

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Civil Action No. 16-CVS-_____

NORTH CAROLINA WASTE AWARENESS)
AND REDUCTION NETWORK,)

Plaintiff,)

v.)

STATE OF NORTH CAROLINA and the)
NORTH CAROLINA UTILITIES)
COMMISSION)

Defendants.)
_____)

**COMPLAINT FOR
DECLARATORY JUDGMENT**

NOW COMES Plaintiff North Carolina Waste Awareness and Reduction Network (“NC WARN”) to challenge the constitutionality of: 1) N.C. Gen. Stat. Section 62-82(b), which purports to allow Defendant North Carolina Utilities Commission (“Commission”) to assess a prerequisite bond or undertaking against any party wishing to appeal the Commission’s granting of a Certificate of Public Convenience and Necessity (“CPCN”) to construct an electrical generating facility, and prevents any challenging party from filing an appeal with the North Carolina Court of Appeals of the Commission’s decision unless the party posts the bond or undertaking; and 2) session laws which exempt CPCN applications for individual electrical generating facilities from the standard CPCN requirements for notice, hearing, evidence, testimony, briefing, oral argument, and construction cost information, such as N.C. Sess. Law 2015-110. NC WARN seeks a declaration from this Court confirming that both laws are facially unconstitutional, and therefore void as to future CPCN proceedings. In separate appeals, NC

WARN has sought to challenge retrospectively recent CPCN and bond decisions by the Commission.

Upon information and belief, Plaintiff NC WARN, hereby alleges and says:

NATURE OF THE ACTION

1. Pursuant to the Uniform Declaratory Judgment Act, N.C. Gen. Stat. Sections 1-253 to -267, and Rules 15(a) and 57 of the North Carolina Rules of Civil Procedure, Plaintiff NC WARN (“Plaintiff”), seeking prospective relief only, hereby alleges that N.C. Gen. Stat. Section 62-82(b) (“CPCN Bond Requirement”), which requires that any party opposing a Commission Order granting a CPCN post a prerequisite bond or undertaking, approved by the Commission, before appealing the Order to the North Carolina Court of Appeals (“Court of Appeals”), violates the North Carolina Constitution and the United States Constitution (“U.S. Constitution”). This statutory requirement effectively blocks citizens’ access to the courts in violation both the North Carolina Constitution and the United States Constitution, rendering this statutory provision facially unconstitutional.

2. Pursuant to the Uniform Declaratory Judgment Act, N.C. Gen. Stat. Sections 1-253 to -267, and Rules 15(a) and 57 of the North Carolina Rules of Civil Procedure, Plaintiff NC WARN, seeking prospective relief only, hereby alleges that any and all acts of the North Carolina General Assembly (“General Assembly”) attempting to exempt any individual proposed utility project, or specified group of projects from the full requirements of N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) (“CPCN Shortcut Laws”) are facially unconstitutional. CPCN Shortcut Laws prevent the public interest inquiry necessary to support the Commission’s granting of the monopoly privilege inherent in a CPCN. CPCN Shortcut Laws prevent the public interest inquiry by eliminating evidentiary hearings; truncating procedural safeguards; precluding

the public from accessing cost information about the project during the CPCN application review processes; and ultimately requiring the Commission to hurriedly decide upon a CPCN application without complete information. CPCN Shortcut Laws therefore establish a CPCN process which would violate the North Carolina Constitution.

THE PARTIES

3. Plaintiff NC WARN is a 501(c)(3) nonprofit membership organization founded in 1988, with its principal place of business located in Durham, North Carolina. NC WARN works on behalf of its over one thousand members to address global climate change by advocating for a swift transition to clean, renewable, and affordable electricity generation and increased energy efficiency within North Carolina.

4. NC WARN's mission includes educating the public on the urgent need to achieve climate and environmental justice for all North Carolinians.

5. NC WARN's mission includes educating the public on the urgent need to make a concerted effort to include those persons historically excluded from participating in the decision-making process on public utility projects.

6. NC WARN conducts and commissions sound, scientific research that it uses to educate the public about environmental policies and decisions that affect North Carolina's public, environmental, and economic health.

7. NC WARN also conducts legal research and informs the Commission and other decision makers on behalf of its members to ensure that North Carolina's lawmakers and agencies protect the public interest by adequately assessing the public, environmental, and economic health impacts of their decisions.

8. NC WARN's legal advocacy includes, but is not limited to, participating in docketed proceedings before the Commission including, but not limited to, its intervention in

Docket E-2, Sub 1089, Petition for CPCN to Construct Combined Cycle Natural Gas Fueled Electric Generation Facility in Buncombe Co. (Western Carolinas Modernization Project).

9. NC WARN has sought to appeal the Commission's decision to approve the CPCN application for the Western Carolinas Modernization Project, Docket E-2, Sub 1089.

10. Defendant Commission issued a Second Bond Order requiring NC WARN to post a \$98,000,000 bond or undertaking as a condition to NC WARN filing an appeal in the Court of Appeals for the CPCN it issued in Docket E-2, Sub 1089.

11. On September 19, 2016, the Commission dismissed NC WARN's appeal of the Commission's Second Bond Order and its appeal of the Commission's CPCN Order the Commission issued in Docket E-2, Sub 1089.

12. The Commission's decisions regarding a CPCN for any public utility is a legally-required precursor to a future request by that public utility for North Carolina's retail electrical customers to pay for the construction costs in ratemaking proceedings.

13. In North Carolina, Duke Energy Corporation ("Duke Energy") operates as a public utility through its subsidiaries, Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC. NC WARN is an electric retail customer of Duke Energy Progress. In addition, most of NC WARN's members are Duke Energy electric retail customers, either directly or indirectly through electric service provided by electrical cooperatives or municipal power agencies. Any increase in rates granted by the Commission as a result of construction authorized by CPCN Shortcut Laws likely would lead to increased utility costs borne by NC WARN and its members.

14. NC WARN has standing to bring this lawsuit on behalf of its members because: its members would otherwise have standing to sue in their own rights; the interests it seeks to

protect are germane to its organizational purpose; and neither the claim asserted, nor the relief requested, requires the participation of the individual members in this lawsuit.

15. NC WARN has standing as a party “whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise.” N.C. Gen. Stat. § 1-254.

16. NC WARN and its membership are aggrieved and irreparably harmed by the General Assembly’s enactment, and the Commission’s implementation, of N.C. Gen. Stat. Section 62-82(b), which the Commission has used as a barrier to preclude NC WARN from bringing valid, substantiated claims before the appellate courts. The resulting actual and potential injuries will not be redressed except by an order from this Court, declaring that the State of North Carolina enacted, and the Commission implemented, N.C. Gen. Stat. Section 62-82(b) in violation of the North Carolina Constitution and U.S. Constitution.

17. NC WARN and its membership are aggrieved and irreparably harmed by the General Assembly’s enactment of N.C. Sess. Law 2015-110, the Mountain Energy Act of 2015, and all future CPCN Shortcut Laws that exempt from the Commission’s consideration N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) in its review of CPCN applications.

18. The exemptions created by the General Assembly’s enactment of N.C. Sess. Law 2015-110, and all future CPCN Shortcut Laws prevent the Commission from conducting a legally-sufficient assessment of whether a proposed project adequately meets public necessity and serves the public interest.

19. The resulting actual and potential injuries to NC WARN will not be redressed except by an order from this Court, declaring that future CPCN Shortcut Laws which exempt N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e)’s requirements from the Commission’s consideration of CPCN applications violate the North Carolina Constitution.

20. It is likely that the State will enact future CPCN Shortcut Laws in response to Duke Energy's stated plans to build new natural gas-fired power plants. *See, e.g., Duke Energy, Duke Energy Carolinas, LLC 2016 Integrated Resource Plan and 2016 REPS Compliance Plan, Docket No. E-100, Sub 147, at 50-51 (2016)* (outlining Duke Energy's plan construct new natural gas-fired plants to produce 5,718 megawatts of electricity; this amount of electrical generation equates to approximately fifteen new large-capacity, gas-fired plants). An excerpted copy of this report is attached to this complaint as Exhibit 1.

21. Defendant State of North Carolina, by and through its General Assembly and Governor, enacts legislation, including N.C. Gen. Stat. Section 62-82(b) and N.C. Sess. Law 2015-110.

22. Defendant Commission is a State commission whose creation, powers, and duties originate from statutes ratified by the General Assembly and enacted into law either by gubernatorial approval or legislative override of a gubernatorial veto. N.C. Gen. Stat. §§ 62-1 *et seq.*

23. Defendant Commission implements enacted legislation that governs the CPCN application process, including N.C. Gen. Stat. Section 62-82(b) and N.C. Sess. Law 2015-110.

24. Defendant Commission is without power to determine the constitutionality of either N.C. Gen. Stat. Section 62-82(b) or CPCN Shortcut Laws.

JURISDICTION AND VENUE

25. The Superior Court has jurisdiction over this action pursuant to the North Carolina Declaratory Judgment Act. N.C. Gen. Stat. §§ 1-253 to -267.

26. This Court has the “power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed,” and “such declarations shall have the force and effect of a final judgment or decree.” N.C. Gen. Stat. § 1-253.

27. An action under the Declaratory Judgment Act is appropriate when it “will serve a useful purpose in clarifying and settling the legal relations at issue, and [] when it will terminate and afford relief from uncertainty, insecurity and controversy giving rise to the proceeding.” *Goldston v. State*, 361 N.C. 26, 34, 637 S.E.2d 876, 881 (2006) (quoting *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002)).

28. The Declaratory Judgment Act is to be liberally construed and administered. N.C. Gen. Stat. § 1-264.

29. There exists a clear and present controversy between Plaintiff and Defendants over the lawfulness of both the CPCN Bond Requirement and CPCN Shortcut Laws.

30. The General Assembly will reconvene on January 11, 2017, to resume legislative business on behalf of Defendant State of North Carolina.

31. Resolution of the present controversy between Plaintiff and Defendants regarding the lawfulness of the CPCN Bond Requirement and CPCN Shortcut Laws meets the stated purposes of the Declaratory Judgment Act.

32. This Court also has jurisdiction over this action pursuant to N.C. Gen. Stat. Section 1-267.1(a1), which requires that this Court hear “any facial challenge to the validity of an act of the General Assembly.”

33. Proper venue lies in Wake County pursuant to N.C. Gen. Stat. Section 1-77(2) because the causes of action asserted herein arose from the General Assembly’s official acts and

Commission's actions taken pursuant to the General Assembly's official acts occurring in Wake County, North Carolina.

34. In addition, a recent decision from the Court of Appeals indicates that any and all challenges to the constitutionality of a statute must be brought in Wake County Superior Court. While that decision remains pending on appeal, prudence dictates that NC WARN bring this challenge before this Court and that this Court accept jurisdiction over this challenge.

FACTS AND ALLEGATIONS

35. A CPCN is a license authorized under the provisions of Chapter 62 of the General Statutes that grants regulated monopoly powers to a public utility or other person premised on the public utility's or other person's demonstration that its provision of services is in the public interest. Acquiring a CPCN is the first step for a would-be public utility franchisee in North Carolina's public utility franchise system, followed by the inclusion of construction costs into the rates approved by the Commission and paid by that franchisee's utility consumers.

36. In 1965, the General Assembly comprehensively overhauled the State's statutes regulating its public utility franchise system for electrical generation and distribution, changing the appeals process for challenges to Commission decisions and providing for full evidentiary hearings before the Commission. *See* N.C. Sess. Law 1965-287. A copy of N.C. Sess. Law 1965-287 is attached to this complaint as Exhibit 2.

37. In 1975, the General Assembly enacted amendments specifically designed to promote greater efficiency in the use of all existing electric utility plants and to reduce electricity costs by requiring greater electricity conservation. *See* N.C. Sess. Law 1975-780. Section 1 of N.C. Sess. Law 1975-780 added N.C. Gen. Stat. Section 62-110. Section 2 of N.C. Sess. Law

1975-780 added N.C. Gen. Stat. Section 62-155. A copy of N.C. Sess. Law 1975-780 is attached to this complaint as Exhibit 3.

38. Legal requirements for public utilities seeking State-sanctioned monopoly privileges under the North Carolina's public utility franchise system are codified in Chapter 62 of the General Statutes, and most comprehensively in Article 6.

39. Per N.C. Gen. Stat. Section 62-110(a), no public utility may construct any public utility plant or system without first obtaining a CPCN from the Commission.

40. Per N.C. Gen. Stat. Section 62-110.1(a), no public utility may construct any electric generating facility for generating electricity that will be sold to the public without first obtaining a CPCN from the Commission which meets the additional requirements of N.C. Gen. Stat. Section 62-110.1.

41. In reviewing a CPCN application, the Commission exercises the powers granted to it by the General Statutes and is legally obliged to follow the procedures set forth in Chapter 62, which guide the Commission's exercise of those powers.

42. In making decisions on a CPCN application, the Commission exercises the judicial powers granted to it by the General Assembly under the terms and conditions of Chapter 62 specifically.

43. North Carolina courts have held the Commission's use and implementation of the powers and duties delegated to it to evaluate CPCN applications by Chapter 62, as enacted by the General Assembly, to be constitutional.

44. The North Carolina courts have yet to decide whether the Commission's implementation of a CPCN Shortcut Law, such as the Mountain Energy Act of 2015, is constitutional.

45. The North Carolina courts have yet to decide whether the Commission's use and implementation of a CPCN Shortcut Law, such as the Mountain Energy Act of 2015, are constitutional exercises of the power to grant monopoly privileges under the public utility franchise system.

46. Courts interpret new statutes enacted on a subject already regulated by existing statutes *in pari materia*, since these statutes share a common purpose and reflect the General Assembly's intent in regulating that same subjects.

47. The primary purpose of N.C. Gen. Stat. Section 62-155 is to declare that the State's policy is to promote energy conservation through efficient utilization of all resources.

48. The primary purpose of N.C. Gen. Stat. Section 62-82 is to create a statutory minimum and supplementary set of procedural rules for any CPCN proceeding for an electrical generating facility.

49. N.C. Gen. Stat. Section 62-82(a) establishes minimum due process protections for potentially affected persons by requiring notice of the proposed CPCN and a judicial hearing conducted by the Commission upon complaint to allow persons to present evidence.

50. While N.C. Gen. Stat. Section 62-60 has granted the Commission "all the powers and jurisdiction of a court of general jurisdiction" it does not have the power to prevent its decisions from being reviewed by the appellate courts created by the North Carolina Constitution.

51. The North Carolina Constitution specifically requires that the delegated judicial power of administrative agencies is constitutionally limited and that appeals from them lie to the General Court of Justice. *See* N.C. Const. art. IV, § 3.

52. The judicial powers of the Commission are specifically limited by the North Carolina Constitution to those powers “as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created.” *See id.*

53. The North Carolina Constitution divides the General Court of Justice into three divisions: the Appellate, Superior, and District Courts.

54. The Commission has no power under the North Carolina Constitution to deny any person his or her right to appeal Commission decisions to the constitutionally-designated courts of the General Court of Justice.

I. Count One—General Statute Section 62-82(b) Unconstitutionally Grants the Commission the Power to Set Excessive and Prohibitive Prerequisite Bonds and Undertakings that Obstruct Parties’ Access to the State’s Appellate Courts.

55. N.C. Gen. Stat. Section 62-90 provides that

[a]ny party to a proceeding before the Commission may appeal from any final order or decision of the Commission within 30 days after the entry of such final order or decision . . . if the party aggrieved by such decision or order shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decisions or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission.

56. N.C. Gen. Stat. Section 7A-29 states that an appeal as of right regarding a CPCN order “lies directly to the Court of Appeals.”

57. N.C. Gen. Stat. Section 62-82(b) restricts the appeal as of right guaranteed by N.C. Gen. Stat. Sections 62-90 and 7A-29 by requiring that any party wishing to appeal a CPCN order file a bond or undertaking 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).

58. N.C. Gen. Stat. Section 62-82(b) also requires that the Commission approve the bond or undertaking amount based upon the cost of construction delays.

59. N.C. Gen. Stat. Section 62-82(b) does not establish how the Commission should assess an appropriate bond or undertaking amount in the event that construction cost information, required by N.C. Gen. Stat. Section 62-110.1(e), is excepted from a CPCN application proceeding, as it was excepted by N.C. Sess. Law 2015-110.

60. When any CPCN process for a specific project is exempted from the provisions of N.C. Gen. Stat. Section 62-82(a) and N.C. Gen. Stat. Section 62-110.1(e), the Commission is not required to develop, and may be prevented from developing, substantial evidence to support any conclusions it makes about an appropriate bond award.

61. By its own admission, the Commission only has attempted to invoke its statutory power under Section 62-82(b) once since 1965, despite having to defend against numerous appeals of past CPCN orders. *See, e.g., State ex rel. Utils. Comm'n v. Piedmont Nat. Gas Co.*, 346 N.C. 558, 488 S.E.2d 591 (1997); *State ex rel. Utils. Comm'n v. High Rock Lake Ass'n, Inc.*, 37 N.C. App. 138, 245 S.E.2d 787 (1978).

62. It was not until May 2016, approximately fifty-one years after Section 62-82(b)'s enactment, that the Commission first used this statutory power. *In re Application of Duke Energy Progress, LLC, for a Certificate of Public Convenience and Necessity to Construct a 752-MW Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville*, Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b) at 4 n.1, Docket No. E-2, Sub 1089 (May 10, 2016) ("First Bond Order") (noting that the Commission "is 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).”). A copy of the First Bond Order is attached to this complaint as Exhibit 4.

63. In its First Bond Order, the Commission set the bond or undertaking amount at \$10 million against NC WARN. NC WARN had not sought a stay or injunction of the Western Carolinas Modernization Project’s construction during the pendency of NC WARN’s appeal of the Commission’s CPCN Order.

64. The First Bond Order was struck down by the Court of Appeals. A copy NC WARN’s Petition and the court’s Order are attached to this complaint as Exhibits 5 and 6, respectively.

65. On remand, the Commission issued the Second Bond Order, setting the bond or undertaking amount at \$98 million. *In re Application of Duke Energy Progress, LLC, for a Certificate of Public Convenience and Necessity to Construct a 752-MW Natural Gas-Fueled Electric Generation Facility in Buncombe County Near the City of Asheville*, Order Setting Undertaking or Bond Pursuant to G.S. 62-82(b), Docket No. E-2, Sub 1089 (July 8, 2016) (Second Bond Order). A copy of the Second Bond Order is attached to this complaint as Exhibit 7.

66. Per the Commission’s interpretation of Section 62-82(b) and the terms of the Second Bond Order, NC WARN was forbidden to pursue an appeal to the Court of Appeals without filing a \$98 million bond or undertaking with the Commission. The Commission dismissed NC WARN’s appeal not only as to the Commission’s Order granting the CPCN, but also as to NC WARN’s appeal of the Second Bond Order itself. A copy of this Order is attached to this complaint as Exhibit 8.

67. Both the First Bond Order and Second Bond Order created insurmountable financial barriers to appellate court review of the Commission's CPCN decision for any plaintiff lacking millions of dollars to spare.

68. Both the First Bond Order and Second Bond Order precluded valid and substantiated claims from being heard by the Court of Appeals, based solely on the wealth of those seeking review.

69. No other state grants its public utilities commission or comparable agency the statutory power to assess a prerequisite bond or undertaking that may prevent a party wishing to challenge a commission or comparable agency order from obtaining judicial review.

70. Article I, section 18 of the North Carolina Constitution provides 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."

71. Article I, section 19 of the North Carolina Constitution provides that

[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws, nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

72. Article I, section 19 protects Plaintiff's substantive and procedural due process rights.

73. Article I, section 6 of the North Carolina Constitution provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."

74. Statutes governing administrative agencies that violate the State's constitutional principle of separation of powers are unconstitutional.

75. Article II, section 1 of the North Carolina Constitution vests the legislative power with the General Assembly.

76. Read together, Article I, section 6 and Article II, section 1 establish "the bedrock principle 'that the legislature may not abdicate its power to make laws or delegate its supreme legislative power to any coordinate branch or to any agency which it may create'" without providing adequate guiding standards. *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696, 249 S.E.2d 402, 410 (1978) (quoting *Tpk. Auth. v. Pine Island*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965)).

77. The final clause of the First Amendment of the U.S. Constitution provides the right to petition the government for civil redress: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for the redress of grievances."

78. In ratifying the United States Constitution, North Carolina's Constitutional Convention emphasized the value of open courts without respect to wealth by specifically enumerating the right to open courts as a natural right of the People when they form a social compact. A copy of the North Carolina's Constitutional Convention's signing statement is attached to this complaint as Exhibit 9.

79. As interpreted by the Commission, N.C. Gen. Stat. Section 62-82(b) obstructs free access to the courts to hear valid, substantiated claims and guarantees of review of Commission

Orders by a right of appeal in violation of both the North Carolina Constitution and the U.S. Constitution.

80. As interpreted by the Commission, N.C. Gen. Stat. Section 62-82(b) obstructs free access to the courts by allowing the Commission to force challenging parties to post a bond or insure an undertaking before reviewing its own decisions.

81. As interpreted by the Commission, N.C. Gen. Stat. Section 62-82(b) obstructs free access to the courts by allowing the Commission to force challenging parties to post a bond or insure an undertaking before authorizing any Court established by article IV of the North Carolina Constitution to review its own decisions.

82. N.C. Gen. Stat. Section 62-82(b) lacks adequate guiding standards for the Commission to use in setting a prerequisite bond or undertaking amount.

II. Count Two—Session Laws that Exempt N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) from the CPCN Review Process Violate Constitutional Safeguards and Guarantees.

A. The Mountain Energy Act of 2015, N.C. Sess. Law 2015-110, Exempted an Individual Proposed Utility Project from Longstanding CPCN Application and Review Requirements.

83. N.C. Gen. Stat. Section 62-82(a) establishes the standard notice, hearing, and briefing and oral argument requirements applicable to a typical CPCN application process.

84. Regarding notice, Section 62-82(a) directs the Commission to require that the CPCN applicant publish a notice of the application “once a week for four successive weeks in a newspaper of general circulation in the county where such a facility is proposed to be constructed.”

85. N.C. Sess. Law 2015-110 exempted the Western Carolinas Modernization Project from this standard notice requirement, instead directing that the Commission must “require the

applicant to publish a single notice of the public hearing in a newspaper of general circulation in Buncombe County.”

86. Regarding the hearing requirement in the case where a complaint regarding the application has been filed with the Commission, Section 62-82(a) provides that

the Commission upon complaint shall, or upon its own initiative may, upon reasonable notice, enter upon a hearing to determine whether such certificate shall be awarded. Any such hearing must be commenced by the Commission not later than three months after the filing of such application, and the procedure for rendering decisions therein shall be given priority . . . Such applications shall be heard as provided in G.S. 62-60.1, and the Commission shall furnish a transcript of evidence and testimony submitted by the end of the second business day after the taking of each day of testimony.

87. N.C. Sess. Law 2015-110 exempted the Western Carolinas Modernization Project from this standard hearing requirement, instead requiring the Commission to hold a single public hearing following the single published notice of the hearing.

88. N.C Sess. Law 2015-110 also exempted the Western Carolina Modernization Project from the standard evidentiary and testimonial requirements provided in Section 62-82(a).

89. Regarding the rights of persons seeking the opportunity to present briefing and oral arguments before the Commission, Section 62-82(a) provides that the Commission or panel convened pursuant to N.C. Gen. Stat. Section 62-60.1 shall require: “that briefs and oral arguments in such cases be submitted within 30 days after the conclusion of the hearing, and the Commission or panel shall render its decision in such cases within 60 days after submission of such briefs and arguments.”

90. N.C. Sess. Law 2015-110 exempted the Western Carolinas Modernization Project from these standard briefing and oral argument requirements, instead directing that the Commission: “render its decision on an application for a certificate, including any related

transmission line located on the site of the new generation facility, within 45 days of the date the application is filed.”

91. N.C. Gen. Stat. Section 62-110.1(e) establishes the standard conditions under which an applicant may receive a CPCN, directing that

the applicant shall file an estimate of construction costs in such detail as the Commission may require. The Commission shall hold a public hearing on each application and no certificate shall be granted unless the Commission has approved the estimated construction costs and made a finding that construction will be consistent with the Commission's plan for expansion of electric generating capacity... In making its determination, the Commission shall consider resource and fuel diversity and reasonably anticipated future operating costs. Once the Commission grants a certificate, no public utility shall cancel construction of a generating unit or facility without approval from the Commission based upon a finding that the construction is no longer in the public interest.

92. N.C. Gen. Stat. Section 62-110.1(e) anticipates that the Commission will hold a public hearing, at least in part to vet the applicant’s construction costs, and that the Commission will have sufficient information to make further determinations about “reasonably anticipated future operating costs”—a factor that directly affects public necessity and the extent to which the proposed project is in the public interest.

93. N.C. Gen. Stat. Section 62-110.1(e) also anticipates that the Commission will, in fact, request information regarding anticipated construction costs in the context of satisfying its duty to ensure that its ultimate determination on the CPCN application is required by public necessity and is in the public interest.

94. The Commission has adopted rules applicable to would-be public utility franchisees filing for a CPCN, which require that the applicant file detailed plans regarding construction costs and schedules pursuant to applications submitted under N.C. Gen. Stat. Section 62-110.1(e). This rule reflects the Commission’s longstanding recognition that sound

CPCN decisions depend upon sufficient information in all CPCN proceedings. *See* R8-61 of the Rules of the Utilities Commission, a copy of which is attached to this complaint as Exhibit 10.

95. N.C. Sess. Law 2015-110 exempted the Western Carolinas Modernization Project from Section 62-110.1(e)'s requirements, and instead merely granted the Commission the discretion to request "an estimate of the costs of construction of the gas-fired generating unit in such detail as the Commission may require."

96. N.C. Sess. Law 2015-110 exempted the Western Carolinas Modernization Project from Section 62-110.1(e)'s requirements, did not provide the Commission with adequate guiding standards, and prevented it from obtaining needed information and evidence by which the Commission could assess the public necessity and determine whether the proposed Western Carolinas Modernization Project is in the public interest.

97. On January 15, 2016, Duke Energy Progress, LLC ("DEP") filed its CPCN application for the Western Carolinas Modernization Project along with a Motion for Partial Waiver of Commission Rule R8-61. DEP specifically sought to file its projected capital costs and operating expenses under seal to protect its bargaining power with vendors. A copy of DEP's publicly-available CPCN application and motion for partial waiver are attached to this complaint as Exhibit 11.

98. DEP's publicly-available application materials in support of its effort to be granted monopoly powers inherent in a CPCN consist of: 1) an Archaeological Identification and Architectural Windshield Survey and supporting photographs; 2) a Natural Resources Report; 3) a Siting and Permitting exhibit; and 4) DEP's 2015 Integrated Resource Plan for DEP's North Carolina and South Carolina energy portfolio. DEP separately filed a Confidential Petition for Certificate of Public Convenience for Partial Waiver of Rule R8-61.

99. DEP filed its projected capital costs and operating expenses information with the Commission under seal, preventing public scrutiny of the costs associated with this proposal.

100. N.C. Sess. Law 2015-110 does not establish how the Commission might adequately assess the public necessity of a CPCN application in light of the exempted information, nor does it provide alternate standards by which the Commission may assess public necessity. Adequately assessing the public necessity of the proposed project is legally necessary to ensure that the project complies with the long-established purpose of the CPCN, explained in paragraphs 35, 39, and 40, and is in the public interest.

101. By exempting the requirements of N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e), N.C. Sess. Law 2015-110 allowed for the Commission to approve the CPCN application for the Western Carolinas Modernization Project without information sufficient to assess public necessity and to ensure that the proposed project is in the public interest.

102. By exempting the requirements of N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e), N.C. Sess. Law 2015-110 excluded other parties to the proceeding, the public, and the judiciary from meaningful review of the proposed project that ultimately will be paid for by the ratepayers.

103. By exempting the requirements of N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e), N.C. Sess. Law 2015-110 also inhibited the Commission's access to information relevant during subsequent ratemaking proceedings; the Commission was required to approve of a CPCN application without complete information before establishing the financial burden that will be carried by the rate-paying public, a burden that might have been found to be disproportionate or wholly unnecessary given complete information.

104. Plaintiff has sought to appeal the legality of N.C. Sess. Law 2015-110, as applied to its challenge of the Commission's CPCN Order and Second Bond Order issued in the matter of the Western Carolinas Modernization Project, in separate proceedings before both the Commission and the North Carolina Court of Appeals, docketed at E-2, Sub 1089, and Case No. P16-368, respectively.

105. The Commission has issued an Order dismissing NC WARN's Appeals of both Orders.

106. The provisions of N.C. Sess. Law 2015-110 and the application of it to the Western Carolinas Modernization Project by the Commission directly illustrate the unconstitutional consequences that result from exempting N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) from the CPCN application process.

107. Plaintiff respectfully requests that this Court resolves this dispute prospectively as to any future CPCN Shortcut Laws which the State may enact or the Commission may seek to implement.

B. Individual Proposed Electrical Generating Facilities Cannot Legally Be Exempted from the Public Utilities Act's Constitutionally-Mandated Requirements for the CPCN Application and Review Processes.

108. The standard CPCN requirements contained in N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) work in concert to provide adequate guidelines for the Commission to hold evidentiary hearings, and allow for adequate procedure, information, and time for the Commission's and public's assessment of the proposed project, as described above. Thus, these statutory provisions provide the procedural and informational safeguards to ensure that public necessity exists and that proposed projects are in the public interest. These statutory provisions satisfy article I, sections 6, 19, 32, and 34 of the North Carolina Constitution.

109. The standard CPCN requirements contained in N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) also ensure that the record is sufficient for judicial review on appeal by courts created by article IV of the North Carolina Constitution, which vests the State's judicial power in those courts.

110. Defendant State of North Carolina's enactment of N.C. Sess. Law 2015-110 and likely future enactment of similar session laws that exempt N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) from the CPCN process, and the Commission's implementation of such session laws, deprive Plaintiff of its procedural and substantive due process rights guaranteed by N.C. Const. article I, section 19, as quoted in paragraph 71.

111. Defendant State of North Carolina's enacting Session Law 2015-110 and likely future enactment of similar session laws that exempt N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) from the CPCN process, and the Commission's implementation of such session laws, violate article I, section 6 of the North Carolina Constitution, as quoted in paragraph 73, and unconstitutionally delegate the legislative power to the Commission without providing adequate guiding standards.

112. Article I, section 32 of the North Carolina Constitution directs that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

113. Article I, section 34 of the North Carolina Constitution provides that "[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." This provision was contained in the State's very earliest Declaration of Rights enacted in 1776 and attached to this complaint as Exhibit 12.

114. The Supreme Court of North Carolina has explained that a narrow exception to article I, section 34 may be granted only when an entity is subject to the Commission's meaningful "regulation and control" to ensure that the entity provides a significant and discernable public benefit. *In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 549-50, 193 S.E.2d 729, 734 (1973) (citations omitted).

115. Defendant State of North Carolina's enacting Session Law 2015-110 and likely future enactment of similar session laws that exempt N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) from the CPCN process, and the Commission's implementation of such session laws, violate article I, section 32.

116. Defendant State of North Carolina's enacting Session Law 2015-110 and likely future enactment of similar session laws that exempt N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) from the CPCN process, and the Commission's implementation of such session laws, violate article I, section 34.

117. Session laws that exempt from the Commission's review the requirements of N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) allow for the Commission to approve CPCN applications without information sufficient to assess public necessity and to ensure that the proposed project is in the public interest.

118. Session laws that exempt from the Commission's review the requirements of N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) exclude other parties to the proceeding, the public, and the judiciary from meaningful review of the proposed project that ultimately will be paid for by the ratepayers.

119. Session laws that exempt from the Commission's review the requirements of N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) also inhibit the Commission's access to information

relevant during subsequent ratemaking proceedings; the Commission is required to approve of a CPCN application without complete information before establishing the financial burden that will be carried by the rate-paying public, a burden that might have been found to be disproportionate or wholly unnecessary given complete information.

120. Session laws that exempt from the Commission's review the requirements of N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) also allow the Commission to exercise quasi-judicial power without appropriate safeguards of judicial process applicable in the General Courts of Justice.

121. N.C. Sess. Law 2015-110 further compounded Section 62-82(b)'s constitutional deficiencies, described in Count I, by preventing the Commission from adequately assessing construction costs and thereby meeting its statutory obligations under N.C. Gen. Stat. Section 62-82(b), which requires the Commission to approve a bond amount that will recompense the applicant for damages, if any, sustained "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)."

CLAIMS FOR RELIEF

122. Plaintiff realleges and incorporates herein by reference the foregoing paragraphs of this complaint.

123. There exists a present controversy between Plaintiff and Defendants as to the constitutionality of N.C. Gen. Stat. Section 62-82(b) as applied to future CPCN appeals.

124. Plaintiff seeks a declaratory judgment from this Court that N.C. Gen. Stat. Section 62-82(b) is facially unconstitutional and void for violating the fundamental principles of open

courts, as protected by N.C. Const. article I, section 18, and therefore may not be implemented in future CPCN appeals.

125. Plaintiff seeks a declaratory judgment from this Court that N.C. Gen. Stat. Section 62-82(b) is facially unconstitutional and void for violating the fundamental principle of due process, as protected by N.C. Const. article I, section 19, and therefore may not be implemented in future CPCN appeals.

126. Plaintiff seeks a declaratory judgment from this Court that N.C. Gen. Stat. Section 62-82(b) is facially unconstitutional and void for violating the fundamental principle of separation of powers, as set forth in N.C. Const. article I, section 6, which prohibits the General Assembly from delegating its legislative powers granted by N.C. Const. article II, without adequate guiding standards. Therefore, Section 62-82(b) may not be implemented in future CPCN appeals.

127. Plaintiff seeks a declaratory judgment from this Court that N.C. Gen. Stat. Section 62-82(b) is facially unconstitutional and void as to violating the fundamental principle of the right to petition the government, as protected by the First Amendment of the U.S. Constitution, and therefore may not be implemented in future CPCN appeals.

128. There exists a present controversy between Plaintiff and Defendants as to the constitutionality of expedited and truncated CPCN application review processes substantially similar to N.C. Sess. Law 2015-110, the Mountain Energy Act of 2015.

129. Plaintiff seeks a declaratory judgment from this Court that expedited and truncated CPCN application review processes that are authorized by future North Carolina session laws to exempt from consideration N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) are

facially unconstitutional and void as to violating the fundamental principles of due process, as protected by N.C. Const. article I, section 19.

130. Plaintiff seeks a declaratory judgment from this Court that expedited and truncated CPCN application review processes that are authorized by future North Carolina session laws to exempt from consideration N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) are facially unconstitutional and void as to violating the fundamental principle of separation of powers, as set forth in N.C. Const. article I, section 6, which prohibits the General Assembly from delegating its legislative powers granted by N.C. Const. article II, without adequate guiding standards.

131. Plaintiff seeks a declaratory judgment from this Court declaring prospectively that any future enactments by the Defendant State of North Carolina of laws that create special exemptions for individual projects under any expedited and truncated CPCN application review processes that exempt such projects from consideration of the requirements of N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) are facially unconstitutional and void as to violating the fundamental principle that the State only may grant exclusive privileges to a person or persons in consideration of public services, as set forth in N.C. Const. article I, section 32.

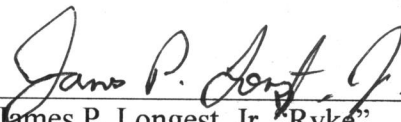
132. Plaintiff seeks a declaratory judgment from this Court declaring prospectively that any future enactments by the Defendant State of North Carolina of laws to create expedited and truncated CPCN application review processes that to exempt from consideration N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) are facially unconstitutional and void as to violating the fundamental principle that the State only may grant monopoly power in limited circumstances when true public convenience and necessity requires such exception, as set forth in N.C. Const. article I, section 34.

PRAYER FOR RELIEF

WHEREFORE, based upon all of the allegations contained in the foregoing paragraphs, Plaintiff respectfully requests that this Court:

1. Adjudge and declare that N.C. Gen. Stat. Section 62-82(b) does not comply with the requirements of the North Carolina Constitution, and therefore may not be implemented in future CPCN appeals;
2. Adjudge and declare that N.C. Gen. Stat. Section 62-82(b) does not comply with the requirements of the U.S. Constitution, and therefore may not be implemented in future CPCN appeals;
3. Adjudge and declare that future CPCN application review processes that are authorized by future North Carolina session laws to exempt from consideration N.C. Gen. Stat. Sections 62-82(a) and 62-110.1(e) do not comply with the requirements of the North Carolina Constitution;
4. Award costs of the action to Plaintiff pursuant to N.C. Gen. Stat. Section 1-263; and
5. Grant any other relief that this Court deems to be just and proper.

Respectfully submitted this 12th day of October, 2016.


James P. Longest, Jr. "Ryke"

N.C. Bar No. 18297

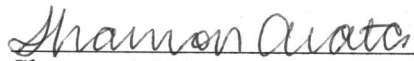
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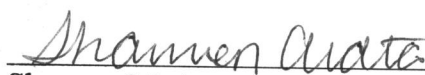
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Complaint for Declaratory Judgment on the persons named below by depositing a copy thereof in the United States mail by certified mail, return receipt requested.

This 12th day of October, 2016.

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