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,	)	FROM NC UTILITIES COMMISSION DOCKET NO. E-2, SUB 1089
v.	)	
NC WARN and THE CLIMATE TIMES,	)	
Petitioners.	)	

FILED 2014 OCT 17 A 10:54

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PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

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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 following orders of the N.C. Utilities Commission ("Commission"): (1) the Order Granting Application in Part, with Conditions, and Denying Application in Part ("CPCN Order") entered on 28 March 2016, (2) the Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b)

entered on 8 July 2016 ("Second Bond Order"), (3) the Order Dismissing Appeal for Failure to Comply with Bond Prerequisite entered on 2 August 2016 ("First Dismissal Order"), and (4) the Order Dismissing Appeals entered on 19 September 2016 ("Second Dismissal Order").

In support of this petition, the Petitioners attach copies of all relevant pleadings and a verification of the facts as follows:

SUMMARY OF THIS PETITION

On 28 March 2016, the Commission issued a CPCN Order that allowed Duke Energy Progress, LLC ("DEP") to construct and operate two (2) 280 MW natural gas-fired units in Buncombe County, North Carolina. Petitioners NC WARN and The Climate Times filed a Notice of Appeal and Exceptions as to the CPCN Order on 27 May 2016. In its Second Bond Order, entered on 8 July 2016, the Commission required that Petitioners post a $98 million bond as a condition of appealing from the CPCN Order. On 28 July 2016, Petitioners filed a Notice of Appeal and Exceptions challenging the Second Bond Order. Because Petitioners did not post the erroneous $98 million bond, on 2 August 2016 the Commission entered the First Dismissal Order, which dismissed the Notice of Appeal of 27 May 2016 as to the CPCN Order. In response, Petitioners, on 18 August 2016, filed a Notice of Appeal and Exceptions as to the First Dismissal Order and CPCN Order. Shortly thereafter, on 19 September 2016, the Commission entered a

Second Dismissal Order, which dismissed all Notices of Appeal filed by Petitioners—including challenges to the Second Bond Order and the First Dismissal Order.

Prior to the Second Dismissal Order, Petitioners had filed a Petition for Writ of Certiorari with this Court on 18 August 2016. Due to Petitioners' uncertainty about the proper means to perfect an appeal under these unusually complex circumstances, the prior Petition for Writ of Certiorari was filed while two notices of appeal were alive and pending before the Commission: the Notice of Appeal (filed on 28 July 2016) as to the Second Bond Order, and the Notice of Appeal (filed on 18 August 2016) as to the First Dismissal Order and CPCN Order. This Court declined to issue its Writ.

Petitioners believe that the present Petition is distinguishable from the prior Petition because all notices of appeal before the Commission have been dismissed and therefore there is no path to appellate review without this Court issuing its Writ. If this Court does not issue its Writ, then the Commission will be judge, jury, and executioner—the Commission will be allowed to issues permits, set extravagant and erroneous bonds designed to prevent appellate review of said permits, and then use the erroneous bonds to dismiss any challenges to the permits or to the bonds themselves. Because the Commission should not be given such absolute authority, we ask this Court to issue its Writ of Certiorari to review the

erroneous Second Bond Order, and the First and Second Dismissal Orders that were entirely based upon the erroneous Second Bond Order, and finally, the CPCN Order.

STATEMENT OF THE FACTS

On 16 December 2015, 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 15 January 2016.

DEP's Application was not filed pursuant to the generally applicable procedure governing applications for public convenience and necessity. Instead, DEP's Application relied upon the Mountain Energy Act of 2015, N.C. Sess. Law 2015-110. The Act allows for an "expedited decision on an application for a certificate to construct a generating facility that uses natural gas as the primary fuel." *Id.* § 1. The Act states that DEP must provide thirty (30) days' notice of its intent to file an application; that the Commission may hold only one (1) public hearing on the application; and that the Commission must render its decision on the application within forty-five (45) days of the application. *Id.*

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

NC WARN and The Climate Times filed a joint Motion to Intervene on 21 December 2015, and the Commission granted the Motion to Intervene on 20 January 2016. Also on 21 December 2015, NC WARN and The Climate Times filed a Motion for Evidentiary Hearing. (Ex C, p 3). The Motion for Evidentiary Hearing proposed several methods of conducting the litigation to allow for meaningful discovery and fact-finding in light of the expedited process required by the Mountain Energy Act. *Id.* at 3-6. However, in an Order of 15 January 2016, the Commission denied the Motion for Evidentiary Hearing. (Ex D, p 5).

On 12 February 2016, NC WARN and The Climate Times filed their Position and Comments, which included several affidavits. (Ex E). NC WARN and The Climate Times opposed DEP's Application for a number of reasons. There was insufficient evidence to prove that DEP needs the extensive additional capacity requested by the Application. *Id.* at 1. 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. *Id.* at 2. Further, the Mountain Energy Act's expedited process did not allow for adequate opportunity to review the Application. *Id.* at 1.

The Commission, on 28 March 2016, entered an Order Granting Application in Part, with Conditions, and Denying Application in Part ("CPCN Order"). (Ex F, p 1). The Commission's CPCN Order granted DEP's Application for the two (2) 280 MW units but denied the request for the additional 192 MW unit. *Id.* at 43-44.

During their investigation of a potential appeal of the CPCN Order, NC WARN and The Climate Times 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.

Thus, on 25 April 2016, the Petitioners filed a Motion to Set Bond. (Ex. G, 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. In an Order of 26 April 2016, the Commission extended the deadline for filing notices of appeal to 27 May 2016.

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 G, ¶ 5). Among other things, the Motion to Set Bond argued that appellate bonds should not be set in an amount so high that appeals become impossible. *Id.* ¶ 6.

DEP filed a Response to the Motion to Set Bond on 2 May 2016. (Ex H, p 1). In its Response, DEP refused to state that an appeal would result in delays in the initiation of construction. *Id.* ¶ 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.

Among other things, the Petitioners' Reply of 5 May 2016 called the Commission's attention to the fact that DEP failed to substantiate any of its alleged damage estimates. (Ex I, ¶¶ 5-6). Also, 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.

On 10 May 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("First Bond Order"). (Ex J, p 1). In its First 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. It goes without saying that the Petitioners could not afford a $10,000,000.00 bond, and could not honestly sign an undertaking representing the ability to pay $10,000,000.00 in damages. Thus, the

Commission's First Bond Order was tantamount to dismissing any appeal of the CPCN Order.

On 23 May 2016, NC WARN and The Climate Times filed with this Court a Petition for Writ of Certiorari requesting that the First Bond Order be reviewed and reversed. In an effort to ensure that all appellate deadlines were met, Petitioners, on 27 May 2016, filed a Notice of Appeal and Exceptions as to both the CPCN Order and First Bond Order without posting any bond or undertaking. (Ex K, p 2).

Before this Court ruled upon the first Petition for Writ of Certiorari, DEP filed a Motion to Dismiss Notice of Appeal and Exceptions on 31 May 2016. (Ex L). The basis of the Motion to Dismiss was that Petitioners did not post the bond or undertaking required by the erroneous First Bond Order. *Id.* ¶ 5. Petitioners filed a Response to Motion to Dismiss on 3 June 2016, arguing that the bond amount was erroneous and that the appeal should not be dismissed while this Court was reviewing the prior Petition for Writ of Certiorari. (Ex M, ¶ 10).

This Court ruled upon the first Petition for Writ of Certiorari before the Commission entered an order on DEP's Motion to Dismiss. In an Order of 7 June 2016, this Court allowed the first Petition for Writ of Certiorari for the purpose of vacating and remanding the First Bond Order and requiring the Commission to set a bond based upon competent evidence.

In response to this Court's Order, on 8 June 2016 the Commission entered an Order Setting Hearing. (Ex N). The hearing was noticed for 17 June 2016. *Id.* at 2.

On 14 June 2016, NC WARN and The Climate Times filed a Response to Order Setting Hearing, in which they objected to the Commission's accepting evidence not previously submitted during its deliberation over the First Bond Order. (Ex O, ¶ 1).

The hearing on the bond issue was held on 17 June 2016. (Ex P). NC WARN and The Climate Times filed the Affidavit of William Powers on the bond issue on 27 June 2016. (Ex Q).

On 8 July 2016, the Commission entered an Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("Second Bond Order"). (Ex R). The Second Bond Order required that NC WARN and The Climate Times post a bond of $98 million within five (5) days. *Id.* at 28. Obviously the Petitioners could not afford a $98,000,000.00 bond or undertaking, so no bond or undertaking was filed within the 5-day deadline.

Following expiration of the 5-day deadline, DEP filed a Renewed Motion to Dismiss on 20 July 2016, again based on the purported bond requirement. (Ex S). Petitioners filed a Reply to the Renewed Motion to Dismiss on 26 July 2016. (Ex T). In their Reply, Petitioners argued that the Second Bond Order was

unconstitutional and unsupported by substantial evidence, and therefore should not be the basis for dismissal of any appeal. *Id.* §§ 17, 21-22. The Reply also indicated that Petitioners planned to challenge the Second Bond Order in this Court and therefore recommended that the Commission reserve judgment on the Renewed Motion to Dismiss until the appeal of the Second Bond Order concluded. *Id.* § 23.

Petitioners filed a Notice of Appeal as to the Second Bond Order on 29 July 2016. (Ex U). Shortly thereafter, on 2 August 2016, the Commission entered an Order Dismissing Appeal ("First Dismissal Order") as to the initial Notice of Appeal that was filed on 27 May 2016 and challenged the CPCN Order. (Ex V).

As a result of the First Dismissal Order, there was a dismissed Notice of Appeal (as to the CPCN Order, filed on 27 May 2016, found at Exhibit K) and an active Notice of Appeal (as to the Second Bond Order, filed on 28 July 2016, found at Exhibit U). NC WARN and The Climate Times wanted to ensure appellate review of the CPCN Order and the Second Bond Order, but as a legal matter, it was unclear whether the correct approach was to file another notice of appeal as to the First Dismissal Order, or to file a Petition with this Court for Writ of Certiorari. In an abundance of caution, Petitioners took both routes: on 18 August 2016, Petitioners filed a Petition for Writ of Certiorari with this Court, challenging the CPCN Order, the Second Bond Order, and the Dismissal Order;

and, also on 18 August 2016, the Petitioners filed a Notice of Appeal and Exceptions as to the First Dismissal Order and the CPCN Order, (Ex X).

On 9 September 2016, this Court denied the prior Petition for Writ of Certiorari. On the same day, 9 September 2016, DEP filed a Motion to Dismiss the two pending notices of appeal: the Notice of Appeal (filed on 28 July 2016) as to the Second Bond Order, and the Notice of Appeal (filed on 18 August 2016) as to the First Dismissal Order and CPCN Order. (Ex Z). NC WARN and The Climate Times filed a Response to DEP's Renewed Motion to Dismiss on 14 September 2016. (Ex AA).

On 19 September 2016, the Commission entered an Order Dismissing Appeals ("Second Dismissal Order"). (Ex BB). The Second Dismissal Order dismissed all outstanding notices of appeal. *Id.* at 9. The Commission gave only one reason for dismissing both the appeals of the CPCN Order, Second Bond Order, and First Dismissal Order: Petitioners never posted the $98 million bond required by the Second Bond Order. *Id.* at 7-9.

REASONS WHY WRIT OF CERTIORARI SHOULD BE ISSUED

Appellate review of Commission decisions is governed by N.C. Gen. Stat. § 62-94, which provides that this Court

> may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the

appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commission, or

(3) Made upon unlawful proceedings, or

(4) Affected by other errors of law, or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

Id. § 62-94(b).

I. The CPCN Order should be reviewed and reversed.

Before constructing these new natural gas-fired units, DEP must obtain a certificate of public convenience and necessity. According to the General Statutes, "no public utility or other person shall begin the construction of any . . . facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility service . . . without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction." N.C. Gen. Stat. § 62-110.1(a).

The CPCN Order should be reviewed and reversed for at least four (4) reasons: (a) there is no evidence in the record that DEP needs 560 MW of new natural gas-fired units in the Asheville area; (b) the Commission failed to make

adequate findings of fact concerning how natural gas supply is highly uncertain, and therefore construction of the new units is putting DEP's customers at a higher risk of outages and price spikes; (c) the Commission failed to consider arguments concerning how methane emissions from natural gas poses an extreme risk to the environment; and (d) the Mountain Energy Act of 2015, N.C. Sess. Law 2015-110 is unconstitutional.

A. There is no evidence in the record that DEP needs 560 MW of new natural gas-fired units in the Asheville area.

"Before awarding a certificate, the Commission must comply with section 62-110.1 which requires a showing of public convenience and *necessity* by the applicant." *State ex rel. Utils. Comm'n v. Empire Power Co.*, 112 N.C. App. 265, 278, 435 S.E.2d 553, 560 (1993) (emphasis in original). In assessing this need, the Commission shall consider the "applicant's arrangements with other electric utilities for interchange of power, pooling of plant, purchase of power and other methods for providing reliable, efficient, and economical electric service." N.C. Gen. Stat. § 62-110.1(d). The Commission must "*avoid the costly overbuilding of generation resources.*" *Empire Power Co.*, 112 N.C. App. at 278, 435 S.E.2d at 560 (emphasis added).

There is no evidence in the record of DEP's need for the proposed 560 MW of new natural gas-fired units in the Asheville area. NC WARN and The Climate Times submitted the affidavit of William E. Powers, "a consulting energy and

environmental engineer with over 30 years of experience in the fields of power plant operations and environmental engineering." (Ex E, *Aff. of Powers* ¶ 1). Mr. Powers reviewed the load forecasts of DEP and found that "there is no basis, based on actual [western North Carolina] summer and winter peak loads over the last eight years, to assume any summer or winter peak load growth over the next ten years." *Id.* ¶ 9(d). Mr. Powers concluded that "the DEP projection that growth will increase and accelerate over the years . . . is unsupported by facts and divorced from the reality of static or declining actual peak loads." *Id.*

But even assuming DEP has need for additional capacity, Mr. Powers identified numerous means to create the additional capacity without the construction of these expensive natural gas-fired units: "Distributed generation, demand response (DR), energy efficiency (EE), combined heat and power (CHP), purchased power and solar should be relied upon to displace fossil fuel generation in the Duke Energy Progress Western (DEP-West) North Carolina region over the next 10-15 years." *Id.* ¶ 14. Indeed, a participant to the Commission docket, Columbia Energy, LLC, asserted that it has an existing natural gas-fired unit that can provide 523 MW of capacity and energy to DEP annually. *Id.* ¶ 16. The General Statutes expressly state that these alternatives to constructing new power plants are highly relevant. N.C. Gen. Stat. § 62-110.1(d).

The Commission rejected this evidence and instead blindly adopted DEP's load forecasts, and thereby committed error. DEP did not provide the Commission with models to detail how it generated its load forecasts that supposedly justify the need for 560 MW of natural gas-fired capacity. Instead, DEP merely provided raw data to the Commission and refused to produce its models because the modeling software is supposedly proprietary. (Ex F, p 33). In other words, the Commission accepted the results of DEP's models without actually examining the models themselves. *Id.*

Hence the Commission had no factual basis for accepting DEP's conclusion that the 560 MW of natural gas-fired capacity are needed and rejecting the conclusions of Mr. Powers. Further, even if DEP could prove that it has a need for the 560 MW, the Commission failed to consider viable alternatives to the project that may have been more economical and less harmful to the environment.

B. Natural gas supply is extremely uncertain and therefore DEP's two (2) proposed natural gas-filed units are uneconomical.

The General Statutes state that the policy of North Carolina towards public utilities is "[t]o promote . . . economical utility service to all the citizens and residents of the State." N.C. Gen. Stat. § 62-2(a)(3). Recognizing this policy of economical utility service, this Court has held that "[t]he primary purpose of the [public convenience and necessity] statute is to provide for the orderly expansion

of the State's electric generating capacity in order to create the most reliable and *economical* power supply possible and to avoid the costly overbuilding of generation resources." *State ex rel. Utils. Comm'n v. Empire Power Co.*, 112 N.C. App. 265, 278, 435 S.E.2d 553, 560 (1993) (emphasis added).

DEP's proposed two (2) natural gas-fired units are anything but economical. NC WARN and The Climate Times filed the Affidavit of J. David Hughes. (Ex E). Mr. Hughes is a geoscientist who has studied U.S. shale gas extensively and published multiple reports on future shale gas production potential. (Ex. E, *Aff. of Hughes* ¶ 1). According to Mr. Hughes, "50% of U.S. natural gas production is now shale gas." *Id.* ¶ 3. Mr. Hughes notes that shale gas production is decreasing far quicker than present projections. *Id.* ¶¶ 4-10.

In order to maintain present shale gas production rates, according to Mr. Hughes it will be necessary to drill many thousands of wells each year. *Id.* ¶ 11. Thus, "[i]f natural gas production declines, as is currently the case, and drilling rates cannot be maintained due to poor economics, fuel prices could skyrocket, putting ratepayers at risk of shortages and price spikes." *Id.* ¶ 12. For this reason, "[s]hale gas (and oil) industries are unsustainable in the longer term unless prices rise considerably." *Id.*

It follows that the CPCN Order permits DEP to construct two cost-ineffective natural gas-fired units. This is grounds to deny DEP's application. *See*

Empire Power Co., 112 N.C. App. at 278, 435 S.E.2d at 560. However, the Commission failed to address this argument in its Order and therefore failed to make essential findings of fact.

C. The two (2) natural gas-fired units have a more harmful greenhouse gas footprint than coal.

The Public Utilities Act declares that the policy of this State is "[t]o encourage and promote harmony between public utilities, their users *and the environment*." N.C. Gen. Stat. § 62-2(a)(5) (emphasis added). Unfortunately, the record evidence in this proceeding shows that DEP's proposed transition to natural-gas units is harmful to the environment.

One of NC WARN and The Climate Times' expert affidavits presented to the Commission was by Robert W. Howarth. (Ex E). Dr. Howarth is "an Earth system scientist and ecologist who has been a tenured faculty member at Cornell University . . . for the past 30 years." (Ex E, *Aff. of Howarth* ¶ 1). Dr. Howarth testified by affidavit that natural gas impacts the environment, specifically global warming, in at least two (2) ways: the emission of CO2 when burned, and in the emission of methane. *Id.* ¶¶ 3-4. Methane is 86 times more potent than CO2 as a greenhouse gas. *Id.* ¶ 15. When considering natural gas's emission of both CO2 and methane, "conventional natural gas and shale gas have larger greenhouse gas footprints than coal." *Id.* ¶ 16. Indeed, "[t]he total greenhouse gas footprint for conventional natural gas is approximately 1.2 times greater than that for coal," and

"[f]or shale gas, the greenhouse gas footprint is approximately 2.7 times greater than that for coal." *Id.*

Despite this grave threat to the environment, the Commission gave the environmental impacts of natural gas only the barest attention: in a four (4) sentence passage, the Commission concluded, without analysis, that "[t]he natural gas-fired units will emit substantially lower levels of greenhouse gases than the older, less efficient coal plants they will replace." (Ex F, p 37). This finding does not address or analyze Dr. Howarth's testimony or make findings of fact as to why Dr. Howarth's testimony was supposedly wrong. *Id.*

Therefore, on this important issue of the environmental impacts of DEP's application, the Commission failed to make essential findings and accordingly should be reversed.

D. The Mountain Energy Act of 2015 is unconstitutional.

In its Application, DEP was exempt by the Mountain Energy Act of 2015, N.C. Sess. Law 2015-110, from complying with the typical Commission process for certificates of public convenience and necessity. The Act allows for an "expedited decision on an application for a certificate to construct a generating facility that uses natural gas as the primary fuel." *Id.* § 1. The Act states that DEP must provide thirty (30) days' notice of its intent to file an application; that the Commission may hold only one (1) public hearing on the application; and that the

Commission must render its decision on the application within forty-five (45) days of the application. *Id.*

The construction of these new facilities is a complex process involving over a billion dollars of ratepayer money —thorough deliberation is therefore essential. NC WARN and The Climate Times sought, but the Commission declined to allow, sufficient time to perform this deliberation. On 21 December 2015, NC WARN and The Climate Times filed a Motion for Evidentiary Hearing. (Ex C, p 3). The Motion for Evidentiary Hearing proposed several methods of conducting the litigation to allow for meaningful discovery and fact-finding in light of the expedited process required by the Mountain Energy Act. *Id.* at 3-6. However, in an Order of 15 January 2016, the Commission denied the Motion for Evidentiary Hearing. (Ex D, p 5). Despite DEP's application not being filed until 15 January 2016, the Commission issued a notice of its decision a mere few weeks later, on 29 February 2016.

This fast-track process violates the North Carolina Constitution. Article I, Section 34 of our State's Constitution provides that "[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." North Carolina's courts have allowed only narrow exceptions to this bar on monopolies:

> In the public utility businesses competition, deemed unnecessary, is curtailed by the requirement that one desiring to engage in such business procure from the Utilities Commission a certificate of public convenience and necessity. However, in those

> fields the State has undertaken to protect the public from the customary consequences of monopoly by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission.

In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 549-50, 193 S.E.2d 729, 734 (1973) (internal citation omitted).

Thus, the process governing applications for certificates of public convenience and necessity reflect our State's policy that monopolies are allowed only when highly regulated. "[B]ecause a public utility is a legally regulated monopoly, '[m]any of the basic principles of the Free Enterprise System, which govern the operations of and the charges by industrial and commercial corporations and those of the corner grocery store, have no application to the regulation of the service or charges of a utility company.'" *State ex rel. Utils. Comm'n v. Edmisten*, 294 N.C. 598, 610, 242 S.E.2d 862, 870 (1978) (*citing Utils. Comm'n v. Gen. Tel. Co.*, 281 N.C. 318, 335, 189 S.E.2d 705, 716-17 (1972)). "The reason for strict regulation of public utilities is that they are either monopolies by nature or given the security of monopolistic authority for better service to the public. The public is best served in many circumstances where destructive competition has been removed and the utility is a regulated monopoly." *State ex rel. Utils. Comm'n v. Carolina Coach Co.*, 260 N.C. 43, 51, 132 S.E.2d 249, 254 (1963).

The scrutiny required of monopolies—like DEP—by the North Carolina Constitution and this State's courts are embedded within the statutes controlling

the typical process for certificates of public convenience and necessity. Yet the Mountain Energy Act of 2016, by creating a fast-track process, prevented the Commission from exercising the scrutiny required.

II. The Second Bond Order should be reviewed and reversed.

In the Second Bond Order, issued on 8 July 2016, the Commission required that NC WARN and The Climate Times post a $98 million bond or undertaking before challenging the CPCN Order. (Ex R). There was no record evidence supporting this extravagant bond requirement, and furthermore, that bond amount is unconstitutional under the Open Courts Clause of the N.C. Constitution.

In relevant part, the bond 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).

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." *Id.* 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." *Id.* Therefore, any bond obligation is limited to damages caused by "delay in beginning the construction of the facility."

Undersigned 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.

Just as in *Hollowell*, there is no record evidence supporting the $98 million bond required by the Commission. The Second Bond Order relied upon the following supposed delay-related damages: "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." (Ex R, p 9). Yet each of these damages estimates is deficient and unsupported by the record.

Consider first the estimate of $40 million in potential damages related to the cancellation of costs of three major equipment contacts. Neither the Commission nor DEP considers whether these contracts can be extended. Further, DEP signed these contracts on 31 May 2016, after NC WARN and The Climate Times filed a Notice of Appeal and Exceptions with the Commission challenging the CPCN Order. (Ex Q, ¶ 5). Thus, when DEP signed these contracts, it was fully aware of NC WARN and The Climate Times' challenge to the CPCN Order. To now claim that an appeal would result in breaches of these contracts is a self-created problem by DEP. DEP should not be permitted to sign contracts as a means of generating

hypothetical damages that have the effect of establishing a prohibitive bond amount and thereby preventing appeals.

As to the $8 million estimate for sunk development costs, DEP is exercising mere speculation. DEP's witness testified: "My estimate would be is that if we were to delay the project for two years, we would have to rework a significant amount of this development effort . . . ." (Ex P, p 46). DEP did not testify, however, that all of these development costs would be sunk, or that development work to date could not be reused.

Also unsupported is the $50 million estimate for increased project costs for the increased cost of labor and materials. DEP arrived at this number by assuming a 2.5 percent annual cost escalation over a 2-year appellate delay. (Ex P, p 48-49). However, NC WARN and The Climate Times submitted an Affidavit from William E. Powers, a consulting and environmental engineer with over 30 years of experience in power plant operations and environmental engineering. (Ex Q, ¶ 1). Mr. Powers testified that "industrial construction costs are lower in 2016 than they were in 2014," and "[t]he current trend in plant construction costs . . . is negative." *Id.* ¶ 7. Thus, "[a] 24-month delay may in fact save DEP substantial money." *Id.* No evidence in the record contradicts Mr. Powers's testimony, yet the Commission accepted DEP's $50 million estimate without question.

But perhaps most importantly, requiring a $98 million bond is completely prohibitive of appeals and is therefore unconstitutional. The Open Courts Clause of the N.C. Constitution, Article I, Section 35, 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." Obviously no public interest group, including NC WARN and The Climate Times, could post a $98 million bond. Hence the Second Bond Order deprives Petitioners of the right to access this State's appellate courts.

Undersigned counsel is aware of no case in this State addressing whether monetary fees (other than standard filing fees) violate the Open Courts Clause. However, substantial case law throughout the nation provides that substantial monetary fees violation open courts laws in numerous states. *E.g.*, *Fent v. State ex rel. Dept. of Human Servs.*, 236 P.3d 61 (OK 2010); *G.B.B. Invs. Inc. v. Hinterkopf*, 343 So. 2d 899 (Fla. Ct. App. 1977); *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419 (Fla. 1992); *In re Estate of Dionne*, 518 A.2d 178 (N.H. 1986); *R. Commc'ns Inc. v. Sharp*, 875 S.W.2d 314 (Tex. 1994); *Jensen v. State Tax Comm'n*, 835 P.2d 965 (Utah 1992).

Additionally, the bond statute—N.C. Gen. Stat. § 62-82(b)—is itself unconstitutional. After conducting a survey of bond statutes nationwide, Petitioners have discovered that some states vest superior courts or courts of appeal

with the authority to set bonds in commission proceedings, *e.g.*, Del. Code tit. 26, §§ 510 & 511, and other states allow for bonds in commission proceedings where there is a stay order, Cal. Pub. Util. § 1764. However, upon information and belief, North Carolina is the only state in America that allows a utilities commission to enter a bond in a certificate of public convenience and necessity proceeding in the absence of a stay order. This unprecedented authority permits the Commission to act as its own judge and thereby thwarts access to appellate courts. The bond statute, N.C. Gen. Stat. § 62-82(b), is therefore unconstitutional in violation of the Open Courts Clause.

Therefore, the $98 million bond is unsupported by record evidence or essential findings of fact, and furthermore, violates the Open Courts Clause of the State Constitution.

III. The First and Second Dismissal Orders should be reviewed and reversed.

In the First Dismissal Order, entered on 2 August 2016, the Commission dismissed the Petitioners' 27 May 2016 Notice of Appeal and Exceptions challenging the CPCN Order. (Ex V). On 19 September 2016, the Commission entered a Second Dismissal Order that dismissed all remaining notices of appeal, namely: the Notice of Appeal (filed on 28 July 2016) as to the Second Bond Order, and the Notice of Appeal (filed on 18 August 2016) as to the First Dismissal Order and CPCN Order. (Ex BB).

The Commission gave only one reason for dismissing these appeals: Petitioners never posted the $98 million bond required by the Second Bond Order. *Id.* at 7-9. However, as discussed above, the Second Bond Order is itself erroneous because it is unsupported by record evidence and is unconstitutional. Thus, the Second Bond Order should not be the basis for dismissing any appeal.

Further, the bond statute explicitly applies only to appeals from CPCN Orders, and therefore the Second Bond Order cannot justify the dismissal of Petitioners' appeals challenging the Second Bond Order, First Dismissal Order, or Second Dismissal Order. The bond statute states, in relevant part:

> 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 . . . . *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).

Thus, the bond requirement exists only for an "appeal from any order of the Commission which awards any such certificate." *Id.* Yet the Commission relied solely on the bond requirement to justify dismissing Petitioners' challenges to the

Second Bond Order and the First Dismissal Order. Thus, the Commission's rulings were erroneous.

Additionally, these appeals should not be dismissed because they present important legal issues to our State. By way of example but not limitation, the North Carolina Constitution, Article I, Section 35, contains an Open Courts Clause stating that "[a]ll courts shall be open . . . ." Obviously no public interest group, including NC WARN and The Climate Times, could post a $98 million bond. Hence the Second Bond Order deprives NC WARN, The Climate Times, and other public interest groups in subsequent cases from accessing our State's appellate courts in violation of the N.C. Constitution. This argument has been accepted by multiple courts throughout the country. *E.g.*, *R. Commc'ns Inc. v. Sharp*, 875 S.E.2d 314 (Tex. 1994).

Further, the Commission should not be permitted to use the bond requirement to prohibit any and all appeals from CPCN Orders. If this practice is accepted, then in any permitting proceeding, the Commission could set a prohibitively high bond that cannot be challenged because the bond itself would be subject to a bonding requirement. This prevents appellate review and provides the Commission with absolute authority.

ATTACHMENTS

Attached to this Petition for consideration by the Court are copies of the following papers that are essential to this Court's review:

A	Notice of Intent to File Application for Certificate of Public Convenience and Necessity [16 December 2015]
B	Order Scheduling Public Hearing and Requesting Investigation and Report by the Public Staff [18 December 2015]
C	Motion for Evidentiary Hearing by NC WARN and The Climate Times [21 December 2015]
D	Order Denying NC WARN and The Climate Times' Motion for an Evidentiary Hearing [15 January 2016]
E	Position and Comments by NC WARN and The Climate Times [12 February 2016]
F	Order Granting Application in Part, With Conditions, and Denying Application in Part ("CPCN Order") [28 March 2016]
G	Motion to Set Bond [25 April 2016]
H	DEP's Response to Motion to Set Bond [2 May 2016]
I	NC WARN and The Climate Times' Reply to DEP's Response to Motion to Set Bond [5 May 2016]
J	Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) ("First Bond Order") [10 May 2016]
K	Notice of Appeal and Exceptions as to CPCN Order [27 May 2016]
L	DEP's Motion to Dismiss the Notice of Appeal and Exceptions of NC WARN and The Climate Times [31 May 2016]

M	NC WARN and The Climate Times' Response to Motion to Dismiss Appeal [3 June 2016]
N	Order Setting Hearing [8 June 2016]
O	Response to Order Setting Hearing by NC WARN and The Climate Times [14 June 2016]
P	Transcript of Bond Hearing of 17 June 2016
Q	NC WARN and The Climate Times' Affidavit of William Powers [27 June 2016]
R	Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) of 8 June 2016 ("Second Bond Order") [8 July 2016]
S	DEP's Renewed Motion to Dismiss Appeal [20 July 2016]
T	NC WARN and The Climate Times' Reply to DEP's Renewed Motion to Dismiss [26 July 2016]
U	Notice of Appeal as to the Second Bond Order [28 July 2016]
V	Order Dismissing Appeal for Failure to Comply with Bond Prerequisite ("First Dismissal Order") [2 August 2016]
W	DEP's Motion to Dismiss Appeal of the Second Bond Order [12 August 2016]
X	Notice of Appeal as to First Dismissal Order and CPCN Order [18 August 2016]
Y	NC WARN and The Climate Times' Response to DEP's Motion to Dismiss [23 August 2016]
Z	DEP's Motion to Dismiss Second Notice of Appeal and Renewed Motion to Dismiss Notice of Appeal [9 September 2016]
AA	NC WARN and The Climate Times' Response to DEP's

Renewed Motion to Dismiss [14 September 2016]

BB Order Dismissing Appeal ("Second Dismissal Order") [19 September 2016]

ISSUES TO BE BRIEFED

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

I. Was the Commission's Second Bond Order supported by competent record evidence and sufficient findings of fact?

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

III. Does the Second Bond Orders violate the North Carolina Constitution?

IV. Is the Second Bond Order affected by errors of law?

V. Was the Commission's CPCN Order supported by competent record evidence and sufficient findings of fact?

VI. Was the Commission's CPCN Order arbitrary and capricious?

VII. Is the CPCN Order affected by errors of law?

VIII. Is the Mountain Energy Act of 2016 unconstitutional?

IX. Were the Commission's First and Second Dismissal Orders supported by competent record evidence and sufficient findings of fact?

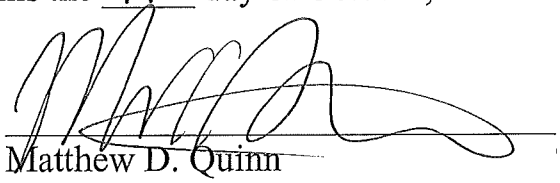
X. Were the Commission's First and Second Dismissal Orders arbitrary and capricious?

XI. Are the First and Second Dismissal Orders affected by errors of law?

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 CPCN Order, Second Bond Order, First Dismissal Order, and Second Dismissal Order; and for such other relief as this Court deems just and proper.

Respectfully submitted, this the 17th day of October, 2016.



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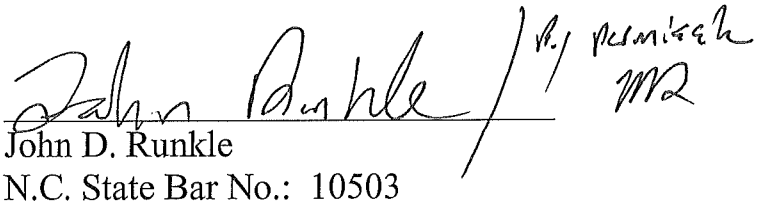

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NORTH CAROLINA

WAKE COUNTY

I, Matthew D. Quinn, being duly sworn, depose and say that I have read the foregoing Petition for Writ of Certiorari, 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 17 day of October, 2016.

E. Warren Kuhn
NOTARY PUBLIC

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

MY COMMISSION EXPIRES:

3/6/17

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing PETITION FOR WRIT OF CERTIORARI 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:

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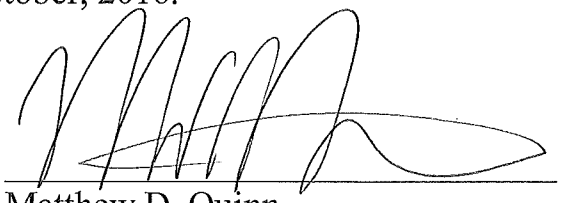
This the 17th day of October, 2016.



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