STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. SP-100, SUB 31

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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| In the Matter of<br>Petition by North Carolina Waste<br>Awareness and Reduction Network for a<br>Declaratory Ruling Regarding Solar<br>Facility Financing Arrangements and<br>Status as a Public Utility | )<br>)<br>)<br>)<br>)<br>) | NC WARN'S COMMENTS |

Pursuant to the Commission's Order Requesting Comments, dated September 30, 2015, now comes NC WARN, by and through the undersigned counsel, with comments addressing the questions posed by the Commission. The Commission's Order summarizes the NC WARN petition and other policy matters, and requests comments from the utilities and other interested parties.

As part of these comments, NC WARN incorporates its petition for a declaratory ruling that it is not a public utility pursuant to G.S. 62-3(23), filed June 17, 2015. In it's petition, NC WARN presented its activities under its power purchase agreement ("PPA") with the Faith Community Church (the "Church") in Greensboro, North Carolina, in which NC WARN installed a 5.2-KW solar photovoltaic ("PV") system on the Church roof. NC WARN has proceeded to sell the electricity generated by the system to the Church.

The installation at the Faith Church is admittedly a test case to determine if the upfront costs of solar equipment and installation of the PV system can be financed through the sale of electricity generated by the system. In the PPA, NC

WARN and the Church have set forth the financial responsibilities for both parties, and it is clearly NC WARN's intention throughout the PPA that the Church should be held financially harmless. Because of NC WARN's financial support, the electricity for on-site usage will be less than half the kilowatt-hour price the non-profit now pays to its energy supplier, Duke Energy. The Church's electricity bill is further reduced by its interconnection and net metering with the utility, Duke Energy. Eventually, the Church will own the PV system.

RESONSE TO QUESTIONS

QUESTION 1. Does the Commission have the express legal authority to allow third-party sales of Commission regulated electric utility services? If so, please provide a citation to all such legal authority?

RESPONSE: The term "third-party sales" is not presently defined in statute, so whether an arrangement between two parties, such as NC WARN and the Church, is inevitably defined as "third-party sales" is not clear-cut. In an effort to clarify what is and what is not permissible in this field, the Energy Freedom Act[1] defined what would be allowable third-party sales, but would have limited it to sales of electricity to a customer from a renewable energy facility, rather than to sales of electricity from any source other than the public utility with the service area assigned to it under G.S. 62-110.2. The SB 245 definition further would limit allowable third-party sales to facilities "owned and operated by a third party and

[1] The Energy Freedom Act, Senate Bill 245 (SB 245), was introduced but not passed in the 2015 Session of the General Assembly, although is eligible for consideration in the 2016 session.

located on the customer's property where such electricity will be consumed," rather than from any generating facility at any location.

Based on its experience with working with nonprofit organizations and residential customers, NC WARN suggests the Commission adopt the narrow definition in SB 245 as allowable third-party sales in the present matter. Having the solar facility on the Church roof, on the Church's side of the meter, is comparable to providing other renewable energy services, such as lighting, thermal heating and hot water. As described in NC WARN's petition, the primary purpose for entering into the PPA was to provide a funding mechanism to the Church for the upfront costs for installation and longer-term costs for maintenance of the system. The easiest and most convenient method of determining the cost of the electricity provided is to charge on a KW-hour basis.

At present, there are a number of circumstances that must be weighed and considered by the Commission, on a case-by-case basis, to determine whether an arrangement between the parties is allowable. The relevant statute defines a public utility:

> a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:
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> 1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation; provided, however, that the term "public utility" shall not include persons who construct or operate an electric generating facility, the primary purpose of which facility is for such person's own use and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation.

G.S. 62-3(23). If the proposed activities fall within the definition of those of a public utility, "producing electricity…for sale to or for the public for compensation," the entity providing the electricity is required to comply with statutory requirements in the Public Utilities Act, and regulation by the Commission.

In its analysis of petitions similar to the one presently before the Commission, the Commission relied on *State ex. rel. Utils. Comm'n v. Simpson*, 295 NC 519, 246 SE 2d 753 (1978). The Court had granted the Commission considerable flexibility in determining the meaning of the phrase "to or for the public," but concluded in that case the radio communication service offered to the public made the activity a public utility.

*Simpson* requires the Commission to balance a number of the "regulatory circumstances of each case," rather than "depend on some abstract, formalistic definition" of what is or is not included in the G.S. 62-3(23) definition of what selling to the public means. We disagree in that the initial delineation of what PPAs are allowable, or a more definitive definition of what selling to the public entails, would reduce the potential number of declaratory rulings the Commission would need to assess. An arrangements between parties substantially different from the one between NC WARN and the Church could still require a closer examination, but overall, there would be less uncertainty.

As stated in the docket regarding solar lighting for a parking lot, Docket No. SP-100, Sub 24 (2009), and the proposal in *National Spinning*, Docket No.

SP-100, Sub 7 (1996)[2], the circumstances the Commission reviews are (1) the nature of the industry sought to be regulated; (2) the type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) the effect of non-regulation or exemption from regulation of one or more persons engaged in the industry. The Commission goes on to state in the solar parking lot case, "in the final analysis, the meaning of 'public' must be such as what will, in the context of the regulatory circumstances, accomplish the legislature's purpose and comport with its public policy."

In its petition, NC WARN discussed each of the *Simpson* circumstances to show it is not a public utility, and that providing a funding mechanism for a rooftop PV facility on the Church is significantly different from the facts in *National Spinning* in which the direct sale of power from one industrial facility to another made the seller a public utility. NC WARN's primary argument is that it is not a public utility as the Solar Freedom project is not sales "to or for the public" but to a specific non-profit, the Faith Community Church, that it is working with to obtain solar electricity. NC WARN is providing funding, a service, rather than just selling electricity to a church. The proceeds from the monthly sales of electricity will go to offset much of the initial costs of the equipment and installation, funded upfront by NC WARN through charitable donations, and the continuing maintenance of the system.

A clear delineation that a PPA similar to one between NC WARN and the Church is allowable would eliminate the need for the Commission to consider all

[2] Both dockets discussed in more detail in NC WARN's petition in this matter.

of the *Simpson* circumstances for each similar project. Pursuant to NCUC Rule R8-65, owners of small PV systems file a report of proposed construction with the Commission and an application for interconnection with the utility. The present system of describing the project, including a copy of the PPA or summary of the financing mechanisms, would provide adequate regulation and Commission oversight. If over time, the Commission determined additional oversight was needed because of the volume of similar projects or complaints of abuse, then it could reexamine its position in this docket.

QUESTION 2. If the Commission has the authority to allow third-party sales of regulated electric utility service, should the Commission approve such sales by all entities desiring to engage in such sales, or limit third-party sales authority to non-profit organizations?

RESPONSE: After consideration of the *Simpson* circumstances, NC WARN believes all rooftop PV systems, owned or leased by a third-party, should be allowed to funded, or otherwise subsidized, by metering the output of the system and charging at a KW hour basis. Although NC WARN and the Church are both non-profit organizations and could continue their arrangement under their PPA if the Commission limited these types of arrangements to non-profits, they both believe the benefits of electricity generated by rooftop or other single customer PV facilities should be open to all entities.

QUESTION 3. What authority, if any, does the Commission have to regulate the electric rates and other terms of electric service provided by a third-party seller?

RESPONSE: To the extent the third-party seller is not a public utility, the Commission does not have the authority to regulate the rates and terms of service provided. As noted above, the present system of initial filing a report of proposed construction to the Commission provides adequate Commission oversight and the Commission retains its ability to make changes as circumstances change, either positively or negatively.

QUESTION 4. To the extent that the Commission is without authority to authorize third-party sales or to the extent the Commission's express authorization is required before third-party sales may be initiated, what action should the Commission take in response to NC WARN's sales in this docket?

RESPONSE: Without conceding any argument that it is not a public a public utility, NC WARN believes the Commission has several options. It could issue an order compelling NC WARN to cease its arrangement with the Church, and require it to reimburse the Church for the several months of payments. The financial relationship and legal issues between the parties is clearly set forth in the PPA and the matter would resolve itself between the parties. NC WARN then has the option of complying with the Commission's order or seeking judicial review pursuant to G.S. 62-90.

In the alternative, the Commission could issue an order expressly authorizing the sales, and accepting the PPA between NC WARN and the Church. This order could be narrow in scope based on the *Simpson* analysis solely of the present circumstances, or more broadly to allow rooftop solar facilities owned by a third-party with payments allowed under PPAs based on KW hour usage. Duke Energy, or other aggrieved persons, would have the ability to seek judicial review.

A third option would be to allow the NC WARN and the Church PPA to continue, and establish a stakeholder meeting to devise a rule defining allowable third-party sales.

Respectfully submitted, this is the 30th day of October 2015.

FOR NC WARN

*/s/ John D. Runkle*

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served courtesy copies of the foregoing upon each of the parties of record in this docket, and other potentially interested parties, by deposit in the U.S. Mail, postage prepaid, or by email transmission.

This is the 30th day of October 2015.

*/s/ John D. Runkle*

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Attorney at Law