NO. COA 16-811

NORTH CAROLINA COURT OF APPEALS



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| STATE OF NORTH CAROLINA *EX REL.* UTILITIES COMMISSION; PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION; DUKE ENERGY PROGRESS, LLC; DUKE ENERGY CAROLINAS, LLC; VIRGINIA ELECTRIC AND POWER COMPANY, d/b/a/ DOMINION NORTH CAROLINA POWER<br><br>Appellees<br><br>v.<br><br>N.C. WASTE AWARENESS AND REDUCTION NETWORK,<br><br>Appellant | From North Carolina Utilities Commission<br>Docket No. Sp-100, Sub 31 |

# BRIEF OF APPELLEES DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC

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BRIEF OF APPELLEES DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC

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## RESTATEMENT OF THE FACTS

On December 19, 2014, North Carolina Waste Awareness and Reduction Network ("NC WARN") initiated its "test case" scheme[1] to challenge North Carolina's prohibition on sales of electricity to third parties by non-public utilities by entering into a Power Purchase Agreement ("PPA") with Faith Community

[1] NC WARN refers to its own proposal as a "funding scheme." (R p 131).

Church[2] ("Greensboro Customer") in Greensboro, which provided that NC WARN will own, install, and maintain a 5.2 kW solar photovoltaic ("PV") electric generation facility (the "Generation Facility") and, in exchange, the Greensboro Customer "will purchase electricity produced by the system at a rate determined by this agreement." (R pp 17-22). The rate prescribed by the PPA is $0.05 per kilowatt hour ("kWh"). (R p 19).

On June 17, 2015, NC WARN filed a petition requesting that the North Carolina Utilities Commission ("the Commission") issue a declaratory ruling that it would not be considered a public utility pursuant to N.C. Gen. Stat. § 62-3(23) and other relevant provisions of Chapter 62, the Public Utilities Act, even though it had already entered into the PPA to sell electricity to the Greensboro Customer. (R p 5). NC WARN informed the Commission that its scheme "could potentially generate a revolving revenue stream and allow NC WARN to provide similar projects to other" NC WARN electric customers in the future. (R p 8). NC WARN noted that its scheme "may be restricted under NC law," (R p 10), and that if the Commission or applicable court determines that NC WARN cannot sell the electricity generated to the Greensboro Customer, NC WARN will donate the Generation Facility to the Greensboro Customer. (R p 8). At the time of its June

[2] Although the Greensboro Customer and the NC WARN *Amici have* faith-based missions, which Duke Energy respects, this appeal is not about the status of these groups or the sincerity of their beliefs. Rather, it concerns a "funding scheme" contrary to North Carolina law and deliberately designed by NC WARN to create a test case for third-party sales in North Carolina.

17, 2015 Request, NC WARN noted that its electric generation facility was awaiting final interconnection approval from DEC. (R p 6). In response, DEC notified NC WARN by June 23, 2015 correspondence that NC WARN's proposed sale of electricity to the Greensboro customer or to any third party is expressly prohibited by North Carolina law, but that in light of NC WARN's stated intention to donate the generation facility to the customer if its Request was denied, DEC would continue to process the interconnection request in order not to inconvenience the Greensboro customer. (R p 129). DEC further notified NC WARN that its interconnection of the NC WARN generation system should in no way be construed as DEC's approval of NC WARN's proposed unlawful activity, which NC WARN acknowledged by its June 24, 2015 return correspondence (*Id.*)

On July 6, 2015, North Carolina Sustainable Energy Association filed a letter requesting the Commission review its existing Orders that are related to the issue of third-party sales. (R p 26).

On September 18, 2015, NC WARN filed a report of its activities under the PPA. In the report, NC WARN stated that on August 28, 2015, it sent its first invoice to the Church for the sale of 1,423 kilowatt-hours (kWh) of electricity at a rate of $0.05 per kWh. The total first electricity bill rendered was for $76.49, including tax at 7.5%. (R p 31).

On September 30, 2015, the Commission issued an Order Requesting Comments. Additionally, the Commission found good cause to make Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively, "Duke Energy"); Virginia Electric and Power Company, d/b/a Dominion North Carolina Power ("DNCP"); and North Carolina Electric Membership Corporation ("NCEMC") parties to this docket without requiring them to file petitions to intervene. The intervention of the Public Staff - North Carolina Utilities Commission ("Public Staff") was automatic pursuant to N.C. Gen. Stat. § 62-15. (R pp 33-34).

Additionally, in its Order Requesting Comments, the Commission requested that the parties address the following questions as part of their initial and reply comments.

> "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.
>
> 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?
>
> 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?
>
> 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?" (R pp 34-35).

Petitions to intervene were filed by and granted for ElectriCities of North Carolina, Inc., North Carolina Eastern Municipal Power Agency, and North Carolina Municipal Power Agency Number 1 (collectively, "ElectriCities"); Carolina Utility Customers Association, Inc. ("CUCA"); North Carolina Interfaith Power and Light ("NCIPL"); North Carolina Sustainable Energy Association ("NCSEA"); and Energy Freedom Coalition of America, LLC ("EFCA"). (R p 309).

On October 30, 2015, initial comments were filed by Duke Energy (R p 115), NCEMC (R p 66), ElectriCities (R p 74), DNCP (R p 141), NC WARN (R p 57), NCIPL (R p84), EFCA (R p 173), and the Public Staff (R p 134), all opposing NC WARN's scheme and actions as clearly contrary to North Carolina law, Supreme Court case law, and Commission precedent.

On November 20, 2015, reply comments were filed by NC WARN (R p 269), NCSEA (R p 227), EFCA (R p 206), NCIPL (R p 241), and DNCP (R p 258).

The Commission issued its Order Issuing Declaratory Ruling (Order) on April 15, 2016. (R p 308). The Commission found and concluded in pertinent part, that,

"1) NC WARN's program constitutes sales "to or for the public" based on current North Carolina law;

2) NC WARN's electric sales to the public (the Church) is impermissible due to the fact that the Church is located within a service area that has been assigned exclusively to Duke;

3) the General Assembly has determined that the public is better served by a regulated monopoly than by competing suppliers of service, and policy decision by the General Assembly has resulted in consistently low electric rates compared to other parts of the country;

4) the Church has legal ways to finance the installation of solar on its premises, including, among others, financing over a period of time by using electric bill savings to pay for the purchase and installation;

5) Commission precedent supports the Commission's determination and the Iowa Eagle Point decision is not controlling and is contrary to North Carolina law;

6) North Carolina is one of the nation's leaders in adding renewable generation;

7) NC WARN knowingly entered into a contract to sell electricity in a franchised area and sold electricity without prior permission from the Commission subjecting itself to sanctions; and

8) although the Commission determines that penalties should be issued, those penalties shall be waived upon NC WARN's honoring its commitment to refund all billings to the Church and ceasing all future sales." (R pp 337-338)

## SUMMARY OF ARGUMENT

**According to N.C. Gen. Stat. § 62-3(23)a.1, It is Clear that NC WARN is Unlawfully Producing, Generating, Transmitting, and Furnishing Electricity to or for the Public for Compensation as a Public Utility.**

NC WARN has chosen to act as a "public utility" under North Carolina law, despite no authority to do so. Public Utility is defined in N.C. Gen. Stat. § 62-3(23)(a)(1) as follows:

> "Public Utility" means a person owning or operating in this State equipment or facilities for (1) Producing, generating, transmitting, delivering or furnishing electricity ... 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 facilities is for such person's own use and not for the primary purpose of producing electricity... for sale to or for the public or compensation.

In determining the scope of the Commission's authority, emphasis should be placed on whether the activity involved is a public utility function rather than on whether the performer is, literally speaking, a public utility. *State ex rel. Utilities Com'n v. Southern Bell*, 326 N.C. 522, 528, 391 S.E. 2d 487, 490 (1990). By its own admission, NC WARN purchased, installed, maintains and retains ownership of a system that produces, generates and furnishes electricity, and the Greensboro Customer pays monthly payments based upon the amount of electricity generated and sold to it by Appellant. (Appellant's Brief p 7). Further, NC WARN admits that this is a "test case" to determine if it can sell electricity to selected utility customers, North Carolina law notwithstanding, in order to recover its up-front costs of procuring, installing, operating and maintaining the Generation Facility for the Greensboro Customer. (R p 5). NC WARN has plainly stated it wants to

become or at least provide the same functions as a competing, electric supplier without any oversight or regulation, (R p 8), despite North Carolina's longstanding policy that "Nothing else appearing, the public is better served by a regulated monopoly than by competing supplier of the service." *State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 268, 148 S.E.2d 100, 109 (1966).

Through contorted legal analyses, Appellant and NC WARN *Amici* argue that this proposal is neither (1) a sale nor (2) to or for the public. However, even a cursory analysis of NC WARN'S proposal indicates that it is engaged in the sale of electricity and not a financing arrangement. Further, the proposal involves a sale to the public. North Carolina law, North Carolina Supreme Court precedent, and the Commission's past orders all unequivocally prohibit the Appellant from doing what it has attempted to do, and the Appellant's request must be rejected, and its blatant disregard for the law and the Commission's authority should not be condoned.

**Standard of Review**

Appellate review of Commission decisions is governed by N.C. Gen. Stat. § 62-94, which provides in pertinent part as follows:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The 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.

Importantly, however, on appeal, "a rule, regulation, finding, determination, or order made by the Commission is deemed *prima facie* just and reasonable." *State ex rel. Utilities Comm'n. v. Public Staff,* 123 N.C. App. 43, 45, 472 S.E.2d 193, 195 (1996); N.C. Gen. Stat. § 62-94(e) (1999). The appellate standard of review is whether the Commission's findings of fact are supported by competent, material and substantial evidence. *State ex rel. Utilities Comm'n. v. Nantahala Power & Light Co.* 313 N.C. 614, 745, 332 S.E.2d 397, 474, *rev'd on other grounds,* 476 U.S. 953, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986). In determining whether to uphold the Commission's actions, the court may not replace the Commission's judgment with its own even when there are two reasonably conflicting views of the evidence. *State ex rel. Utilities Comm'n. v. Carolina Indus. Group for Fair Utility Rates,* 130 N.C.App. 636, 639, 503 S.E.2d 697, 699-700 (1998). To meet the requirement that "substantial rights have been prejudiced," the error must

be prejudicial, and the rule that actions of the Commission are presumed just, clearly indicates that judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria which circumscribe judicial review. *State ex rel. Utilities Commission v. Bird Oil Co.*, 302 N.C. 14, 20, 273 S.E.2d 232, 235 (1981).

As this Court explained the application of the standard of review in rejecting another recent appeal by NC WARN, where Appellant also argued the Commission had insufficient evidence to support its finding that the public convenience and necessity standard had been met, "where there is substantial evidence supporting the Commission's findings and conclusions, we will not second guess the Commission's determination." *In re Duke Energy Corp.*, 232 N.C. App. 573, 586, 755 S.E.2d 382, 390, *review denied*, 367 N.C. 787, 766 S.E.2d 628 (2014). Likewise, as set forth below, the Commission's Order was supported by competent, material and substantial evidence, its conclusions were sound, and thus it should be upheld by this Court.

## ARGUMENT

### I. Chapter 62 and North Carolina Appellate Court Decisions Prohibit Unregulated Electric Sales To or For the Public.

The seminal case addressing the issue of public utility sales "to or for the public" is *State ex rel. Utils. Comm'n v. Simpson,* 295 N.C. 519, 246 S.E.2d 753

(1978). In *Simpson*, a doctor provided a two-way radio service for ten customers in his county medical society and argued that such an offering was only to a small number and could in no way be deemed to or for the public. In holding that the doctor in *Simpson* was acting as a public utility and subject to regulation by the Commission, the Court held that "the public does not mean everybody all the time." *Id.* at 522, 246 S.E.2d at 755. The Supreme Court further explained the statutory definition as follows,

> One offers service to the "public" when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in this connection, that his service is limited to a specified area and his facilities are limited in capacity. *For example, the operator of a single vehicle within a single community may be a common carrier.*

*Id.* at 520, 246 S.E.2d at 754 (emphasis added; quoting *Carolina Tel.*, 267 N.C. at 268, 148 S.E.2d at 109). Here, NC WARN has held itself out as willing to serve all who apply up to the 5.2 kW capacity of its facilities, has already generated and sold electricity to the Greensboro Customer, and is therefore selling to or for the public for compensation.[3]

The *Simpson* Court held,

> What is the "public" in any given case depends rather on the regulatory circumstances of that case. Some of these circumstances

[3] In fact, during times of low on-site usage electric power will be put onto the power grid and credited against the kilowatt hours sold to the Church by Duke Energy. (Appellant's Brief, p. 8). As a result, electricity from Appellant's Generation Facility will serve other customers on DEC's system.

> are (1) nature of the industry sought to be regulated; (2) type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) effect of non-regulation or exemption from regulation of one or more persons engaged in the industry.

*Id.* at 524, 246 S.E.2d at 756. Importantly, the *Simpson* Court added, "The meaning of "public" must in the final analysis be such as will, in the context of the regulatory circumstances…accomplish the legislature's purpose and comports with its public policy." *Id.*

Throughout their briefs, Appellant and NC WARN *Amici* criticize the Commission for not addressing the *Simpson* factors. To the contrary, in determining NC WARN was offering service to the public, the Commission correctly applied the *Simpson* factors throughout its 30-page Order Issuing Declaratory Ruling. Appellant and NC WARN *Amici* misread and mischaracterize the factors in *Simpson.* Appellant states this Court held in *Bellsouth Carolina PCS, L.P. v. Henderson Cnty.*, 174 N.C. App. 574, 578, 621 S.E.2d 270, 273 (2005) that the *Simpson* factors must be examined in every case, "No single factor is controlling in determining whether an entity is a public utility, although each factor must be weighed, including lack of competition in the local marketplace, the good or service provided and the existence of regulation by the government authority." Notably, these factors from *Bellsouth* differ slightly from the factors established in *Simpson,* and Appellant incorrectly attributes the factors in *Bellsouth* to *Simpson*

when this Court was actually citing Anderson's American Law Of Zoning, § 12.32 (4th ed. 1996) and *Campanelli v. AT&T Wireless Serv. Inc.*, 85 Ohio St.3d 103, 706 N.E.2d 1267, 1269 (1999). Nonetheless, both *Bellsouth* and *Simpson* stand for the proposition that what constitutes a public utility requires a flexible rule. *Bellsouth,* 174 N.C. App. at 273. Contrary to Appellant's and NC WARN *Amici's* arguments, however, the Commission appropriately applied the *Simpson* case in denying Appellant's declaratory judgment request.

**A. The Commission appropriately applied the *Simpson* factors.**

Contrary to Appellant and NC WARN *Amici*'s arguments, the Commission did not stop at the "form" of the PPA[4], but analyzed the substance of NC WARN's sale of electricity to the Greensboro Customer under the *Simpson* test. In examining the nature of the electric industry and the type of market it serves, the Commission notes in its Order that, under Chapter 62 and Commission Orders implementing the Public Utilities Act, the service area in Greensboro has been assigned exclusively to Duke Energy Carolinas, and other service areas in North Carolina have been assigned exclusively to other electric suppliers.[5] Unlike the

[4] As is telling, however, and as discussed *infra,* NC WARN chose to bind Greensboro Customer through a Power Purchase Agreement, not a financing or lease agreement.
[5] N.C. Gen. Stat. § 62-110.2

telecommunication industry,[6] North Carolina law does not permit retail electric competition as Appellant sought to have the Commission condone. (R p 326). The prohibition is based on the economic principle that provision of electric service for compensation is a service fixed with a public interest, and competition results in duplication of investment, economic waste, inefficient service, and high rates. (R pp 326-327). When other states determined that retail competition for electric service was a better model in the 1990s, North Carolina studied this alternative model, but after witnessing the calamitous experience in California, determined to retain the status quo. (R p 327).

NC WARN argues that it only intends to expand its public utility service sale of electricity to self-selected non-profit organizations and not "all of Duke Energy's customers," and therefore argues that selling electricity to this separate class of customers under its scheme should not be considered for or to the public. (R p 14). Yet, the Supreme Court in *Simpson* specifically rejected such an argument. The Supreme Court held that the regulated industry at issue had users who fell into definable classes and that, "Were a definition of public adopted that allowed prospective offerors of services to approach these separate classes without falling under the statute, the industry could easily shift from a regulated to a largely

[6] In recent decades, the General Assembly, not the Commission or the Courts, as a matter of state policy, has taken numerous steps to open up telecommunication service to retail competition. *See e.g.*, N.C. Gen. Stat. § 62-110 (b), (c), (d), (e), (f1) and (f4) and N.C. Gen. Stat. § 62-133.5.

unregulated one." *Simpson,* at 525, 246 S.E.2d at 757. If NC WARN were allowed to generate and sell electricity to the class of non-profit organizations, of which there are many in North Carolina, other entities could begin selling electricity to other separate classes under the guise that each separate class was not in and of itself the public. If allowed, this would shift the electric industry "from a regulated industry to a largely unregulated one." *Id.* Duke Energy Carolinas has the exclusive right under North Carolina law to serve the Greensboro Customer. As part of the regulatory compact, Duke Energy Carolinas is granted the exclusive franchise to serve customers within its assigned service territory and with that comes the obligation to serve all customers at rates and service requirements set by the Commission. NC WARN, on the other hand, wants to serve only the customers it chooses at whatever rates and under whatever service requirements it alone wants, without any oversight by the Commission, Public Staff or Attorney General's Office.

If Appellant is allowed to further its scheme, such a bifurcated system simply would not work and does not serve the public interest. Public Utilities are required to serve all customers that seek service. Rates are based on the provision of service to all customers at average costs. As explained by the Commission, if carried to its logical extension, the effect of non-regulation or exemption from regulation could have negative consequences for the industry and general public.

Authorization of third-party sales presents the real probability that the public will not be well served as this will leave burdensome, less profitable service to the regulated incumbent and result in higher prices to the remaining customers for the service – the precise harm identified by the Court in *Simpson.* (R p 328). NC WARN's attempt to deregulate North Carolina's electric public utility industry by excluding a separate sub-class of the public cannot be allowed and would undermine the State's long-standing policy of favoring regulated utility services.

The Commission also examined the kind of competition that naturally inheres in the electric industry. The Commission determined that NC WARN's request seeks approval of a program introducing third-party sales to an indefinite number of non-profit consumers. (R p 328). The Commission recognized that others might wish to expand third-party sales beyond those to non-profit consumers and serve large commercial establishments that also desire the installation of PV facilities from which to buy for their own use or to sell excess electricity to other businesses presently served by the incumbent regulated providers. (R p 328). Each of these classes involves a sale of electricity that competes with incumbent regulated providers. When Duke Energy customers heat or cool their buildings, manufacture goods and products, watch television, charge their phones, or cook meals for their families, they are not specifically using solar energy, nuclear energy or fossil fuel energy. Rather, customers are using electrons

that have been produced from a diverse mix of generation resources, which include solar, other renewables, fossil and nuclear generation. NC WARN argues that it does not compete with Duke Energy because Duke does not have a program similar to that offered by NC WARN. (Appellant's Brief p 26). Using NC WARN's logic, one must conclude that Chick-Fil-A does not compete with McDonald's because Chick-Fil-A does not sell Big Macs. Consistent with the *Simpson* industry analysis, Duke Energy is in the business of selling kilowatt hours of electricity. NC WARN is, likewise, attempting to sell kilowatt hours of electricity and readily admits this by stating the Greensboro Customer "purchases electricity produced by the system at a rate of $0.05 kwh". (Appellant's Brief p 7). In its analysis under *Simpson,* the Commission correctly applied each factor and determined NC WARN was offering services to the public. The Commission's decision should be affirmed.

### B. Under N.C. Gen. Stat. § 62-3(23)a.1, NC WARN is selling electricity to the public for compensation.

In its brief, NC WARN awkwardly and self-contradictorily admits it could be generating energy to any offsite person. Appellant states, "If the PV generates excess power over the needs of the Faith Community Church, then the excess power is put into Duke Energy's power grid." (Appellant's brief p 8). However, two sentences prior and in the same paragraph, NC WARN states, "The power

generated by the PV is for the Faith Community Church's use only." (Appellant's Brief p 8). This begs the question: Where does NC WARN believe the energy that it generates goes once it is delivered onto Duke's power grid? The answer, of course, is to Duke Energy's other customers.[7]

Again, N.C. Gen. Stat. § 62-3(23)(a)(1) defines "public utility" as a person owning or operating equipment or facilities for generating electricity to or for the public for compensation, with the exception that it does not include persons who operate a generating facility for their own use and not for the primary purpose of producing electricity for sale to or for the public for compensation. NC WARN and the NC WARN *Amici* acknowledge that NC WARN is not operating the system for their own use, and this exception should not apply. (Appellant's Brief p 2; *Amicus* brief p 5). Thus, it is axiomatic that NC WARN is generating electricity for the Greensboro Customer for compensation. It is for the Legislature, not for this Court or the Commission, to determine whether the policy of free competition between suppliers of electric power or the policy of territorial monopoly or an intermediate policy is in the public interest. *State ex rel. Utilities Commission v. Lumbee River Elec. Membership Corp.*, 275, N.C. 250, 257, 166 S.E.2d 663, 668 (1969). If the Legislature has enacted a statute declaring the right of a supplier of

[7] NC WARN's actions should be distinguished from net metering. Net metering involves a customer providing service to itself and offering any excess power to the regulated utility. In this situation NC WARN is not providing electricity to itself but is selling electricity to a third party and, thus, is not engaged in net metering .

electricity to serve, notwithstanding the availability of the service of another supplier, neither this Court nor the Commission may forbid service by such supplier. *Id.*

## II. The Purchase Power Agreement Constitutes an Unlawful Sale of Electricity and is Not a Financing Agreement.

Appellant makes varying arguments as to why its delivery of electricity for compensation to the Church is not a sale, including some which contradict its prior filings at the Commission. As is its usual practice, Appellant mischaracterizes the Commission's Order. Appellant mistakenly labels analysis critical of its position as a lack of analysis and asks the Commission to declare the law to be as Appellant wishes rather than as it currently exists.

Appellant's central argument is that it is selling electricity in order to really provide a financing service to the Greensboro Customer through its PPA, and therefore this Court should ignore North Carolina law or the plain form and substance of its test case scheme. In its brief Appellant argues, "The Commission's error is best illustrated by its examination of whether NC WARN is 'producing, generating, transmitting, delivering or furnishing electricity' as required by N.C. Gen. Stat. § 62-3(23)(a)(1)." It criticizes the Commission for a "breezy two-paragraph section containing little or no analysis" and claims the Commission was wrong to declare, "No party disputes that NC WARN is

furnishing electricity under its program for compensation." (Appellant's Brief p 18). By disputing whether it is furnishing electricity for compensation, it appears Appellant-NC WARN has not communicated with the NC WARN that appeared before the Commission, or perhaps it simply forgot what it told the Commission. In its comments before the Commission, NC WARN admitted that it *"has proceeded to sell the electricity generated by the system to the church."* (Emphasis added) (R p 57).

Despite Appellant's earlier admission it was in fact selling the electricity generated to the church, it now attempts to backtrack, and argues the "function" of its PPA is a financing arrangement. In its original Request for Declaratory Relief, it stated, "The installation at the Faith Church is a test case to determine if the upfront cost can be financed through *the sale* of electricity generated by the PV panels." (emphasis added) (R p 5). Appellant argues the Commission did not analyze why the PPA is necessary or what principal role the PPA served, and the Appellant states that it could not purchase the solar panels for the roof without a repayment system. However, throughout its comments in the Commission Docket and its brief before this Court, Appellant never explains why its admitted sale of electricity is necessary for financing. Interestingly, the "repayment" system that NC WARN views to be essential is based on a fluctuating volume of electricity

sales and has no relationship to the cost or the value of the assets allegedly being financed.

The Commission writes in its Order, "It is unclear why NC WARN seeks to sell electricity to the church rather than providing financing to the church to be repaid through the savings NC WARN represents will be achieved from the electricity the PV facilitate will generate....NC WARN certainly makes no effort to support its conclusory assertion that sales are necessary for its program." (R p 328). The Commission further explains, "Adding the sale feature provides no apparent benefit to NC WARN's program; rather, it only converts a perfectly legal transaction into an unlawful one." (R p 329). The Commission further analyzes NC WARN's argument by giving a hypothetical example,

> "Based on NC WARN'S logic, an owner developer of PV facilities that chooses not to borrow funds from a third party, but wishes to retain ownership and sell power to the building owner, would be prohibited from doing so, but an owner/builder that borrows money would not be so prohibited. This false dichotomy highlights the logical fallacy in NC WARN'S position." (R p 329).

The point is that it is the sale of electricity by the owner to a third party that makes the transaction unlawful. It does not matter whether the owner finances the generating facility with its own funds or with borrowed money. In one final example the Commission wrote, "Financing the construction of generation resources and selling power from them are two distinct functions. Existing law

does not prohibit financing of public utility or customer-owned generating facilities, but sales of power to or for the public makes the generator a public utility irrespective of the manner in which the facility was financed." (R p 329).

The fact that Appellant only cited a single page of the Commission's Order for its proposition that the Commission had not analyzed why the PPA was necessary or identified the principal role the PPA served is staggering. Such a troubling argument could, at best, call into question whether Appellant simply stopped reading the Commission's 32-page Order at page seventeen. The simple fact is, as the Commission correctly notes, at no point during the Commission proceeding did NC WARN offer any evidence as to why the sale of electricity was necessary to its financing agreement. The question is not as Appellant stated, "Why the PPA was necessary to the financing," but whether it was. The Commission reviewed the evidence, or lack of it, and determined it was not. With regard to the principal role of the PPA as a financing agreement, the only argument Appellant has attempted to provide is the wording of its PPA, "Both parties acknowledge this PPA is part of NC WARN's Solar Freedom project, in which NC WARN is developing funding methods to allow non-profit organizations to benefit from solar energy." (R p 17). In other words, Appellant wants this Court to believe that the PPA is actually a financing agreement because they say it is. One sentence

out of a nine-page PPA simply does not transform the unlawful sale of electricity into an otherwise potentially legitimate financing arrangement.

**A. The PPA's specific terms do not create a financing agreement.**

Again, ignoring for a moment that the parties even refer to their arrangement as a "Power Purchase Agreement" there are no other terms in the agreement that are generally found in any financing agreement. There is no statement of the amount owed by the debtor or the underlying cost of the facilities being financed. There is no guarantee the title to the system will transfer to the Church at the end of the term. The PPA states, "At the end of the agreement term, if both parties agree, or anytime among mutual agreement between the parties, FCC may assume ownership of the system." (R p 18). According to the terms of the agreement, the Church could purchase electricity from Appellant for the full length of the agreement, and at the termination of the agreement, Appellant could unilaterally refuse to transfer title to the Church. (R p 18).

For guidance, N.C. Gen. Stat. § 25-1-203(b) outlines how leases are distinguished from security interests and provides some instruction on the necessities for a security interest.[8] None of the earmarks of a security interest are present here. First, to be a security interest, the original term of the agreement

[8] While not all financing arrangements involve the creation of a security interest, the existence of a security interest necessarily involves a financing arrangement.

must be equal to or greater than the economic life of the goods being financed. This does not apply to the PPA. Second, to create a security interest, the party financing the goods must renew the agreement for the remaining economic life of the goods or become owner of the goods. As previously noted, this does not apply to the PPA. Third, for a security interest to exist the financing party must have an option to renew the transaction for the remaining economic life of the goods for no additional consideration. This provision is also not found in the PPA. Finally, the financing party must have an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon the expiration agreement. As previously stated, under the terms of the PPA, both parties must agree for the Church to own the system, and Appellant has a unilateral right to refuse the transfer of ownership. While the PPA does not specifically involve a security interest, these factors are crucial in a determination of whether the underlying transaction is truly a financing arrangement. Clearly, such an arrangement is inconsistent with the fundamental requirements of a legitimate financing arrangement. Rather, this agreement is precisely what it says it is, a "power purchase agreement" for the purchase of electricity. (R p 17). As Appellant accurately declared it to be so in its Comments filed with the Commission on June 17, 2015, "NC WARN has proceeded to sell the electricity generated by the system to the Church." (R p 57).

## III. The Legislature has Rejected Allowing Third-Party Sales.

Appellant made one further argument as to why the Commission should not determine Appellant's actions to be a sale of electricity. In its Comments filed with the Commission on October 30, 2015, Appellant urged the Commission to adopt the definition of third-party sales found in the proposed legislation that never passed in the General Assembly's 2015 session. (R p 59). However, in a footnote Appellants acknowledged, "The Energy Freedom Act, Senate Bill 245 ("SB 245")[9] was introduced *but not passed* in the 2015 Session of the General Assembly, although is eligible for consideration in the 2016 session." (emphasis added) (R p 58). Clearly, this is a policy issue that has been previously considered and rejected by the General Assembly. The legislature is the appropriate place for such potential statutory changes to be addressed. The North Carolina Supreme Court has noted, "It is for the Legislature, not for this Court or the Utilities Commission, to determine whether the policy of free competition between suppliers of electric power or the policy of territorial monopoly or an intermediate policy is in the public interest." *Lumbee River Elec. Membership Corp.*, 275 N.C. at 257, 166 S.E.2d at 668. In its Order, the Commission discusses HB 245 and its authority to adopt a definition from an unratified bill, "The General Assembly has been

[9] Appellant incorrectly cited this bill in its Comments. The correct citation is House Bill 245 ("HB 245"). The bill passed its first reading in the House but was referred to Committee without further consideration. It did not pass in 2016, either.

successful in determining the best policy for the state resulting in consistently low electric rates compared to the nation....it is not the Commission's role to alter that paradigm....Only the legislature can act on the policy arguments NC WARN makes in this Docket." (R p 328). The Commission recognized its appropriate role in these policy determinations under the laws of North Carolina. To the extent Appellant wishes to change state policy, it should make its recommendations to the General Assembly, not the Commission or this Court.

## IV. The Actual Owner of the Generating Facility is Immaterial. The Appropriate Question is Whether the Owner is Selling Electricity.

NC WARN *Amici* also argue that the Commission erred in basing its decision, at least in part, on whether the customer must own its power system. They seek to construct an argument by drawing a contrast between N.C. Gen. Stat. § 62-3(23)(a)(1), and N.C. Gen. Stat. § 62-3(23)(d). They note that § 62-3(23)(a)(1) states customers who "construct or operate" solar-powered equipment on their own premises are not a public utility, and under § 62-2(23)(d), "a water or sewer system owned by a homeowners association that provides service to its members is not a public utility." NC WARN *Amici* then declare that because "owned" appears in one section and not the other, there is no requirement that the Church own the facility. (NC WARN *Amici Brief* pp 2-3). Leaving aside the fact that, as the Commission stated, the General Assembly has identified there are

differences in electric utility service and other types of utility service. (R p. 327). The question does not turn on who *owns* the facility, however, but whether the owner of the facility is *selling* electricity in violation of the law. It is undisputed that NC WARN owns the Generation Facility and has been selling electricity for compensation to the Greensboro Customer. As the Commission appropriately found in its Order, that is dispositive under North Carolina law, and this Court should affirm the Commission's decision.

## V. The Commission's Order Is Consistent with its Orders in Analogous Situations Based on North Carolina Law and Should Be Affirmed.

In its Request for a Declaratory Ruling, NC WARN cites Commission decisions, which it suggests go directly to the question of whether a non-utility party can sell power directly to someone within the franchised territory of an electric utility. (R p 10).[10] In their brief before this Court, NC WARN *Amici* also cite the Commission Order in *Progress Solar Investments* and an additional Commission Order involving *FLS YK Farm, LLC.*[11] Each of these decisions turns on its own individual facts, is consistent with the Commission's reasoning in this case, and demonstrates further that NC WARN's Request has no merit. In its Order, the Commission found that *National Spinning* is more analogous to the

[10] *Request for a Declaratory Ruling by National Spinning Company, Inc. and Wayne S. Leary, dba Leary's Consultative Services,* NCUC Docket No. SP-100, Sub 7 (April 22, 1996) and *Request by Progress Solar Investments, LLC, and Progress Solar Solutions, LLC, for a Determination that Their Proposed Activities Would Not Cause to Be Regarded as Public Utilities under G.S. §62-3(23),* Docket No. SP-100, Sub 24 *Order on Request for Public Utility Status* (November 25, 2009).

[11] *In Re Application of FLS YK Farm, LLC for Registration of a New Renewable Energy Facility,* Docket No. RET-4, Sub 0 (April 22, 2009)

instant case because the electricity generator in that case sought to sell service to a consumer that was otherwise served by the incumbent electric utility. (R p 330). The Commission rejected the claim that the generator was exempt from regulation as a Public Utility because the generating equipment was owned by a third party and not National Spinning, the consumer of electricity. (R p 330). In *National Spinning,* the Commission considered a declaratory request that the proposed construction and operation of a renewables-fueled electric and steam generation facility at a DEP industrial customer by a renewables developer did not render the customer or renewables developer a public utility. In part, the proposed renewables developer ownership and operation proposal at issue in National Spinning was devised as a funding mechanism to qualify for certain federal tax credits. *National Spinning* at p. 4. The Commission applied the Simpson and CT&T cases in denying the declaratory request and holding that the proposed arrangement was prohibited public utility activity under the N.C. Gen. Stat. § 62-3(23)a1. Id. at 4-7. The Commission also held that the Simpson "slippery slope" concern, discussed supra, equally applied to the declaratory request in National Spinning in emphasizing the following:

> If the Commission were to allow Petitioners to perform the activities proposed herein, other suppliers and customers will inevitably seek similar arrangements. . . . New, unregulated electric suppliers could 'cherry pick' the electric utilities' best customers, leaving them with significant stranded investment. The rates that must be charged to the

> remaining residential, commercial and smaller industrial customers, who are not in a position to install turbine generators and purchase generation steam, would be impacted. The ultimate result could be a windfall for a relatively small number of large industries, at the expense of other customers.

Id. at p. 7. Likewise, NC WARN's appeal here is fraught with the same flaws and perils and must also be denied.

Unlike *National Spinning,* the commodity to be sold by the Petitioner in *Progress Solar* was solar space lighting, a commodity that the Commission found to be distinct from the sale of electric service. (R p 330) In *Progress Solar*, the LED lighting system was totally self-contained, not connected to the electric grid and based on a fixed amount that did not vary based upon the amount of illumination created by the system. (Commission Order, Docket No. SP-100, Sub 24, pp 1,2). Further, the Commission noted that the lighting system could not be used to generate electricity and thus could not be used to bypass the electric utilities' exclusive franchises. (*Id* at p. 3) Similarly, the *FLS YK Farm* case cited by NC WARN *Amici* involves a different set of facts and is not dispositive of the issues in this case. In *FLS YK Farm*, the Commission noted that the case involved the use of an on-site solar facility to be used to heat on-site water for domestic needs, which would not fall within the definition of public utility. (Commission Order, Docket No. Ret-4, Sub 0, p. 2). The Commission further noted that the decision should not be regarded as precedent for any other activity. (*Id* at p. 3).

### A. *Eagle Point Solar* is not based on North Carolina's *Simpson* Factors and is distinguishable from the case at hand, and therefore, should not be relied on by this Court.

Both Appellant and NC WARN *Amici* encourage this Court to adopt the standard used by the Iowa Supreme Court in *SZ Enters, LLC d/b/a Eagle Point Solar vs. Iowa Utility Bd*, 850 N.W. 2d 441 (Iowa 2014). In *Eagle Point,* the Iowa Supreme Court determined Eagle Point Solar was not a utility despite entering into a similar, but different arrangement than that between Appellant and the Church.

*Eagle Point* is an Iowa case decided under the laws of the State of Iowa, and not Chapter 62. Furthermore, in *Eagle Point,* the Iowa Supreme Court relied on an Arizona case, *Natural Service Gas v. Serv-Yu Cooperatvies, Inc.* 70 Ariz. 235, 219 P. 2d 324 (1950). The Iowa Courts had previously adopted *Serv-Yu* as a test to determine whether an entity was a public utility. *Serv-Yu* provides for an eight-pronged test, which should be viewed as a practical approach. *Id.* at 447. In other words, *Serv-Yu* establishes a standard similar to, but not the same as, that found in *Simpson,* and uses more and different factors.

As noted by the Commission, our Supreme Court's *Simpson* decision postdates the Arizona case by twenty-eight years, and makes no mention of the *Serv-Yu* factors. (R p 333). Despite this, the Commission exhaustively analyzed the decision in *Eagle Point* and determined that it was wrongly decided for numerous reasons, including that the PPA had been converted to a financing/lease

agreement before the appeal, which would have rendered the case moot under North Carolina law. (R p 331), that the Iowa Court improperly placed interest on the location of the meter, and relied on one-sided, out of date, scholarly articles not included in the record. (R pp 332-333).

Even in its decision in *Eagle Point*, the Iowa Supreme Court recognized different state courts have used the *Serv-Yu* factors in similar cases and reached different decisions.[12] *Eagle Point*, 850 N.W. 2d at 456. Most importantly, the Commission and this Court must make their decisions under Chapter 62 and the relevant case law of North Carolina, not Iowa or Arizona. *Simpson* is the appropriate standard and was correctly applied by the Commission.

While there are compelling legal reasons for this Court to refuse to follow *Eagle Point*, additionally, the situation in *Eagle Point* is not identical to the instant case. First, in *Eagle Point* the Court noted, "At the conclusion of the agreement, Eagle Point would transfer all ownership rights of the PV generation system to the city." *Id.* at 445. No such arrangement exists in the PPA between Appellant and the Church, because Appellant retains the unilateral right not to transfer title of the system to the Church. (R p 18). Such a right is inconsistent with a legitimate financing arrangement.

[12] See *PW Ventures, Inc. V. Nichols*, 533 So.2d 281 (Fla. 1988) (Holding a third-party solar seller was acting as a public utility).

## VI. The Private Right to Contract Does Not Apply in this Case because the PPA is Expressly Prohibited by Statute and is Contrary to Public Policy.

NC WARN *Amici* make a short and curious argument concerning the right of private contract citing *Nationwide Mutual Ins. Co. v. Aetna Life and Cas. Co*, 283 N.C. 87, 93, 194 S.E. 2d 834, 838 (1973) for the proposition that "Customers have a Constitutional right to contract privately for such system *unless such financing contracts are expressly prohibited by statutes or are contrary to public policy.*" (emphasis added). It is a longstanding tenet of the law that contracts against public policy are void. See *Standard Fashion v. Grant*, 165 N.C. 453, 81 S.E. 606 (1914) (holding courts will not lend aid to enforce contracts that violate statutes or public policy), *Cauble v. Trexler*, 227 N.C. 307, 42. S.E. 2d 77 (1947) (holding where the law-making power speaks on a particular subject over which it has power to legislate, public policy is enacted). While no one would dispute the constitutional right of private contract, the Commission correctly decided the agreement was prohibited by North Carolina statute and contrary to public policy.

## Conclusion

In the final analysis, this case represents NC WARN's attempt to enter the retail electricity market despite North Carolina's long-standing policy of having a regulated market to ensure reliability and affordability for the public. From the onset, NC WARN acknowledged this was a test case to see whether it could sell

electricity to non-profits in North Carolina. (R p 5). The fact that NC WARN is only serving one customer does not conceal its greater ambition to serve an expanding customer base. North Carolina courts have held that even service to a single customer was for the public's use and benefit. See *Carolina Tel. & Tel. Co. v. McLeod,* 321 NC 426, 364 S.E.2d 399 (1988).[13]

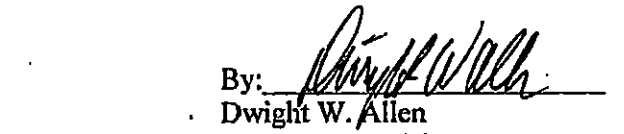
The General Assembly has been successful in determining the best policy for the state, which has resulted in consistently low electric rates compared to the nation, and that policy is one of providing regulated exclusive service area franchises to a utility to provide electric service. (R p 328). It is within the General Assembly's prerogative to change its policies, but until it does so NC WARN's conduct is unlawful.

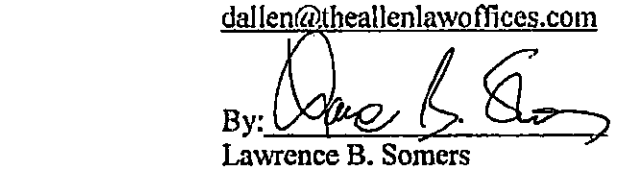
WHEREFORE, for all the foregoing reasons, Appellees, DEC and DEP, respectfully request that this Court affirm the Commission's Order Issuing Declaratory Ruling dated April 15, 2016, in its entirety.

Respectfully submitted, this 19th day of December 2016.

ALLEN LAW OFFICES, PLLC
Dwight W. Allen
Britton H. Allen
Brady W. Allen

[13] This case involved an action for condemnation of privately owned property and is illustrative of the legal principle that the provision of utility service, irrespective of the number of customers affected, is an action affected with the public interest.

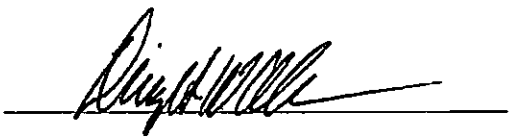
By: 
Dwight W. Allen
NC Bar No. 5484
The Allen Law Offices
1514 Glenwood Avenue, Suite 200
Raleigh, North Carolina 27608
Telephone: 919- 838-0529
dallen@theallenlawoffices.com

By: 
Lawrence B. Somers
NC Bar No. 22329
Deputy General Counsel
Duke Energy Corporation
Post Office Box 1551/NCRH 20
Raleigh, North Carolina 27602
Telephone: 919-546-6722
bo.somers@duke-energy.com

Attorneys for Appellee
Duke Energy Progress, LLC and
Duke Energy Carolinas, LLC

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28 (j) of the North Carolina Rules of Appellate Procedure, counsel for Respondents, DEC and DEP, certifies that the foregoing response, which is prepared using proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, the certificate of compliance and appendices) as reported by the word processing software.



Dwight W. Allen

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing BRIEF OF APPELLEES DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC was served on the following parties to this matter by electronic service or by depositing the same, postage prepaid and properly addressed with the United States Postal Service to: Chief Clerk

North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4300
mount@ncuc.net

Matthew D. Quinn
Law Offices of F. Bryan Brice, Jr.
127 W. Hargett Street, Suite 600
Raleigh, NC 27601
matt@attybryanbrice.com

John D. Runkle
Attorney at Law
2121 Damascus Church Road
Chapel Hill, NC 27516
jrunkle@pricecreek.com

Southern Environmental Law Center
David Neal
Lauren Bowen
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516
lbowen@selcnc.org
dneal@selcnc.org

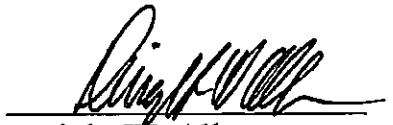
Sam Watson
General Counsel
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4300
swatson@ncuc.net

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

E. Brett Breitschwerdt
Monica E. Webb
McGuire Woods
P.O. Box 27507
Raleigh, N.C. 27611

Horace P. Payne, Jr.
Senior Counsel
Dominion Resources Services, Inc.
Legal Department
120 Tredegar Street, RS-2
Richmond, VA 23219

This the 19th day of December, 2016



Dwight W. Allen