presented with a damages estimate of $1,369,040 yet somehow, without any supporting facts, rounding off the bond to $1 million. *Hollowell*, 170 N.C. App. at 403, 612 S.E.2d at 403. The same applies here. Nothing in DEP's submissions explains how $10 million is the correct number. Again, the Commission's Bond Order is not supported by competent record evidence.

23. It should also be noted that a $10 million bond is the equivalent of preventing appeals. It is doubtful that any Commission litigant other than DEP could post such a bond. This is particularly problematic in the present case, as DEP's Application was subject to the expedited timelines of the Mountain Energy

Act of 2015, S.L. 2015-110. The shortened time for litigation makes error more likely. Thus this is the worst of all possible cases in which to set a bond that is so high that appeal becomes impossible. This is the type of agency decision which should be reviewed by the judiciary.

24. For the foregoing reasons, extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the Commission for a stay order.

ATTACHMENTS

Attached to this Petition for consideration by the Court are certified copies of the Bond Order to be reviewed, as well as certified copies of other papers that are essential to this Court's review:

Exhibit	Document Title
A	Notice of Intent to File Application for Certificate of Public Convenience and Necessity
B	Order Scheduling Public Hearing and Requesting Investigation and Report by the Public Staff
C	Order Granting Application in Part, With Conditions, and Denying Application in Part ("CPCN Order")
D	Motion for Extension of Time to File Notice of Appeal and Exceptions
E	Order Granting Motion for Extension of Time
F	Motion to Set Bond

G	Procedural Order
H	DEP's Response to Motion to Set Bond
I	Petitioners' Reply to Duke's Response to Motion to Set Bond
J	Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Bond Order")

ISSUES TO BE BRIEFED

If this Court issues a Writ of Certiorari, Petitioners would present the following questions:

I. Must bond orders under N.C. Gen. Stat. § 62-82(b) be supported by competent record evidence?

II. Was the Commission's Bond Order supported by competent record evidence?

III. Was the Commission's Bond Order arbitrary and capricious?

CONCLUSION

WHEREFORE, Petitioners NC WARN and The Climate Times respectfully request that this Court issue its Writ of Certiorari to review the North Carolina Utilities Commission's Bond Order; issue its Writ of Supersedeas to stay execution and enforcement of the Commission's Bond Order; and issue a temporary stay of the enforcement and execution of the Bond Order.

Respectfully submitted, this the 19th day of May, 2016.

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

John D. Runkle / By permission MQ
John D. Runkle
N.C. State Bar No.: 10503
2121 Damascus Church Road
Chapel Hill, NC 27516
(919) 942-0600 – telephone
jrunkle@pricecreek.com

Counsel for NC WARN & The Climate Times

NORTH CAROLINA

WAKE COUNTY

I, Matthew D. Quinn, being duly sworn, depose and say that I have read the foregoing Petition for Writ of Certiorari, Petition for Writ of Supersedeas, and Motion for Temporary Stay, know the contents thereof, and that the same are true of my own knowledge, except as to the matters therein stated upon information and belief, and as to those, I believe them true.

Matthew D. Quinn

Sworn to and subscribed before me
this the 19 day of May, 2016.

E. Warren Kuhn
NOTARY PUBLIC

MY COMMISSION EXPIRES:

3/6/17

E. WARREN KUHN
Notary Public
Wake County
My Commission Expires
03/06/2017
NORTH CAROLINA

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing PETITION FOR WRIT OF CERTIORARI, PETITION FOR WRIT OF SUPERSEDEAS, AND MOTION FOR TEMPORARY STAY was served on the following parties to this action, pursuant to Appellate Rule 26, by depositing the same enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department to:

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

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

Antoinette R. Wike
Chief Counsel
Public Staff
4326 Mail Service Center
Raleigh, NC 27699-4300
Antoinette.Wike@psncuc.nc.gov

Lawrence B. Somers
Deputy General Counsel
Duke Energy Corporation
PO Box 1551/NCRH 20
Raleigh, NC 27602-1551
bo.summers@duke-energy.com

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

Scott Carver
Columbia Energy, LLC
One Town Center, 21st Floor
East Brunswick, NJ 08816
scarver@lspower.com

Gurdin Thompson
Austin D. Gerken, Jr.
Southern Environmental Law Center
Suite 220
601 West Rosemary Street
Chapel Hill, NC 27516-2356
gthompson@selcnc.org
djgerken@selcnc.org

Sharon Miller
Carolina Utility Customer Association
Suite 201 Trawick Professional Ctr
1708 Trawick Road
Raleigh, NC 27604
smiller@cucainc.org

Peter H. Ledford
Michael D. Youth
NC Sustainable Energy Association
4800 Six Forks Road
Suite 300
Raleigh, NC 27609
peter@energync.org
Michael@energync.com

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

Ralph McDonald
Adam Olls
Bailey and Dixon, LLP
Carolina Industrial Group for Fair
Utility Rates II
P.O. Box 1351
Raleigh, NC 27602-1351
mcdonald@bdixon.com

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

Richard Freeman
374 Laughing River Road
Mars Hill, NC 28754
firepeople@main.nc.us

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

Daniel Higgins
Burns Day & Presnell, P.A.
Columbia Energy, LLC
P.O. Box 10867
Raleigh, NC 27605
dhiggins@bdppa.com

This the 19th day of May, 2016.

Matthew D. Quinn