

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)	NOTICE OF APPEAL
Certificate of Public Convenience and Necessity)	AND EXCEPTIONS
to Construct a 752 Megawatt Natural Gas-Fueled)	BY NC WARN AND THE
Electric Generation Facility in Buncombe County)	CLIMATE TIMES
Near the City of Asheville)	

NOW COME NC WARN and The Climate Times, by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 62-90 and Rule 18 of the North Carolina Rules of Appellate Procedure, and give Notice of Appeal to the North Carolina Court of Appeals from the North Carolina Utilities Commission's ("Commission") Order Granting Application in Part, With Conditions, and Denying Application in Part issued on March 28, 2016 ("CPCN Order") and Order Dismissing Appeal for Failure to Comply with Bond Prerequisite issued on August 2, 2016 ("Dismissal Order"). The present Notice of Appeal and Exceptions is in addition to the previously filed Notice of Appeal and Exceptions (filed on July 28, 2016) that challenged the Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) issued on July 8, 2016 ("Second Bond Order").

NC WARN and The Climate Times want to preserve any right to appellate review, but the law is unclear on whether the correct route to appeal is through the present Notice of Appeal and Exceptions or, alternatively, a petition with the N.C. Court of Appeals. Thus, in an abundance of caution, NC WARN and The

Climate Times both file the present Notice of Appeal and Exceptions and simultaneously a Petition for Writ of Certiorari with the N.C. Court of Appeals.

As set forth below, the Commission in its CPCN Order grants a certificate of public convenience and necessity (the “certificate”) to Duke Energy Progress, LLC (“DEP”) for its proposed natural gas-fired electric generation facility in Buncombe County (the “facility”). Contrary to North Carolina law, the CPCN Order fails to meet the standards for the issuance of a certificate, i.e., the project is both fair and reasonable, and the facility is in the public convenience and is necessary. The decision to issue the certificate was not based on a fair process or a complete record. Moreover, the state statute, the Mountain Energy Act of 2015, Session Law 2015-110, under which the Commission granted the certificate, is unconstitutional on its face and as applied by the Commission.

As also set forth below, the Dismissal Order is entirely premised upon the Second Bond Order. However, the Second Bond Order was not supported by competent evidence supporting a bond or undertaking of \$98 million. Furthermore, the Second Bond Order is unconstitutional under the Open Courts Clause of the N.C. Constitution. Thus, the Dismissal Order was improper.

EXCEPTION NO. 1 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 8 and 43-44 of the CPCN Order, and supporting findings of fact, pages 29 and 39-43, based on an unfair process resulting in an incomplete record. As a result, these conclusions and related findings of fact are beyond the Commission’s statutory

authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

In making its conclusions and findings, the Commission relied on a “paper record” based on an arbitrarily-limited opportunity for filing comments based on its interpretation of the Mountain Energy Act of 2015, Session Law 2015-110, that the decision had to be rendered within 45 days of the filing of the application. As a result, the Commission did not follow its normal hearing process of allowing intervention, modified discovery, the prefiling of expert testimony, an evidentiary hearing with cross examination and rebuttal witnesses, and submittal of proposed decisions and briefs. A single public hearing was held only 6 days after the application was filed. As a result, the record upon which the certificate was granted was incomplete and due process was violated.

As applied by the Commission, the Mountain Energy Act of 2015 was additionally in violation of North Carolina constitutional and statutory requirements prohibiting monopolies unless they are fairly regulated. N.C. Const. art. I, § 34.

EXCEPTION NO. 2 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 8 and 43-44 of the CPCN Order, and supporting findings of fact, pages 29 and 39-43, by following the provisions of the Mountain Energy Act of 2015, Session Law 2015-

110, which is unconstitutional on its face in that it grants a private emolument to a public utility that is essentially unregulated due to the Mountain Energy Act of 2015. As a result, the grounds upon which the Commission determined these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The Mountain Energy Act of 2015 grants a single company, DEP, an exclusive emolument, i.e., an unreasonably expedited review period, in violation of the North Carolina Constitution. N.C. Const. art. I, § 32.

EXCEPTION NO. 3 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 7 and 43-44 of the CPCN Order, and supporting findings of fact, pages 35 and 37-38, regarding the devastating impacts of the methane vented and leaked from the fuel infrastructure from fracking gas wellhead to burn point on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The Commission was required to support its conclusions of law with competent findings of fact. It has not done so regarding the climate impacts from methane venting and leakage. There are no facts or evidence in the entire record supporting the Commission's conclusion, while there are dispositive statements by experts through affidavit that the proposed plants will have an adverse impact on the climate.

EXCEPTION NO. 4 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 7, 43-44 of the CPCN Order, and supporting findings of fact, pages 31-35, regarding the economic risks associated with the project's reliance on natural gas, on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The Commission was required to support its conclusions of law with competent findings of fact. It has not done so regarding the economic risks associated with fracking gas availability and price increases over the life of the facility. There are no facts or evidence in the entire record supporting the Commission's conclusion, while there are dispositive statements by experts through affidavit that the reliance on fracking gas is an unreasonable risk. In the CPCN Order, the Commission ignores the unrefuted testimony of experts on the

risks of reliance on natural gas as the fuel source for its proposed generating plants because of the future reduced availability of natural gas and the predicted price increases. This will result in unfair and unreasonable rate hikes for consumers from escalating fuel costs and stranded assets.

EXCEPTION NO. 5 (as to the CPCN Order):

The Commission erred in making its Conclusions of Law, pages 7 and 43-44 of the CPCN Order, and supporting findings of fact, pages 29-37, regarding the need for the project on the grounds that these conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

The Commission was required to support its conclusions of law with competent findings of fact. It has not done so regarding the need for the project as it ignored evidence that the increased capacity is both unnecessary and cost ineffective. Part of the record was affidavit testimony from experts that the need for the project had not been adequately proved, yet the Commission failed to make findings of fact refuting this evidence.

EXCEPTION NO. 6 (as to the Dismissal Order):

The Commission erred in making its Conclusions of Law, pages 5-6 of the Dismissal Order, and supporting findings of fact, page 5, regarding dismissal of

the Notice of Appeal and Exceptions of May 27, 2016, on the grounds that the Dismissal Order is entirely premised upon the erroneous Second Bond Order.

The bond statute, N.C. Gen. Stat. § 62-82(b), requires a finding that an appeal will result in a delay in construction. No competent evidence to that effect was presented to the Commission. Instead, all evidence about delays from an appeal was speculative and contradicted by other portions of the record. In fact, the Commission committed error on pages 13-14 of the Second Bond Order when it stated that DEP bears no burden to state that an appeal will result in delay.

For these reasons, the Dismissal Order relies on conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

EXCEPTION NO. 7 (as to the Dismissal Order):

The Commission erred in making its Conclusions of Law, pages 5-6 of the Dismissal Order, and supporting findings of fact, page 5, regarding dismissal of the Notice of Appeal and Exceptions of May 27, 2016, on the grounds that the Dismissal Order is entirely premised upon the erroneous Second Bond Order.

No competent evidence was submitted to the Commission in support of any bond amount whatsoever. Only conclusory, hypothetical damage amounts were provided by DEP for the Commission's consideration without supporting

evidence, yet there was affidavit testimony provided that refuted the conclusory statements submitted by DEP. The Commission did not make adequate findings of fact as to why \$98 million was the appropriate amount for the bond or undertaking and why the affidavit testimony refuting these amounts was disregarded.

For these reasons, the Dismissal Order relies on conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

EXCEPTION NO. 8 (as to the Dismissal Order):

The Commission erred in making its Conclusions of Law, pages 5-6 of the Dismissal Order, and supporting findings of fact, page 5, regarding dismissal of the Notice of Appeal and Exceptions of May 27, 2016, on the grounds that the Dismissal Order is entirely premised upon the erroneous Second Bond Order.

Article I, Section 35, of the North Carolina Constitution is an Open Courts Clause which states 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.” No public interest group could post a \$98 million bond. Hence the Second Bond Order deprives NC WARN and The Climate Times of the right to access this State's appellate courts in violation of the State's Constitution.

For these reasons, the Dismissal Order relies on conclusions and related findings of fact are beyond the Commission's statutory authority and jurisdiction; violate constitutional provisions; are affected by errors of law; are unsupported by competent, material and substantial evidence in light of the entire record; are arbitrary and capricious; and are not in the public interest.

CONCLUSION

For the reasons set forth above, the CPCN Order and Dismissal Order were arbitrary and capricious; affected by errors of law; unsupported by competent, material, and substantial evidence in light of the entire record; violate constitutional provisions; beyond the Commission's statutory power and jurisdiction; and was not in the public interest.

Respectfully submitted, this the _____ day of August, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day he served a copy of the foregoing NOTICE OF APPEAL AND EXCEPTIONS OF NC WARN AND THE CLIMATE TIMES 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 ____ day of August, 2016.

LAW OFFICES OF F. BRYAN BRICE, JR.

By: _____
Matthew D. Quinn