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Nov 20 2015

November 20, 2015

VIA ELECTRONIC FILING

Mrs. Gail L. Mount, Chief Clerk
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, North Carolina 27603-5918

Re: Docket No. SP-100, Sub 31

Dear Mrs. Mount:

On behalf of Virginia Electric and Power Company, d/b/a Dominion North Carolina Power, enclosed for filing in the above-referenced docket is the *Reply Comments of Dominion North Carolina Power*.

Thank you for your assistance in this matter. Please do not hesitate to contact me if you need any additional information.

Very truly yours,

s/ *E. Brett Breitschwerdt*

EBB:asm

Enclosure

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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. SP-100, SUB 31

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition by North Carolina Waste Awareness and Reduction Network for a Declaratory Ruling Regarding Solar Facility Financing Arrangements and Status as a Public Utility	))))))	REPLY COMMENTS OF DOMINION NORTH CAROLINA POWER

As allowed by the North Carolina Utilities Commission's ("Commission") September 30, 2015, *Order Requesting Comments*, Virginia Electric and Power Company, d/b/a Dominion North Carolina Power ("DNCP" or the "Company"), submits these reply comments in response to the October 30, 2015, initial comments filed by the North Carolina Waste Awareness and Reduction Network ("NC WARN"), Interfaith Power and Light ("NCIPL") and the Energy Freedom Coalition of America, LLC ("EFCA") in this proceeding.

The Company's initial comments applied North Carolina law and prior appellate and Commission decisions to find that NC WARN's unilaterally-undertaken "solar facility financing arrangement" and sale of electricity to the Faith Community Church ("FCC") constitutes public utility activity – a sale of electricity to or for the public – under Chapter 62 of the General Statutes ("the Public Utilities Act"). By engaging in the solar power purchase agreement ("PPA") with FCC, NC WARN is subject to Commission regulation and its actions also violate Duke Energy Carolinas, LLC's ("DEC") certificated exclusive franchise to serve FCC under N.C.G.S. § 62-110.2. While these determinations seem relatively clear based on the comments filed by the Company,

DEC and Duke Energy Progress, LLC ("collectively "Duke"), ElectriCities of North Carolina, Inc. ("ElectriCities") and the Public Staff – North Carolina Utilities Commission ("Public Staff"), NC WARN, NCIPL, and EFCA ask the Commission to arrive at a fundamentally different outcome. The following reply comments address why these parties' recommendations cannot be adopted.

I. The Commission has no authority to "adopt" 2015 House Bill 245's ("HB 245") definition of third-party sales, as recommended by NC WARN.

NC WARN recognizes that HB 245 "was introduced but not passed in the 2015 Session of the General Assembly . . ." but then proceeds to recommend that "the Commission adopt the narrow definition in SB 245 *[sic]* as allowable third-party sales in the present matter."[1]

As the Company's initial comments recognized, the scope of persons or activities subject to Commission regulation as public utilities is a legislative decision for the General Assembly. Indeed, the Commission has no authority to modify the scope of the activities that the General Assembly has legislated shall be regulated as activities of public utilities. *See State ex rel. Utilities Com. v. Carolina Tel. & Tel*. Co., 267 N.C. 257, 268, 148 S.E. 2d 100, 109 (1966) ("Neither the Commission nor this Court has authority to add to the types of business defined by the Legislature as public utilities"). Because HB 245 was not enacted into law by the General Assembly, NC WARN's recommendation for the Commission to adopt HB 245's definition of third-party sales as exempt from Commission regulation under the Public Utilities Act must be rejected.

[1] NC WARN Initial Comments, at 2-3.

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II. The sale of electricity by NC WARN to FCC cannot reasonably be distinguished from the facts and policy considerations at issue in the Commission's 1996 *National Spinning Order*.

The Company, Duke, ElectriCities, and the Public Staff all point to the Commission's 1996 *National Spinning Order*[2] as the Commission's controlling articulation of North Carolina law and policy, holding that a third-party retail electric sale constitutes public utility activity that would violate another public utility's exclusive franchise to serve. EFCA similarly asserts that the *National Spinning Order* is "perhaps the case with the closest set of facts to the instant request."[3] In contrast, NC WARN asserts that its ongoing sales of electricity to FCC are "significantly different from the facts in *National Spinning*,"[4] while NCIPL's comments relegate the *National Spinning Order* to only a footnote.[5]

Contrary to NC WARN's and NCIPL's disregard for the *National Spinning Order*, a careful review of the facts and policy considerations at issue shows it is quite analogous to the circumstances underlying NC WARN's Declaratory Ruling Request. For example, both situations contemplate a third-party generation project owner selling electricity (or steam to generate electricity in the case of National Spinning) to a single end-use customer. Another similarity is that the structuring of National Spinning's transaction was also seemingly driven by tax credits. The *National Spinning Order* explained that "Petitioners hoped to take advantage of a federal tax credit" which required the sale of gas to an unrelated party.[6] In the instant case, NC WARN and

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[2] *In the Matter of Request for a Declaratory Ruling by National Spinning Company, Inc. and Wayne S. Leary, d/b/a Leary's Consultative Services*, Order Denying Petition for Declaratory Ruling, Docket No. SP-100, Sub 7 (April 22, 1996) ("*National Spinning Order*").
[3] EFCA Initial Comments, at 9.
[4] NC WARN Initial Comments, at 5.
[5] *See* NCIPL Initial Comments, at footnote 2.
[6] National Spinning Order, *supra* note 2, at 4.

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Nov 20 2015

NCIPL both explain that allowing third-party sales would benefit nonprofit entities "that cannot take direct advantage of tax credits to help pay for the installation of solar PV systems."[7] However, like the *National Spinning Order*, a customer's ability to monetize tax credits should not change the Commission's legal analysis that a third-party sale of electricity constitutes public utility activity. Finally, the contemplated three-way relationship between the customer, the third-party generation owner, and the utility is also strikingly similar. In its initial comments, NCIPL argues that the behind-the-meter nature of the proposed solar PPA financing arrangement is significant because the customer is primarily consuming the solar power produced while maintaining its customer relationship with Duke, and is only seeking to put limited excess power onto the electric grid.[8] However, in the *National Spinning Order*, the generation project to be constructed and operated by the project developer, Leary, was similarly intended to "displace much of National Spinning's purchases from CP&L" while National Spinning would "continue to purchase a portion of its requirements from CP&L . . . [and] sell any excess power generated at the proposed facility to CP&L."[9] Thus, the facts and circumstances underlying the *National Spinning Order* closely align with the facts and circumstances underlying the Declaratory Ruling Request.

The policy considerations at issue are also quite similar. Both proposals reduce the electric costs for a single customer (and inevitably for whole classes of customers as other generation developers and customers seek similar arrangements).[10] While this may

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[7] NCIPL Initial Comments, at 4.
[8] *Id.*, at 3, 7 (Explaining that the "system primarily goes to meeting the energy needs of that customer, with any excess power delivered to the grid" and suggesting the BTM installation "is not primarily a vehicle for selling electricity").
[9] National Spinning Order, *supra* note 2, at 3.
[10] *See id.*, at 7.

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advantage the solar PPA customer, the *National Spinning Order* recognized that it could also result in an "inequitable shifting of costs" that would ultimately impact the rates charged to other customer classes who are not in a position to install back up generation or solar PV.[11] The *National Spinning Order* also recognized that the Company and other regulated electric utilities continue to plan and build generation to reliably serve all customers. Allowing solar PPA customers to avoid paying for the generation, transmission and distribution infrastructure built to serve them would undermine the state's ratemaking structure as well as the territorial assignment statutes put in place to ensure electric service is being provided efficiently and at the least cost.

In sum, NC WARN and NCIPL have failed to make any reasoned arguments to distinguish the facts and policy at issue in the Declaratory Ruling Request from those present in the *National Spinning Order*. Accordingly, the Commission should follow the *National Spinning Order*'s analysis in making its determination in this proceeding.

III. Judicial decisions, legislative enactments, and ballot initiatives from other jurisdictions warrant only passing consideration in applying North Carolina's Public Utilities Act to NC WARN's Declaratory Ruling Request.

NC WARN, NCIPL and EFCA each emphasize how policymakers and courts in other jurisdictions have approached third-party sales in an attempt to influence the Commission's review of the Declaratory Ruling Request. The Declaratory Ruling Request itself cites an Iowa Supreme Court decision finding that a third-party retail solar PV sale of electricity does not constitute public utility activity under the public utility code of that state.[12] NCIPL and EFCA similarly point to this case, amongst others, as evidence that other jurisdictions have exempted third party retail electric solar PV sales

[11] *Id.*, at 7.
[12] *See* Declaratory Ruling Request, at 11, *citing SZ Enterprises, LLC v. v. Iowa Utils. Bd.*, 850 N.W.2d 441 (Iowa 2014) ("Eagle Point Solar").

from those states' public utility regulatory schemes.[13] In the Company's view, legislative enactments, pending ballot initiatives and regulatory and judicial decisions in Iowa, New Mexico, Nevada, Arizona, or Hawaii warrant only passing consideration by the Commission in applying North Carolina's Public Utilities Act, especially when North Carolina law and precedent is so well-established.

With regard to the Iowa Supreme Court's *Eagle Point Solar* decision, this split decision overturned an Iowa Utilities Board ("IUB") determination that third-party retail electric solar PV sales constituted public utility activity subject to IUB regulation. As noted in the dissenting opinion, the majority showed no deference to the IUB's expertise regarding the electric industry and the need to regulate solar PPAs as public utility activities.[14] Regardless of whether this case was correctly decided under Iowa law, it has little bearing on the Commission's consideration of the Declaratory Ruling Request under North Carolina law.

The Company also disputes NCIPL's view that recent decisions from other jurisdictions consistently demonstrate that "[solar] PPAs do not compel regulation of third-party owners as public utilities."[15] Of note, the IUB in its underlying declaratory ruling in *Eagle Point Solar* held that the public interest required regulation of third-party solar PPAs as public utility activity.[16] The Company's own recent experience in its Virginia jurisdiction also refutes this view. In 2011, a solar developer sought a similar declaratory ruling from the State Corporation Commission of Virginia that its proposed solar power purchase agreement to serve a retail customer in Dominion Virginia Power's

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[13] *See* NCIPL Initial Comments, at 14- 20; EFCA Initial Comments, at 4-6.
[14] *See Eagle Point Solar*, supra note 11, 850 N.W.2d at 470-476 (Mansfield J. dissenting).
[15] NCIPL Initial Comments, at 20.
[16] *See In Re: SZ Enterprises, LLC d/b/a Eagle Point Solar*, Declaratory Ruling, at 12 Docket No. DRU-2012-0001 (Iowa Utilities Board April 12, 2012).

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Nov 20 2015

service territory was lawful.[17] The Company opposed the solar developer's request as violating DVP's exclusive franchise to serve retail customers in its certificated service territory, and the developer ultimately withdrew its requested declaratory ruling.[18] In any case, the Company's experience in Virginia should be given the same limited consideration as the regulatory decisions from other jurisdictions put forward by NCIPL and EFCA – the Commission should ultimately decide the Declaratory Ruling Request under North Carolina's Public Utilities Act.

IV. NC WARN's Declaratory Ruling Request is not an unlimited opportunity for EFCA's members to obtain Commission guidance on the legality of other third-party leasing and financing arrangements.

NC WARN's Declaratory Ruling Request presents the Commission with discrete facts and circumstances to be reviewed under the Public Utilities Act. NC WARN's solar PPA with FCC is clearly a third-party sale of electricity, and NC WARN has not suggested that its activities fit under or in any way implicate the allowable self-generation exemption under N.C.G.S. § 62-3(23)(a)(1). However, the primary thrust of EFCA's comments is that the Commission should expand this case to provide "broader guidance regarding its policy towards third-party ownership of distributed generation" including whether "other prevalent modes of third-party ownership" might fit within the self-generation exemption.[19] EFCA goes on to explain that third-party solar companies in other jurisdictions offer other "leasing and financing products, including pre-paid leases, capital leases, operating leases, and various specialized loan products" and then asks the

[17] *See In the Matter of Petition of Secure Futures, LLC, Lexington Solar, LLC, and Washington & Lee University for a Declaratory Judgment*, Petition for a Declaratory Judgment, VSCC Case No. PUE-2011-00107 (Sept. 21, 2011).
[18] *See In the Matter of Petition of Secure Futures, LLC, Lexington Solar, LLC, and Washington & Lee University for a Declaratory Judgment*, Motion to Withdraw Declaratory Judgment Petition and Notice of Abandonment of License by Secure Futures, LLC, Lexington Solar, LLC and Washington & Lee University, VSCC Case No. PUE-2011-00107 (Nov. 2, 2011).
[19] EFCA Initial Comments, at 1-2.

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Nov 20 2015

Commission to provide guidance in this case whether these products are lawful in North Carolina.[20]

The Company appreciates that EFCA, unlike NC WARN, is seeking Commission guidance on whether specific activities are lawful *before* engaging in them. However, the record in this proceeding has not been sufficiently developed for the Commission to fully consider the numerous leasing and financing products EFCA identifies or to provide the broader guidance EFCA requests. EFCA also seems to recognize the limited scope of this proceeding when suggesting the Commission "must carefully weigh the circumstances of each individual PPA or classification of PPAs" and "cautions [the Commission] that the range of factual circumstances reflecting these different PPA classifications are not before the Commission at this time."[21]

EFCA's request for broader guidance also exceeds the purpose and scope of this Declaratory Ruling Request. As the North Carolina Supreme Court has explained about our Uniform Declaratory Judgment Act, the ability to seek a declaratory judgment "does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs."[22] In the Company's view, the Commission should neither expound on broader policy issues that are not before it nor should it opine regarding the legality of the numerous leasing and financing products that EFCA has identified in its comments.

[20] EFCA Initial Comments, at 3.
[21] EFCA Initial Comments, at 18.
[22] *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949).

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CONCLUSION

DNCP respectfully requests the Commission consider the foregoing comments in its review of the Declaratory Ruling Request in this proceeding.

Respectfully submitted, this the 20th day of November, 2015.

DOMINION NORTH CAROLINA POWER

By: s/ *E. Brett Breitschwerdt*
Counsel

Counsel for Virginia Electric and Power Company
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Comments of Dominion North Carolina Power*, submitted in Docket No. SP-100, Sub 31, has been delivered via U.S. mail or electronically upon all parties of record in the above-captioned proceeding.

This, the 20th day of November, 2015.

s/ *E. Brett Breitschwerdt*

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