KEYES, FOX & WIEDMAN LLP

October 30, 2015

Ms. Gail Mount, Chief Clerk
North Carolina Utilities Commission
430 N. Salisbury Street
Raleigh, North Carolina 27603-5918

Via Electronic Filing

Re: NCUC Docket No. SP-100, Sub 31
OPENING COMMENTS of the ENERGY FREEDOM COALITION OF AMERICA, LLC.

Dear Ms. Mount,

Please find enclosed for filing in the above-referenced docket the *Opening Comments* of the Energy Freedom Coalition of America, LLC. Please do not hesitate to contact me if you have any questions. Thank you for your assistance with this matter.

With best regards,

/s/ Thadeus B. Culley

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Enclosure
cc: Service List for Docket No. SP-100, Sub 31

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. SP-100, Sub 31

In the Matter of Petition by North Carolina Waste Awareness and Reduction Network for a Declaratory Ruling Regarding Solar Facility Financing Arrangement and Status As a Public Utility	))))))	Opening Comments of the Energy Freedom Coalition of America, LLC

The Energy Freedom Coalition of America, LLC ("EFCA")[1] appreciates the opportunity to comment on the questions presented by the Commission's September 30, 2015 *Order Requesting Comments.*

Through this process, the Commission has the opportunity to clarify its analytical and legal approach to the question of whether a third-party owner of distributed generation is engaged in the sale of electricity *to or for the public* and is, thus, subject to the Commission's jurisdiction as a public utility. The Commission possesses the authority to determine the scope of its jurisdiction over such activities, in the first instance, and has significant discretion to weigh the particular facts of this case to determine that a sale of electricity from a single rooftop solar facility to a single customer does not constitute a sale *to or for the public*.

In framing the legal questions, EFCA notes that the *Order Requesting Comments* relates to entities beyond the petitioner in this case. To the extent that the Commission intends to provide broader guidance regarding its policy toward third-party ownership of distributed generation, EFCA requests that the Commission clarify that "third-party ownership" is not synonymous with "third-party sales." Indeed, to the extent that certain third-party financing

[1] EFCA, a limited liability company incorporated in Delaware, is an organization that seeks to promote public awareness of the benefits of solar and alternative energy through public advocacy. EFCA's members include SolarCity Corporation, Silevo Solar and Zep Solar.

arrangements are categorically not "third-party sales" of electricity, the Commission is positioned to clarify that such arrangements fit within the self-generation exemption found in North Carolina General Statutes Section 62-3(23)(a)(1). Expressly addressing this legal issue now could help avoid recurring iterations of similar questions before this body.

The *Request for Declaratory Order* filed by North Carolina Waste Awareness and Reduction Network ("NC WARN") insists that the Commission make an important determination, with both legal and policy implications for North Carolina. Recognizing that NC WARN's request is a narrow one, with a unique set of circumstances that are unlike most third-party ownership arrangements across the country, EFCA appreciates that the *Order Requesting Comments* seeks to establish a more clear understanding of the Commission's legal authority and responsibilities in response to the broader category of "third-party sales" of electricity. While ultimately NC WARN's request will be resolved upon the facts specific to their request, EFCA appreciates the Commission's request to maximize information as it develops the legal and analytical framework to approach the broader question of third-party ownership of distributed generation.

In response to the Commission's questions, EFCA provides its comments in three parts. First, we discuss the broader context of third-party ownership models currently in use in the United States to help the Commission foresee how its analytical approach to the facts of this case might impact other prevalent modes of third-party ownership. Second, we provide a discussion of the legal basis for the Commission in determining the scope of its own jurisdiction over activities that involve the commodity of electricity. Third, we provide responses to the Commission's four questions and discuss considerations that could be relevant to the Commissions future consideration of third-party financing arrangements.

I. Background on Third-Party Ownership of Distributed Generation

Third-party ownership has become a dominant model in the growth of the rooftop solar industry across the United States and is currently present in some form in 25 states.[2] Third-party ownership of rooftop solar, itself, can take many forms.[3] Power Purchase Agreements between the owner of the rooftop facility and the utility customer that hosts the system are a prevalent in over a dozen states, where such sales have been expressly allowed by statute or through declaratory relief by state courts or regulatory agencies. As is the case with the NC WARN PPA with Faith Church, customers using a PPA approach pay a fixed rate per kWh produced by the onsite, behind-the-meter solar generation system. PPAs are the only form of third-party ownership that allows the federal tax benefits associated with the investment tax credit to be realized when the host customer is a tax-exempt entity.

In addition to PPAs, third-party solar companies offer a number of other leasing and financing products, including pre-paid leases, capital leases, operating leases, and various specialized loan products. Just as personal preferences exist in the decision to purchase or lease a car, customers benefit from a range of options to enable them to overcome the substantial barrier of purchasing a solar facility outright. Third-party ownership allows customers to simplify the process, as all available tax benefits and incentives can be monetized and incorporated into the specific form of payment agreement the customer chooses. In other words, third-party ownership is primarily about advancing customer choice and giving customers the types of options they

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[2] *See* Database of State Incentives for Renewables & Efficiency (DSIRE), Summary Map of Third-Party Solar PPA Policies, with citations to state law or commission orders provided on third page, *available at*: http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2015/08/3rd-Party-PPA_072015.pptx

[3] *See* Bethany Speer, *"Residential Solar Photovoltaics: Comparison of Financing, Benefits, Innovations, and Options,"* (NREL) NREL/TP-6A20-51644 (October 2012).

enjoy in the general consumer market for obtaining products that they wish to use for domestic or personal use.

The consideration of whether third-party ownership is permitted under laws of various states, tends to mirror the exact questions before the Commission at this time. On account of the striking similarities in public utility statutes—many of which were adopted contemporaneously in the first third of the twentieth century—other state regulatory agencies and courts have addressed the same basic question of whether a dedicated sale of electricity from an onsite facility to a host customer constitutes a public utility service, or in the terms of North Carolina's and many other state's statutes, service "to or for the public for compensation." It is noteworthy that only a handful of states have specifically addressed the facts of rooftop solar, with nearly all of them concluding that a system that serves only one customer and is entered into through a private agreement between a company and a customer is not a sale *to or for the public.*[4]

Currently, there are requests for declaratory orders before three state utility commissions, including North Carolina, New Hampshire, and Delaware[5] and a number of pending ballot

[4] *See, e.g., Declaratory Order, 09-00217-UT,* New Mexico Public Regulation Commission (12/17/09); *Order*, Docket 07-06024, Nevada Public Utilities Commission (11/26/08); Decision No. 71795, Docket E-20690A-09-0346 Arizona Corporation Commission (7/12/10) at p. 27 (company's offering of on-site facility service to government and non-profit customers does not make it a public service corportation); *In re Powerlight Corp.* Hawaii Public Utilities Commission Decision and Order No. 20633 (11/13/03) at p. 5 (facility that offers service to single "on-site" customer is not a public use); *but cf. Interpretative Statement of the Washington Utilities and Transportation Commission*, Docket No. UE-112133 (noting that the Commission may have limited jurisdiction over certain third-party solar companies, but that the determination is fact specific and that it would consider a rulemaking to establish clear guidelines for limited regulation if the legislature did not address the issue in 2015) (issued July 30, 2014).

[5] *See, e.g.,* New Hampshire Public Utilities Commission Docket 15-303 and Delaware Public Service Commission Docket No. 15-1358.

initiatives in Florida would legalize third-party solar sales in that state.[6] Commissions in Colorado, Arizona, Hawaii, New Mexico, and Washington have all addressed whether third-party owners of rooftop solar are public utilities.[7] This reflects a common discretion among state utility commissions and regulatory agencies to determine the scope of their jurisdiction in the first instance. This jurisdictional determination on third-party owners of rooftop solar has only been challenged up to the Supreme Court of one state, with the Iowa Supreme Court reversing the Iowa Utilities Board's determination that it had jurisdiction over a third-party solar provider. The Iowa Supreme Court delivered a clear discussion of why third-party ownership of solar does not fall within the category of activities intended to be regulated by the state's Utilities Board.[8]

Of course, this is a state-specific inquiry, as the common law defining "public" or "to or for the public" in the utility context has evolved differently in each state with state-specific nuances. In Florida, for example, the Florida Supreme Court established a rigid standard for service to the public, holding that electric service to a single customer constituted service to the general public.[9] For North Carolina, however, the evolution for the determinative test for public utility status is reflected in *Simpson*, which as discussed below, presents the Commission with a flexible standard for determining what constitutes service to public. In contrast with the rigid bright line currently in Florida law, North Carolina law requires the Commission to consider the

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[6] "*Solar-Choice Advocates in Florida Get Supreme Court Approval for Their Ballot Initiative*" (GreenTech Media) (October 23, 2015), *available at* http://www.greentechmedia.com/articles/read/solar-choice-advocates-in-florida-get-supreme-court-approval-for-their-ball.

[7] *See, e.g.,* Decision No. 71795, Docket E-20690A-09-0346 Arizona Corporation Commission (7/12/10) (allowing third-party ownership model for government and non-profit customers); *Declaratory Order, 09-00217-UT,* New Mexico Public Regulation Commission (12/17/10); *Order*, Docket 07-06024, Nevada Public Utilities Commission (11/26/08).

[8] *SZ Enterprises, LLC v. Iowa Utils. Bd.*, 850 NW 2d 441 (Iowa 2014).

[9] *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281 (Fla. 1988).

regulatory circumstances before concluding that a service to any number of customers represents service *to or for the public.* The North Carolina Supreme Court has never held that electric service or sales to a single customer is categorically *to or for the public*, as it concerns public utility status.

II. Legal Basis Providing the Commission Authority to Determine the Scope of Its Jurisdiction Over Third-Party Sales of Electricity.

The jurisdiction of the Commission is established by statute, as it has general jurisdiction "to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or incident to the proper discharge of its duties."[10] The definition of public utility, however, introduces some ambiguity into whether certain activities fall within the Commission's jurisdiction over public utilities. For example, the statute does not define the term "public," which is a key component of determining whether an activity meets the statutory definition of public utility. North Carolina courts have construed "public," as used in Section. 62-3(23)(a)(1), leaving the Commission significant discretion to determine the scope of its jurisdiction consistent with legislative objectives. Thus, the Commission's jurisdiction is grounded expressly in statute, but the scope of its jurisdiction is not as tightly prescribed and relies on common law tests to determine whether an activity rises to the level public utility status.

A. Statutory basis for Commission jurisdiction

The Commission's statutory basis for jurisdiction over third party owners of electric generating equipment and third party sales of electricity is limited to those instances where the

[10] N.C. Gen. Stat. § 62-30. All statutory references herein are to the General Statutes of North Carolina, unless otherwise indicated.

third party's activity meets the definition of a public utility. A public utility is any person who (1) owns or operates equipment or facilities for procuring, generating, transmitting delivering, or furnishing electricity (2) to or for the public (3) for compensation. Section 23(a)(1) provides:

> (23) 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:
>
> 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; [emphasis added].

With the bolded and underscored language, it is important to understand that the analysis of public use focuses on whether the equipment or facilities used to generate or furnish electricity is put to a public use. This is significant to the current analysis of NC WARN because the question is whether the facilities at Faith Church are serving the public, not whether NC WARN, as an entity, will be serving the public if it replicates its model many times over across the state.

As discussed above, the statute also contains a self-generation exception for customers that "construct" or "operate" an electrical generating facility where the primary purpose is for their own use. This exception does not make customer ownership of the system a prerequisite for enjoying the exception from public utility status.

B. State court precedent defining the scope of Commission jurisdiction

North Carolina statutes do not define the term "public" or the phrase "to or for the public." Interpretation of what it is meant by "public" or "to or for the public" has been left to the Commission and to the courts. North Carolina courts first interpreted the phrase "to or for the public" in *State ex rel. Utilities Commission v. Carolina Telephone & Telegraph Co*., 267 N.C.

257, 268 (1966) ("Telegraph"). The *Telegraph* court provided the first explanation of what "public" means in the context of the public utilities statute:

> One offers service to the 'public' within the meaning of this statute 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.

Under this conception of "public," it is clear that the number of ultimate customers served is not determinative of the public character of service.

The North Carolina Supreme Court expanded upon the *Telegraph* conception of "public" in *State ex rel. Utilities Com. v. Simpson*, 295 N.C. 519, 524 (1978). In *Simpson*, the Court recognized that a flexible standard was required, holding that "what is 'public' in any given case depends . . . on the regulatory circumstances of that case."[11] The Simpson court found that some of these circumstances 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 kind of market; and (4) the effect of non-regulation or exemption from regulation of one or more persons engaged in the industry."[12]

The court in Simpson concluded that "[t]he 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 comport with its public policy."[13] Somewhat presciently, the *Simpson* court

[11] *Simpson,* 295 N.C. at 254.
[12] *Id.*
[13] *Id.* (internal quotations removed).

emphasized that a flexible interpretation of the term "public" is necessary to "comport legislative purpose with the variable nature of modern technology."

C. Prior Commission orders defining scope of Commission jurisdiction

Prior Commission decisions have applied the *Simpson* analysis to determine whether a sale of electricity is to or for the public. Many of these cases were referenced and excerpted in the letter to the Commission from the North Carolina Sustainable Energy Association and are not all restated here. Many of the Commission's early cases addressed fairly traditional technologies (e.g., landfill gas transport; cogeneration, water and sewer service). The issue of third party ownership of rooftop solar equipment and the subsequent sale of electricity generated by that equipment are matters of first impression.

The *National Spinning* case, cited in NCSEA's letter and in NC WARN's request, is perhaps the case with the closest set of facts to the instant request. In *National Spinning*[14] the Commission was asked for a declaratory ruling as to whether the sale of steam by the operator of a generation facility (Leary) to National Spinning, or the sale of generation of electricity by National Spinning, are activities that meet the definition of a public utility and would therefore subject either party to regulation by the Commission. The Commission first determined that the combined activity of steam production for electric generation—and the electric generation itself—were closely linked and hard to distinguish. Because Leary owned the steam producing equipment and National Spinning owned the electric generating turbines, the nature of the arrangement in which Leary sold steam to National Spinning to use for electricity generation did not meet the self-generation exception.

[14] *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*, NCUC Docket SP-100, Sub 7 (1996).

Since the self-generation exception did not apply, the Commission applied the *Simpson* regulatory circumstances test to determine whether the proposed activity should be considered "to or for the public." The Commission concluded that (1) given the nature of the electric industry, (2) National Spinning's high load factor and importance as a customer to Carolina Power & Light (the utility serving National Spinning), (3) the desirability of large industrial customers like National Spinning for regulated utilities and the competition for these customers from independent power producers, and (4) the potential for independent power producers to "cherry pick" the electric utility's best industrial customers, the proposed activity was "to or for the public" and that Leary should be subject to Commission regulation as a public utility.[15]

Beyond *National Spinning*, the Commission has addressed some forms of solar technology, but in circumstances that are distinct from the facts of rooftop solar generation at issue in this case. In *Progress Solar*[16] the Commission found that Progress Solar Investments (PSI) solar lighting service did not constitute an activity that subject PSI to be regulated as a public utility. The Commission determined that PSI was not holding itself out to provide solar lighting to the general public because the lighting would be provided only as a result of bargained for transactions and pursuant to agreed-upon terms and conditions. The Commission further noted that the use of solar resources to provide lighting was consistent with state policy to promote the development of renewable resources.[17]

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[15] *Id.* at 7.

[16] *In the Matter of Request by Progress Solar Investments, LLC, and Progress Solar Solutions, LLC, for a Determination that their Proposed Activities Would Not Cause them to be Regarded as Public Utilities under G.S. 62-3(23)*, NCUC Docket No. SP-100, Sub 24 (2009).

[17] *Progress Solar* at 3. The Commission found similarly that Progress Solar Solutions (PSS) provision of operation and maintenance services to PSI would not subject PSS regulation as a public utility.

Similar to *Progress Solar*, in *FLS Farm*,[18] the Commission found that FLS Farm did not hold itself out to provide solar thermal heat production to the general public. The Commission found that because FLS Farm's "sale of BTUs . . . located on-site to a single entity pursuant to a bargained for transaction for the purpose of . . . the entity's on-site use does not constitute the provision of utility service to or for the public . . .".[19] Also similar to the Commission's reasoning in *Progress Solar*, the Commission further noted that FLS Farm's proposal's consistency with state policy to promote the development of renewable energy for the purpose of, inter alia, encouraging private investment in renewable energy and improving air quality. In *FLS Farm*, the Commission emphasized the importance of the bargained for transaction and that FLS Farm did not offer heat produced at the Kanuga Center facility to any other entities. While the Commission notes that the *FLS Farm* decision should be regarded as precedent for any activity other than the activity involved in that case, it is instructive as to the analysis that the Commission has applied to cases in which there is a bargained for transaction for the provision of a service to a single entity for that entity's sole use.

Though the Commission has applied the *Simpson* test on a number of occasions to determine its jurisdiction, the circumstances of the instant case make it one of first impression.

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[18] *In the Matter of Application of FLS YK Farm, for Registration of a New Renewable Energy Facility*, NCUC Docket No. RET-4, Sub 0 (2009).

[19] *Id.* at 7.

III. Responses to Commission Questions

QUESTION 1: Does the Commission have the express legal authority to allow third-party sales of Commission regulated electric utility services?

A. The Commission has authority to determine whether a sale of electricity from a third-party is a regulated electric utility service or whether it is a non-jurisdictional activity.

The sale of *Commission-regulated electric utility services* requires the person engaged in that activity to acquire a certificate of public convenience and necessity and is subject regulation as a public utility by the Commission.[20] The threshold question before the Commission now, however, is whether (1) a third party "sale" of electric services has occurred in the first instance, and (2) if a sale has occurred, whether the sale is to or for the public and, thus, subject to regulation by the Commission.

In determining whether a sale of Commission regulated electric utility services has occurred, the Commission must determine that third party sales of electric services are "to or for the public" according to Section 62-3(23)(a)(1), as construed in *Simpson*. The Commission has the express authority to apply the *Simpson* factors to cases before it to determine, in the first instance, if it has jurisdiction over an entity. If the Commission determines that it does not have jurisdiction over NC WARN because its activities are not being provided *to or for the public*, then the Commission may affirm NC WARN's legal right to continue its arrangement with Faith Church without harassment. However, if the Commission finds that NC WARN is providing a sale of electricity *to or for the public*, the Commission appears limited in its ability to unilaterally authorize one public utility to violate the territorial rights of another certificated utility.[21]

[20] N.C. Gen. Stat. § 62-110.

[21] N.C. Gen. Stat. § 62-110.2.

B. The Commission lacks authority to regulate third-party transactions that fall under the self-generation exemption in Section 62-3(23)(a)(1).

EFCA notes that many forms of third-party ownership and financing appear to constitute self-generation and do not implicate the "third-party sale" of electricity (either regulated or non-regulated). Under the self-generation exception in Section 62-3(23)(a)(1), a person is not a public utility where they "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." The statute does not require a customer that "constructs" or "operates" a generating facility to be the holder of legal title to that facility in order to fit within the exception to public utility status. In leaving out an ownership requirement, the General Assembly contemplates that a customer that arranges for the installation, construction, or operation of a facility on their behalf is not a public utility. Even in Florida, where a general prohibition against any electric sales to a single customer exists, the Commission recognizes that some modes of third-party ownership equate to self-generation and do not constitute a third-party sale.[22]

It would negate the purpose of this self-generation exception—to relieve customers who desire to self-generate of the burden of regulation—to foreclose all possible arrangements where a third-party retains title to the system, often only for the purpose of optimizing the use of available tax credits. Thus, an arrangement that falls under the self-generation exception would

[22] *See, e.g.,* Fla. Admin. Code § 25-6.065 ("The term 'customer-owned renewable generation' does not preclude the customer of record from contracting for the purchase, lease, operation, or maintenance of an on-site renewable generation system with a third-party under terms and conditions that do not include the retail purchase of electricity from the third party."); *In Re Petition of Monsanto Company,* Florida Public Service Commission Order No. 17009 at *6, PSC Docket No. 860725-EU (Dec. 22, 1986) (no sale of electricity occurred where the lessee leased "equipment which produces electricity rather than buying electricity that the equipment generates.").

negate the need for the Commission to undergo the more open-ended *Simpson* analysis of determining whether the transaction, or sale, is *to or for the public*.

EFCA suggests that the Commission can use the current opportunity to give clear guidelines that some third-party arrangements for the installation of solar come within the self-generation exemption and do not implicate the third-party sale of electricity. In particular, where the owner retains title to the equipment through a lease agreement and the customer has exclusive rights to enjoy the entire output of the system based on the consideration of fixed monthly payments made to the system owner—and not on consideration based on metered per kWh payments—the Commission should make clear that such arrangements do not involve the third-party sale of metered electricity.

This interpretation is not unprecedented before this Commission. In Docket E-22, Sub 466, Dominion North Carolina Power ("Dominion") proffered a definition of "customer-owned generation," for purposes of its Commercial Distributed Generation proposal, which included situations where a third-party owned the equipment and provided its output to a customer under the terms of a capital lease type financing arrangement. As Dominion noted in oral argument, this type of arrangement appeared to come under the self-generation exemption in Section 62-3(23)(a)(1) and would categorically establish that the third-party vendor operating the distribution generation facility was not a public utility engaged in a third-party retail sale of electricity:

> For purposes of this program, we're defining customer-owned generation as customers who either own the backup generation outright or they purchase the backup generation through a capital lease type financing arrangement and use the backup generation to serve their own load.
>
> By limiting participation to only customer-owned generation there can be no argument that unlawful retail sales or infringement on

> the public utilities' franchise service territory are occurring. This self-generation is excluded from the statutory definition of public utility pursuant to NCGS Section 62-3.23(a)(1) and therefore it does not implicate North Carolina's territorial assignment law in the Company's view.[23]

Indeed, Chairman Finley's dissent in that case did not object to Dominion's assertion that requiring the customer to own the distributed generation unit—including situations where the equipment was obtained by capital lease—would steer clear of the "prohibited third-party retail sales" concern raised earlier in the proceeding:

> Dominion addressed the Commission's concerns relating to the third-party contractor and potential unlawful retail sales by stating in the amended application that only customer-owned backup generation would be eligible to participate in the CDG Program. The amended program application and proposed program tariff defined customer-owned generation to include backup generators either owned by the customer or that are subject to a lease that is used as a financing instrument to facilitate the purchase of such backup generation facilities by the customer. […] The amended program application also required a commitment by the third-party contractor in the general terms and conditions document not to make sales of metered electric energy to customers participating in the program. Based on these clarifications, Dominion asserts that there would not be any retail sale of power under the CDG Program in violation of North Carolina law.[24]

It would be illogical to suggest that only the retail customer should enjoy the exemption and that the third-party owner of the leased equipment would be regulated as a public utility. This result would also run counter to state and national policies that encourage customers to engage in self-generation with clean or renewable generation resources. It is noteworthy that the

[23]Transcript of Oral Argument for April 13, 2011 in Docket No. Sub E-22, Sub 466, argument of Ms. Vishwa B. Link on behalf of Dominion North Carolina Power at pp. 26, lines 2 through 16.

[24] *Order Denying Approval of Program*, Docket No. E-22, Sub 466 at p. 2 of Chairman Finley's dissent (September 14, 2011).

FERC has held that the owner of leased equipment and the utility customer that is leasing and using such equipment are considered a unified entity for purposes of Qualifying Facility status, with both entities entitled to the rights of PURPA Section 210.[25] While the FERC did not take up the question of whether such a leasing arrangement constituted a "sale" of any manner, or whether QF status afforded the lessor any exemptions from state law,[26] the 1985 order includes discussion of how third-party financing furthers the purposes of PURPA to encourage customer use of generation for purposes of self-generation:

> The majority's decision and reasoning effectively precludes cogeneration development projects that involve separate corporate ownership of the production and consumption functions (often called third-party ownership arrangements) from asserting their right to back-up power. That may, for the reasons noted above, impose a chilling effect on the future development of such projects.
>
> […]
>
> The limited evidence I have indicates that a considerable portion of the major cogeneration projects being developed are financed by third parties, either through direct equity financing or through arrangements that utilize the tax benefits of leasing….[27]

It should follow that an equipment lease for a solar generation facility—with consideration paid to the lessor that is not based on the metered sale of electricity—fits within the letter and the spirit of the self-generation exemption.

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[25] *Alcon, Inc.*, 38 F.E.R.C. ¶ 61,042 (1987).

[26] Under 18 C.F.R. 292.602(c), QFs are exempted from "state laws or regulations respecting (i) The rates of electric utilities; and (ii) The financial and organizational regulation of electric utilities." FERC has acknowledged that QFs are not exempt from state's exclusive jurisdiction over retail sales, but has not addressed whether an equipment lease might be exempted from state regulation as a matter related to the financial organization of the QF that does not implicate a sale of electricity.

[27] *See, e.g., Alcon Inc.*, 32 F.E.R.C. ¶ 61,247, 61,581 at *40-41 (Commissioner Stalon in dissent) (1985), *reversed on reh'g by Alcon, Inc.*, 38 F.E.R.C. ¶ 61,042 (1987).

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?

Should the Commission determine that service of the nature contemplated in the NC WARN request is not service *to or for the public*, it is authorized to allow those sales to continue. NC WARN states its intent to replicate this arrangement with other similarly situated customers, but the record does not include an exhaustive list of the potential customers or the extent to which non-profit entities in the state are desirous of entering PPAs with NC WARN. Based on the request before the Commission, the question is fairly narrowly drawn to the particular circumstances and, depending on the Commission's analytical frame for applying the *Simpson* factors to the specific circumstances of rooftop solar, could require further factual development to determine whether service to all types of customers beyond non-profit or tax-exempt entities (e.g., residential, commercial, industrial) constitutes service to the public.

A. The Commission may base a categorical exemption on the fact that a solar PPA for a single facility dedicated to a single customer for private use does not constitute a sale to or for the public.

EFCA acknowledges that it may be possible for the Commission to determine on the record before it that service to a single customer from a rooftop solar generation facility (dedicated to a single customer) does not represent a public utility service (dedicated to the public). Indeed, the central question in this case is capable of being simplified to support a broader exemption from public utility status:

> Is the character of the retail sale of electricity from a single solar facility to a single host customer a sale of electricity *to or for the public* where such facilities are designed and intended for onsite private use (e.g., for lawful

participation in state programs like net metering) and the terms of operation are governed by private contracts?

This question could be resolved for all types of PPA providers and customers if the Commission is willing to draw a bright line that a privately dedicated solar facility that is installed pursuant to a retail PPA to serve a single customer is, categorically, not a facility generating electricity to or for the public for compensation. However, to the extent the Commission finds that the circumstances of individual PPAs or distinct classifications of PPAs (e.g., solar PPAs for residential customer versus solar PPAs for non-profit customers) are pivotal to its resolution of this question, it must carefully weigh the circumstances of each individual PPA or classification of PPAs. EFCA cautions that the range of factual circumstances reflecting these different PPA classifications are not before the Commission at this time.

B. Application of the *Simpson* factors to NC WARN's third-party sale of electricity from a rooftop, net-metered solar generation facility will provide some guidance on whether all such sales are permissible.

The nature of solar generation, as an intermittent resource, is an important consideration in the application of the *Simpson* factors. For example, unlike many previous cases, including *National Spinning*, rooftop solar PPAs do not obviate the need of the host customer to purchase electricity from the utility. While it is true that a net metering customer, generally, reduces purchases of electricity from the utility, recent studies show that net metering customers remain net purchasers of electricity and continue to significantly contribute to the cost of providing electrical service.[28] Thus, a solar PPA that enables a customer to engage in a utility net metering

[28] *See, e.g.,* California Public Utilities Commission. October 2013. *California Net Energy Metering Ratepayer Impacts Evaluation.*(pg. 10) http://www.cpuc.ca.gov/NR/rdonlyres/75573B69-D5C8-45D3-BE22-3074EAB16D87/0/NEMReport.pdf.

program does not result in "grid defection" or stranded assets. This is, in part, due to the fact that most rooftop solar customers engaged in net metering are relatively small customers and do not have significant infrastructure built and dedicated just to provide service to them, as is the case with larger industrial customers like the one in *National Spinning*.

Additionally, solar does not generate around the clock, meaning that a rooftop solar customer will always be a purchaser of some electricity from the utility. For the purposes of the *Simpson* analysis, the affect of non-regulation of rooftop solar PPAs is not a risk of cherry picking and stranded assets—as was the concern in *National Spinning*—it is simply providing another avenue for customers to enjoy the benefits of self-generation through a Commission-approved program (net metering). Any revenue deficiency associated with net metering—which most rooftop solar systems are engaged in—is a separate question that must be established after a comprehensive analysis of the costs and benefits of that program.[29] The Commission's March 2009 order amending the net metering rules seems to suggest that there are significant public policy interests associated with net metering and customer renewable self-generation even if some small cross-subsidy could be proven:

> The utilities' testimony and cost data, while asserting that the current net metering policy is rife with cross-subsidies that benefit customer-generators, focused on lost revenues rather than actual costs and ignored many potential benefits. The Commission agrees with those parties that assert that renewable customer-owned generation almost certainly provides some additional benefits and that the utilities should have acknowledged those benefits in their analyses. Even so, the presence of cross-subsidies alone is not

[29] *Order Amending Net Metering Policy,* Docket No. E-100, Sub 83 at p. 11 (Issued March 31, 2009) (noting the need for more data to determine whether net metering causes a cost shift and that evidence of "cross-subsidies alone is not dispositive, and the evidence presented in this proceeding and the clearly enunciated State policy favoring development of additional renewable generation support expanding net metering eligibility to renewable generation with capacity up to 1 MW.).

> dispositive, and the evidence presented in this proceeding and the clearly enunciated State policy favoring development of additional renewable generation support expanding net metering eligibility to renewable generation with capacity up to 1 MW. [footnote omitted] While the Public Staff's proposal to pursue additional cost studies has merit, the Commission is concerned that further study will unduly delay the State's efforts to meet more of its electricity needs via renewable resources.[30]

The importance of supporting customer investment in renewable self-generation is a countervailing consideration to any negative effect of cross-subsidization. The same logic should hold true in analyzing the effect of not regulating NC WARN, as the impact on the utility will be equivalent to a similarly situated net metering customer that owns his own system.

The Commission is simply not in a position to assume that enabling participation in the net metering program will unleash negative consequences on the public which justify regulation and transform the private transaction of a rooftop solar PPA into one that is *to or for the public*.

C. Non-profit status of the seller (or buyer) is a subsidiary consideration and is not determinative in the application of the *Simpson* factors.

Consideration of whether the entity selling electricity through a solar PPA is a non-profit or a for-profit company (and whether the customer is a non-profit organization or not) is subsidiary to the question of the effect of non-regulation. The dominant thread in case law and previous Commission decisions is whether allowing sales of otherwise regulated commodities would have a negative effect by allowing unregulated entities to unfairly cherry pick the regulated utility's most profitable customers, leaving other customers to shoulder any stranded costs. The driving consideration in weighing this factor in those cases was the impact on other ratepayers, not the fact of whether or not a third-party would profit. Whether the seller realizes profit is immaterial to whether the underlying transaction will negatively or positively impact the

[30] *Id.*

public interest. If the concern is about whether a for-profit seller will grow faster and larger than a non-profit seller, there are inadequate facts in the record to tell whether NC WARN's proposed business model is more or less advantageous for growth than a private company, which must pay taxes on some portion of proceeds. Accordingly, there is nothing inherently informative about NC WARN's non-profit status to give the Commission a reason to categorically authorize one group of sellers and not the other based on the effect of non-regulation.

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

The Commission's direct authority over third-party owners of distributed generation is limited to situations where the Commission has determined that the third-party entity is a public utility, as defined in Section 62-3(23). For third-party owners that are found to be public utilities, it follows that the Commission has a duty to ensure under Section 62-32 that rates and services are just and reasonable and in the public interest. Of course, a third-party that is also a public utility is likely precluded from providing service to any customer of a jurisdictional utility.[31]

If a third-party owner is not a public utility, however, the Commission lacks any legal basis for direct control over the terms of service or rates charged for those services. This does not preclude the Commission from exerting indirect influence on third-party owners through conditions on participation in Commission-approved programs, but EFCA notes that such conditions should only be imposed where they are germane to the regulation of jurisdictional utilities, such as requirements to ensure the safe and reliable operation of the grid.

[31] N.C. Gen. Stat. § 62-110.2. EFCA takes no position here on the consequences of public utility status for a third-party owner providing service in the service territories of municipal utilities or electric cooperatives, but reserves the right to respond to issues raised concerning those situations in reply.

Moreover, within the competitive nature of the solar industry and the existing consumer protection laws in place, Commission intervention in consumer transactions is unnecessary. Unlike traditional monopolies, third-party providers of distributed generation services operate in a competitive environment and have to offer attractive terms and put a premium on excellent customer service. Unlike captive ratepayers, customers of third-party distributed generation services have many choices in arranging for onsite solar generation and can shop around to find the best fit. As consumer transactions, third-party solar service arrangements are already thoroughly regulated by existing state and federal consumer protection laws.

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?

EFCA expresses no opinion regarding the appropriate action the Commission should take if it finds that NC WARN was required to obtain Commission authorization prior to commencing sales of electricity to an end-use customer in this state. EFCA reserves the right, however, to reply to the opening comments of other parties in response to this question.

IV. CONCLUSION

EFCA appreciates the opportunity to submit these comments to detail how the Commission has the discretion and authority to determine that third-party owners of distributed generation, including those engaged in third-party sales similar to the PPA arrangement in NC WARN's request, are not public utilities and are not subject to Commission jurisdiction. In addressing the broader questions related to the Commission's jurisdiction over third-party sales from all types of third-party owners, EFCA encourages the Commission to clarify that certain

financing mechanisms are inherently within the self-generation exception in Section 62-3(23)(a)(1), including leases that are based on fixed payments, not metered sales of electricity.

Dated October 30, 2015

Respectfully submitted,

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ATTORNEY FOR ENERGY FREEDOM COALITION OF AMERICA

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. SP-100, Sub 31

In the Matter of Petition by North Carolina Waste Awareness and Reduction Network for a Declaratory Ruling Regarding Solar Facility Financing Arrangement and Status As a Public Utility	)))))	The Petition to Intervene of the Energy Freedom Coalition of America, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served via facsimile, electronic mail or first-class mail to all parties of record in this proceeding on this 30th day of October, 2015.

Thadeus B. Culley