**STATE OF NORTH CAROLINA**
**UTILITIES COMMISSION**
**RALEIGH**

DOCKET NO. SP-100, SUB 31

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

| In the Matter of | | |
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| Petition by North Carolina Waste Awareness | ) | |
| and Reduction Network for a Declaratory | ) | ORDER ISSUING |
| Ruling Regarding Solar Facility Financing | ) | DECLARATORY RULING |
| Arrangements and Status as a Public Utility | ) | |

BY THE COMMISSION: On June 17, 2015, North Carolina Waste Awareness and Reduction Network (NC WARN), a non-profit corporation, filed a petition requesting that the Commission issue a declaratory ruling that it would not be considered a public utility pursuant to G.S. 62-3(23) and other relevant provisions of Chapter 62, the Public Utilities Act, if it enters into a power purchase agreement (PPA) with Faith Community Church (Church) in Greensboro, North Carolina, to install a 5.2 kW solar photovoltaic (PV) electric generating system on the roof of the Church and to sell the electricity produced by the PV system to the Church, another non-profit entity.[1] NC WARN notes in its petition that a key issue to be resolved by the Commission is whether State law prohibits third parties, such as NC WARN, from installing a PV system and selling the power produced by the system to a non-profit entity. Further, NC WARN notes that it has a history of developing up-front funding mechanisms for solar systems, including providing free solar panels and/or solar hot water heaters to three non-profit organizations in the Triangle area and initiating Solarize NC programs in Durham, Chatham County, the Triad, and western Wake County, primarily for residential owners.

On July 6, 2015, North Carolina Sustainable Energy Association (NCSEA) filed a letter requesting that the Commission review its existing Orders that are related to the issue of third-party sales. NCSEA summarized several Commission Orders that it perceives to be related to third-party sales and the issues presented by NC WARN's petition.

On September 30, 2015, the Commission issued an Order Requesting Comments. In that Order, the Commission found good cause to request that interested persons file initial and reply comments regarding NC WARN's petition. Additionally, the Commission found good cause to make Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC (collectively, Duke); 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. Finally, the Commission

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[1] 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 1,423 kilowatt-hours (kWh) of electricity at a rate of $0.05 per kWh. The total bill was $76.49, including tax at 7.5%.

found good cause to request 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?

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). The intervention of the Public Staff – North Carolina Utilities Commission is recognized pursuant to G.S. 62-15 and Commission Rule R1-19(e).

On October 30, 2015, initial comments were filed by Duke, NCEMC, ElectriCities, and DNCP (collectively, the Electric Suppliers); NC WARN; NCIPL; EFCA; and the Public Staff. On November 20, 2015, NC WARN, NCSEA, EFCA, NCIPL, and DNCP filed reply comments.

## SUMMARY OF PARTIES' COMMENTS

NC WARN

In its petition and initial comments, NC WARN states that it is proposing a funding mechanism, that of monthly payments to NC WARN for electricity generated by a PV system and delivered to an end-use consumer, to overcome one of the most significant barriers to widespread use of solar electric generation. Such a funding mechanism would both allow consumers, such as the Church, to avoid the up-front cost of installing a PV system and create a revenue stream to allow NC WARN to install similar systems for additional consumers. To that end, argues NC WARN, it is not subject to regulation by the Commission for third-party sales of electricity because it "is providing funding, a service, rather than just selling electricity to a church."

Even if it is deemed to be selling electricity and not simply providing a funding service, argues NC WARN, it is not subject to regulation because it is not selling electricity "to or for the public" as provided in the definition of public utility in G.S. 62-3(23)a.1. As NC WARN notes:

> The relevant statute defines a public utility:
>
> > a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:
> >
> > 1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation; provided, however, that the term "public utility" shall not include persons who construct or operate an electric generating facility, the primary purpose of which facility is for such person's own use and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation.
>
> G.S. 62-3(23). If the proposed activities fall within the definition of those of a public utility, "producing electricity … for sale to or for the public for compensation," the entity is required to comply with statutory requirements in the Public Utilities Act, and regulation by the Commission.

NC WARN Comments, p. 4. According to NC WARN, the arrangement that it has entered into with the Church does not cause NC WARN to fall within the definition of a public utility because it is not selling to the public; rather, NC WARN is selling "to a specific non-profit, the Faith Community Church, that it is working with to obtain solar electricity." Id. at 5.

NC WARN, therefore, answers the Commission's first question by arguing that the Commission does have the legal authority to determine that the sale of electricity as described in NC WARN's petition is not a sale to or for the public subject to Commission regulation, citing State ex rel. Utils. Comm'n v. Simpson, 295 N.C. 519, 524, 246 S.E.2d 753 (1978) (Simpson). In Simpson, the North Carolina Supreme Court adopted a flexible definition of "the public" under the Public Utilities Act, requiring the Commission to balance the regulatory circumstances of each case to define "the public" in the utilities context rather than depend on some abstract, formulistic definition of the public. NC WARN Comments, p. 4.

NC WARN discusses two cases in which the Commission applied the flexible approach articulated in Simpson in determining whether the sellers would be subject to Commission jurisdiction as public utilities under the Public Utilities Act. See Order Denying Petition for Declaratory Ruling, In re Request by National Spinning Company,

Inc. and Wayne S. Leary, d/b/a Leary's Consultative Services, Docket No. SP-100, Sub 7 (Apr. 22, 1996) (National Spinning); Order on Request for Determination of Public Utility Status, In re Request by Progress Solar Investments, LLC, and Progress Solar Solutions, LLC, Docket No. SP-100, Sub 24 (Nov. 25, 2009) (Progress Solar).

NC WARN asserts that its arrangement in this docket is more like that in Progress Solar, which the Commission found to be permissible, than that in National Spinning because in this case NC WARN is providing a service, i.e., funding, in addition to selling electricity to the Church. By contrast, in National Spinning, the Commission was not asked to consider whether either of the parties would have been a public utility if some service in addition to the direct sales of electricity had been proposed. According to NC WARN, the existence of this distinction would support a Commission determination that the sale of electricity as described in the petition is not a sale to the public as set forth in G.S. 62-3(23)a.1 and, therefore, is not subject to Commission regulation. In its reply comments, NC WARN stated that the Public Staff, in its analysis of National Spinning, failed to consider the crucial distinction between sales on the customer's side of the meter, as NC WARN proposed in this case, and the sale of excess power from a company like National Spinning to an adjacent manufacturing facility.

Additionally, NC WARN asserts that, on balance, other Simpson factors would support a Commission conclusion that the sale of electricity to the Church is not a sale to the public. Specifically, NC WARN states that such a conclusion is warranted because (1) there is an acute need for some type of funding mechanism to assist the faith community and other limited resource non-profits to avail themselves of the benefits of solar generation; (2) too often, these entities are prevented from benefitting from solar generation due to the high upfront costs that the purchase and installation of these systems entail; (3) it is the current policy of the state of North Carolina to encourage renewable energy, and the proposition NC WARN has advanced would encourage the development of renewable resources; (4) Duke Energy does not have any program, nor has it proposed any such funding program, that would encourage the rooftop installation of PV systems for similar customers; (5) NC WARN is only selling to a single customer; and, (6) eventually, as a result of this funding mechanism, the Church would own the system.

Finally, NC WARN notes the phrase "third-party sales" is not presently defined in the statute. As a result, NC WARN contends that whether the arrangement between NC WARN and the Church would constitute a "third-party sale" as the Commission's question implies is not so clear-cut. NC WARN urges the Commission to adopt the definition proposed in House Bill 245 (HB 245),[2] the Energy Freedom Act, which it states was introduced in the 2015 General Assembly in an effort to clarify what would and would not be permissible when an entity other than an electric utility is selling electricity. House Bill 245 would allow third-party sales, but would limit such sales to facilities "located on

[2] House Bill 245 was not enacted into law, but remains eligible for consideration in the 2016 Session of the General Assembly. NC WARN incorrectly referred to the proposed bill as Senate Bill 245 in its petition.

the customer's property where such electricity will be consumed," as proposed by NC WARN in this case.

NC WARN further argues that the Commission should follow SZ Enterprises, LLC d/b/a Eagle Point Solar v. Iowa Utils. Board, 850 N.W.2d 441(2014) (Eagle Point Solar), in which the Iowa Supreme Court held that the sale of electricity from a PV facility by Eagle Point Solar to the City of Dubuque pursuant to a similar statutory definition of public utility would not be subject to regulation by the Iowa Utilities Board. Because the circumstances in that case are directly analogous to the circumstances in this case, this Commission should conclude, as did the Iowa Supreme Court, that utilizing a PPA as a financing method for a PV system would not cause an entity to be subject to regulation by the Commission. In so doing, according to NC WARN, the Commission would be in accord with numerous other commissions around the country.

In its reply comments, NC WARN observes that the substantive comments by Duke and DNCP focus on the lack of explicit statutory authority in the Public Utilities Act allowing "third-party sales." In NC WARN's opinion, the lack of specific statutory authority is not dispositive. The Commission should apply Simpson to determine if the sales in question are permitted. In conducting this analysis, the Commission should not be overly influenced by the arguments of Duke and DNCP concerning the importance of maintaining the franchise of the utility monopoly, particularly when NC WARN and other parties have offered legitimate, countervailing arguments in opposition.

In answering the remaining questions set forth in the Commission's September 30 Order, NC WARN believes the Commission should allow metered sales from any PV facility, whether or not the seller or purchaser is a non-profit entity. To the extent the third-party seller is not a public utility, the Commission does not have any authority to regulate the rates and terms of service provided. Lastly, NC WARN notes that the Commission could issue an order either authorizing the proposed sale or compelling NC WARN to cease and desist its arrangement with the Church and requiring NC WARN to reimburse the Church for any payments made.

In its reply comments, NC WARN further stated that Duke misrepresented NC WARN's intentions and several statements made by NC WARN. For instance, Duke contends that NC WARN has held itself out as offering its services to all who apply and that NC WARN intends to expand its public utility service. According to NC WARN, neither statement is true. It has only offered this service to the Church, and it is not offering public utility service. Finally, NC WARN requests that the Commission schedule this matter for oral argument.

NCIPL

In its initial and reply comments, NCIPL observes that the up-front cost of installing PV systems present difficulties for many faith congregations. Relying on Simpson and Eagle Point Solar, NCIPL, as does NC WARN, argues that the PPA arrangement proposed by NC WARN is permissible as a financing mechanism to overcome this barrier.

NCIPL, therefore, supports the arrangement proposed by NC WARN and would request that the Commission issue a declaratory ruling that the proposed arrangement would not subject NC WARN to regulation as a public utility. In addition, NCIPL seeks clarification that other third-party financing arrangements that supply PV systems on the property of and for use of individual customers would not trigger Commission regulation, regardless of the status of the third-party owner.

In response to the Commission's first question, NCIPL contends that Simpson provides the Commission with the express legal authority to allow third-party sales of electricity from behind-the-meter PV systems that are affixed to the property of a consumer and are for that consumer's use, noting the Supreme Court determined that the definition of "the public" in the Public Utilities Act should be viewed flexibly rather than in abstract or formulistic terms. Once the Simpson factors are considered, it would be improper for the Commission to subject to regulation as public utilities third-party owners of PV systems that are financed with PPAs, as PPAs are merely a vehicle for paying for the installation and use of PV systems. In other words, the primary nature of a business that utilizes a PPA as a method of payment is the installation of PV systems for the use of individual customers and not the provision of electric utility service. The methods that customers use to pay for alternative, self-generating energy sources, when such installations serve on-site energy needs does not necessarily require Commission oversight and regulation.

The factors that would militate against such Commission regulation in this case are that (1) the PPA is merely a financing vehicle for the purchase of the PV system, the terms of which are agreed upon after arms-length negotiation; (2) the PV system itself will only serve a portion of the Church's needs and does not remove the Church from the utility's reach; and, (3) third-party owned PV systems complement rather than supplant existing markets for sale of electricity. Additionally, NCIPL asserts that the Commission should not regulate this transaction because: (1) the transaction as structured is designed to take advantage of certain tax credits to offset the purchase of such systems which are unavailable to religious institutions and other non-profits; (2) allowing PPAs to finance third-party owned PV systems would have little to no effect on those already in place because neither the installers of PV systems that are purchased outright by the consumers nor the consumers who buy such PV systems for their own use are regulated as public utilities; and (3) transactions of this type are consistent with the policy of this State to promote the development of renewable energy.

In its reply comments, NCIPL distinguishes National Spinning based on the differences in scale, timing, and nature of the generating facility, noting that the larger customers involved in that case are much desired and have a more significant impact on the utility than the small PV facility in this case. In addition, the Commission's decision in National Spinning predates relevant public policy provisions enacted by the General Assembly which encourage renewable energy.

NCIPL believes the Commission should follow its decision in Progress Solar here because of the close similarities between the two cases. In its reply comments, NCIPL

disagrees with Duke and DNCP, which argue that Progress Solar should not apply because, unlike National Spinning, it did not involve the direct generation or sale of electricity. NCIPL contends that this argument is not persuasive because the definition of public utility encompasses the services being provided, i.e., "facilities for producing … or furnishing electricity or any other like agency for the production of light … to the or for the public for compensation," NCIPL's Reply Comments, p. 11, and is not limited to the production of electricity. In NCIPL's opinion, this decision is important because the Commission applied the Simpson regulatory circumstances and determined that Progress Solar would not be providing electricity or other like agency "to or for the public." Said services were a bargained-for transaction and were consistent with the recently enacted policy encouraging the development of renewable resources.

NCIPL further disagrees in its reply comments with the Public Staff's arguments based on the failure of the General Assembly to pass HB 245. Noting that North Carolina courts have stated that the failure of the legislature to act is "a 'weak reed upon which to lean' and a 'poor beacon to follow' in construing a statute," NCIPL states that the Commission should not be swayed by legislative inaction; rather, the Commission should be guided by the Simpson regulatory circumstances test, existing North Carolina policy, and persuasive legal authorities applying those regulatory circumstances. Although Eagle Point Solar is not binding upon the Commission, NCIPL disagrees with Duke that it is contrary to North Carolina law and urges the Commission to closely review the decision in making its determination in this case.

Lastly, in answering the remaining questions set forth in the Commission's September 30 Order, NCIPL believes that, as both a legal and practical matter, there is no justification for limiting the ability of third-party for-profit entities from installing and operating PV systems that are "purchased" with PPAs. While third-party owners of PV systems would not be subject to Commission regulation and oversight, they would be subject to consumer protection laws and oversight by the Attorney General's Office and the Better Business Bureau. As NCIPL believes the Commission can authorize third-party sales, the Commission should permit NC WARN and the Church to proceed with the PPA for the length of the contract.

EFCA

In its initial comments, EFCA observes that third-party ownership in its many forms has become the dominant model for the growth of rooftop PV facilities across the country. EFCA states that third-party ownership is primarily about advancing customer choice and giving customers the type of options that they enjoy in the consumer market for obtaining products that they use for domestic and personal use.

EFCA notes that many states have addressed the basic question raised by NC WARN's proposal in this case, a number of which concluding that a system serving only one customer and entered into as a result of a private agreement between a customer and a company does not constitute a sale to or for the public. However, as EFCA further notes, not all states that have considered the issue have allowed third-party

sales. See, e.g., PW Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988) (holding that providing electric service to a single customer constitutes service to the general public). EFCA urges the Commission to be guided by the flexible standard adopted in Simpson rather than the rigid standard it believes was adopted in Florida.

In its reply comments, EFCA observes that the Commission must determine whether the proposal by NC WARN will have a distinctly private characteristic or whether the proposal will have such significant impact on the public that it may be considered clothed in the public interest and appropriate for government intervention. In EFCA's opinion, the facts of this case do not establish a public characteristic for the underlying transaction or satisfy the traditional justification for regulation of NC WARN or any other entity engaged in similar circumstances. According to EFCA, the public's interest in encouraging individual freedom and utilization of demand-side renewable generation substantially outweighs the utilities' interest in limiting the market forces and emerging technologies that give customers greater control over their individual electricity consumption.

EFCA disagrees with DNCP's Simpson analysis, which it believes fails to acknowledge that NC WARN's proposal is qualitatively different than the service offered by a regulated utility in this state and fails to apply the regulatory circumstances test. EFCA agrees with NCIPL, however, that the application of the Simpson regulatory circumstances test leads to the conclusion that the questioned activity is wholly private and does not invoke the public interest concerns necessary to trigger public utility status under Simpson. EFCA also notes that it found NCIPL's discussion of the Iowa Supreme Court discussion in Eagle Point Solar compelling because of the striking similarities between the North Carolina and Iowa laws and the similarity of analysis employed by the Iowa Supreme Court and the Simpson decision.

In response to the Commission's first question, EFCA does not believe the Commission has the authority to allow third-party sales of regulated utility service because, by definition, such sales are outside the jurisdiction of the Commission. The threshold question in this case, then, is not whether Commission-regulated electricity has been sold; rather, it is (1) whether a third-party sale of electricity has occurred in the first place, and (2) if such sale has occurred, whether the sale is to or for the public and, thus, subject to regulation. Pursuant to Simpson, the Commission has express authority to determine whether the Commission has regulatory jurisdiction over NC WARN's activities. If the Commission determines that it has such jurisdiction, i.e., that NC WARN has sold electricity to or for the public, the Commission is limited in its ability to authorize NC WARN to violate the territorial rights of a certificated public utility. If the Commission determines that it does not have such jurisdiction, the Commission should affirm the arrangement and allow it to continue without harassment.

Further, EFCA observes that in framing the questions, the Commission appears to contemplate entities beyond the petitioner in this case. EFCA, therefore, requests that, to the extent that the Commission intends to go beyond the facts in this case and provide broader guidance regarding its policy toward third-party ownership of distributed

generation, the Commission should clarify that "third-party ownership" is not synonymous with "third-party sales." According to EFCA, many forms of third-party ownership and financing appear to constitute self-generation and do not implicate a "third-party sale" of electricity.

In answering the remaining questions set forth in the Commission's September 30 Order, EFCA agrees that the Commission should approve third-party sales by any entity if the Commission concludes that a privately dedicated PV facility that is installed pursuant to a retail PPA to serve a single customer is not a facility providing electricity to or for the public for compensation. NC WARN's status as a non-profit entity is not relevant; if the third-party owner is not a public utility, the Commission lacks any legal basis to regulate its rates or service. 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. Finally, EFCA requests that the Commission provide an opportunity to present oral argument.

Duke

In its comments, Duke observes that it is ironic that NC WARN has asked the Commission for an exemption from regulation when it is clear that North Carolina law, court precedent, and past Commission orders all prohibit NC WARN's action, i.e., generating and selling electricity to its chosen customer without waiting for the Commission to rule on the legality of its scheme. According to Duke, NC WARN's request must be rejected, and its blatant disregard for the law and the Commission's authority should not be condoned.

In response to the Commission's first question, Duke states that the Commission does not have the legal authority to allow third-party sales of Commission-regulated electric utility service because third-party sales, such as that proposed by NC WARN, are plainly prohibited under North Carolina law and Commission precedent, as the Commission has recently acknowledged. In Docket No. E-100, Sub 90, the Commission was asked by the Southern Environmental Law Center to "clarify that Chapter 62 does not prohibit power purchase agreements between utility customers and non-utility solar installers." The Commission responded definitively concluding that "Chapter 62 of the North Carolina General Statutes prohibits third-party sales of electricity by non-utility solar installers to retail customers." See Order Approving Pilot Programs, In re Investigation of Voluntary Green and Public Benefit Fund Check-Off Programs, Docket No. E 100, Sub 90 (January 27, 2015).

Duke argues that under North Carolina law, only public utilities are permitted to sell electricity to the public for compensation. To do so, such entities must obtain a certificate of public convenience and necessity (CPCN) from the Commission prior to constructing or operating any utility plant or system. The Supreme Court and this Commission have explained that the public policy basis of the CPCN requirement to engage in public utility activities "is the adoption by the General Assembly, of the policy,

that nothing else appearing, the public is better served by a regulated monopoly than by competing suppliers of the service. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 271,148 S.E.2d 100, 111 (1966) (Carolina Telephone). This policy is further expressed in the Territorial Assignment Act of 1965.

Duke further argues that NC WARN has constructed a PV generating facility and sold electricity to the Church based on its contention that it is not a public utility because it has confined its sales to a single customer or that it will, in the future, only provide such service to a limited subset of Duke's customers, i.e., self-selected non-profit organizations. The Court rejected this exact argument in Simpson, where a doctor argued that he was not acting as a public utility by providing two-way radio service to a small number of customers in his county medical society. In rejecting this contention, the Court noted that neither the small number of customers nor the fact that his service was only being offered to a small discrete segment of the market would necessarily disqualify his service from being classified as a public utility service. In holding that Simpson had attained public utility status, the Court stated that "one offers service to the 'public' when he holds himself as willing to serve up to the capacity of his facilities without regard to the fact that his service is limited to a specific area and his facilities are limited in capacity." NC WARN has held itself out as willing to serve all who apply up to its capacity and has generated and sold electricity to the customer. It is, therefore, selling to the public for compensation and has obtained public utility status. In doing so, it has violated North Carolina law and ignored the authority of the Commission.

Lastly, Duke notes that NC WARN, in its petition, discusses two Commission decisions, National Spinning and Progress Solar. Duke argues, however, that neither decision supports NC WARN's position. Rather, both decisions demonstrate that NC WARN's request has no merit. In Progress Solar, for example, the proposal specifically provided that "[n]o generation or sale of electricity will occur, and the amount of the payment will not vary based upon the amount of illumination created by the system." Similarly, Eagle Point Solar, which NC WARN cites as support for its position, is irrelevant because it is based upon Iowa law and precedent that is contrary to North Carolina law and precedent.

For the reasons stated in Duke's response to Commission Question No. 1, Duke argues that the Commission does not have legal authority to allow third-party sales of Commission-regulated electric utility service. If the Commission does not have the authority to authorize third-party sales of regulated electric utility service, it stands to reason that the Commission cannot thereafter approve NC WARN's sale of such service to the Church because of its non-profit status or to any other self-selected non-profit organizations.

Duke notes that NC WARN contends that the Commission may approve such sales because the sale to the Church and/or the prospective sale to other such non-profits are not sales to or for the public. This contention was rejected by the Simpson Court, and the Commission should do likewise in this instance; a customer is not exempted from the law or excluded as a member of the using and consuming public simply because it

operates as a non-profit organization. If NC WARN were allowed to generate and sell electricity to "non-profit organizations," of which there are many, what would prevent NC WARN or any other entity from attempting to provide utility service to another class of Duke's customers under the guise that that each separate class was not in and of itself "the public." Further, a step in that direction could shift the electric industry from a regulated industry to one that is largely unregulated. A shift of this type and magnitude would be in contravention of the expressed policy of the General Assembly and this Commission that "nothing else appearing, the public is better served by a regulated monopoly than by competing suppliers of the service," Carolina Telephone, 267 N.C. at 271, 148 S.E.2d at 111, and could lead to the slippery slope where unregulated electric suppliers such as NC WARN could "cherry pick" the electric utilities best customers, which the Commission found so concerning in National Spinning.

Finally, Duke argues that to the extent that the third-party seller of electricity is acting as a public utility without obtaining a CPCN, it is subject to the regulatory powers of the Commission as a de facto public utility. State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986), mod. and aff'd, 318 N.C. 686, 351 S.E.2d 289 (1987). According to Duke, it is clear that NC WARN was aware that the generation and sale of electricity to the Church violated North Carolina law and precedent. Despite this knowledge, NC WARN willfully engaged in this conduct after being warned by the Company that such conduct would be unlawful. It did so without waiting for the Commission to rule on its request that its actions be condoned. It continues to do so at present. The Commission should issue a cease and desist order to NC WARN to prevent NC WARN from continuing to act as a public utility and require NC WARN to refund to the Church any payments that it has received. Further, Duke contends the Commission should assess civil penalties on NC WARN pursuant to the authority granted to it in G.S. 62-310 for NC WARN's willful violations of Chapter 62 and the Commission Rules, orders, and regulations.

NCEMC

In its comments, NCEMC responds to the Commission's questions, stating that no provision in the Public Utilities Act expressly authorizes the Commission to permit third-party sales of Commission-regulated electric utility service. Because the Commission, as an administrative agency, has no regulatory authority except that conferred on it by statute,[3] the Commission has no authority to allow third-party sales where no such express authority exists in the statute. NCEMC notes that it is widely understood that North Carolina policy prohibits third-party power purchase agreements, citing information published by the United States Department of Energy and the Database of State Incentives for Renewables and Efficiency (DSIRE).[4] NCEMC further notes that the Commission has the authority and duty to regulate the facilities used in third-party

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[3] State ex rel. Utils. Comm'n v. National Merchandising Corp., 288 N.C. 715, 722 (1975) (citing State ex rel. Utils. Comm'n v. Atlantic Coast Line R. Co., 268 N.C. 242, 245 (1966)).

[4] "3rd Party Solar PV Power Purchase Agreement (PPA)," DSIRE, March 2016 <http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2014/11/3rd-Party-PPA_032016.pdf>.

seller arrangements, but not the rates and terms of service were such service allowed, which it is not. Lastly, NCEMC states that the Commission should issue an order declaring that NC WARN is in violation of the Public Utilities Act and impose such penalties or remedies as it deems appropriate.

ElectriCities

In its comments, ElectriCities observes that NC WARN seeks Commission approval of the power sale arrangement that it has entered into with the Church. In ElectriCities' opinion, this power sale arrangement is not permitted under North Carolina law because NC WARN is to be paid by the Church on a per kilowatt-hour basis based on the amount of electricity used by the Church.

According to ElectriCities, NC WARN contends that it is not a public utility because the sale of its power to the Church is not a sale to or for the public. This contention, however, cannot be squared with NC WARN's strategy to not only sell power to the Church pursuant to its agreement, but also to generate enough revenue pursuant to this arrangement so that it can replicate this arrangement and provide power to a potentially unlimited number of non-profits in the future. The breadth and scope of NC WARN's proposal makes this case fundamentally different from past Commission decisions where the Commission found that the sale of steam or landfill gas by a single purpose entity to a single user would not be a public utility offering service to and for the public.

In response to the Commission's questions, ElectriCities states that the Commission does not have express legal authority to allow third-party sales of Commission-regulated electric service to retail customers, as the Commission itself concluded in Docket No. E-100, Sub 90, regardless of whether the entities engaged in the transaction are for-profit or non-profit. By this request, NC WARN asks the Commission to reverse that conclusion. ElectriCities urges the Commission not to do so.

ElectriCities further argues that NC WARN's attempt to characterize its arrangement with the Church as a "funding service" rather than a sale of electricity should similarly be unavailing. According to ElectriCities, if a bank lent money to the Church so that it could install its own solar panels and generate its own electricity, arguably one could contend that the bank's provision of funding was a "service" which enabled the Church to purchase the system. In the scenario that NC WARN has constructed, however, NC WARN does not lend money to the Church so that the Church can purchase the system and generate its own electricity. Instead, NC WARN will purchase, install, and own a system that it installs on the church's roof and pay for the system that it will own by selling electricity to the Church. Such an arrangement is a classic power sale arrangement which is not permitted by North Carolina law. In that scenario, the Church neither owns nor purchases the system. If the Commission determines that NC WARN is not a public utility, however, the Commission would not be authorized to regulate the rates, terms, or condition of service that NC WARN would provide to its customers absent a legislative grant of authority permitting it to do so. Finally, in response to what action the

Commission should take in this docket, ElectriCities states that the Commission should deny NC WARN's request.

DNCP

In its initial comments, DNCP notes that North Carolina has become a leader in installed solar energy capacity without modifying the State's traditional regulatory model because North Carolina's energy policies have successfully promoted solar energy development while maintaining electric utilities' singular responsibility subject to Commission oversight. Pursuant to these policies, DNCP is increasingly including solar energy as an important component of its long-term resource planning portfolio to serve its customers.

In response to NC WARN's proposal, DNCP notes that the North Carolina Supreme Court interpreted the definition of public utility in the Simpson case, holding that certain regulatory factors should be considered in determining whether certain activities constituted public utility activities subject to regulation by the Commission. In DNCP's opinion, NC WARN's retail sale of electricity cannot be reconciled with the Simpson decision or prior Commission decisions. Because, applying the Simpson factors, NC WARN's retail sale of electricity to the Church constitutes public utility activity, the Commission cannot authorize NC WARN to bypass Duke's exclusive franchise and sell electricity directly to the Church.

DNCP discusses a number of cases in which the Commission has previously applied the Simpson factors and ruled on this issue. For example, in National Spinning, the Commission held that a proposal to allow an entity to sell steam for use in generating electricity would cause that entity to be a public utility subject to regulation by the Commission because the purchasing customer would be able to bypass the certificated utility that has a monopoly franchise for the area. This would allow unregulated electric suppliers to cherry-pick the electric utility's best customers, leaving the utility with stranded investment and costs which would be shifted to other customers. Despite NC WARN's attempts to distinguish this case, there are no significant distinctions between the facts in National Spinning and the facts in this case. DNCP asserts, for instance, that in this case as well as National Spinning the third-party generation owner is proposing to sell electricity to a single end-use customer, the parties structured the transaction to allow the customer to take advantage of a tax credit that would otherwise be unavailable, and, the customer of the generator would continue to purchase a portion of its requirements from Duke and sell any excess power generated at the proposed facility back to Duke. In addition to these factual similarities, the policy considerations are quite similar. DNCP observes that in both instances, the proposals were designed to reduce the costs for a single customer and, ultimately, a whole class of customers as other generation developers and customers seek similar arrangements. While such arrangements may be beneficial to the favored class of customers, such arrangements ultimately could lead to an inequitable shift of costs to other customers who could not install the favored arrangement.

Similarly, the Commission rejected a proposal by a combined heat and power generator to be allowed to provide electricity to its third-party steam customer for free, finding that the seller would have simply recovered its costs through other payments from the buyer. Order on Request for Declaratory Ruling and Notice of Intent to Revoke Registration of New Renewable Energy Facility, In re Application of W.E. Partners 1, LLC, Docket No. SP-729, Sub 1 (Sept. 17, 2012). Lastly, in approving changes to the NC GreenPower program, the Commission rejected a request by the Southern Environmental Law Center that the Commission clarify that the Public Utilities Act does not prohibit PPAs between utility customers and non-utility solar installers, concluding instead "that Chapter 62 of the North Carolina General Statutes prohibits third-party sales of electricity by non-utility solar installers to retail customers." Docket No. E-100, Sub 90. On the other hand, in Progress Solar, the Commission applied the Simpson factors in considering a proposal for the provision of solar-powered lighting systems and concluded that the proposal would not cause either the supplying party or the recipient of such services to be a public utility subject to regulation by the Commission.

In applying the facts in this case to the law as established by these precedents, DNCP concludes that (1) NC WARN is providing electricity to the Church for compensation; (2) the provision of electricity to the Church pursuant to this arrangement constitutes providing electricity to the public for compensation; (3) NC WARN has clearly indicated that the service that it is providing to the Church is meant to be a template so that it can provide such arrangements to other self-selected non-profits; and (4) NC WARN's sale and contemplated expansion of these sales clearly erodes Duke's exclusive franchise, undermines the current regulatory model, and would be inconsistent with the State policy promoting the inherent advantages of regulated public utilities.

In its reply comments, DNCP asserts that (1) the Commission has no authority to adopt HB 245's definition of third-party sales as recommended by NC WARN; (2) the sale of electricity by NC WARN to the Church cannot reasonably be distinguished from the facts and policy considerations at issue in the Commission's 1996 National Spinning Order; and (3) 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.

In response to the Commission's questions, DNCP, therefore, states that the Commission does not have the legal authority to allow third-party sales of Commission-regulated electricity utility service as proposed by NC WARN. Such an arrangement is not allowed under state law. The Public Utilities Act has long established that it is the policy of the state to promote the inherent advantages of regulated public utilities, to promote adequate, reliable and economic utility service, and to foster the continued service of public utilities on a well-planned and coordinated basis. DNCP observes that it is also the policy of this state to require a CPCN before an entity can engage in public utility activities and, nothing else appearing, that the public is better served by a regulated monopoly than by competing suppliers of utility service. This policy is expressed for electric utility service by the Territorial Assignment Act of 1965, which granted exclusive franchise rights to provide retail electric service to customers in North

Carolina assigned within the individual utilities' service territories. The Commission has no authority to expand or limit the scope of activities that the General Assembly has legislated shall be regulated as activities of a public utility. Thus, any modification of this policy would be for the legislature, and not the Commission, to determine.

Assuming arguendo that the Commission could allow third-party sales of a regulated utility service, the Commission would not have any authority to distinguish between non-profit and other entities desiring to engage in such sales because the General Assembly has not granted the Commission such authority in the Public Utilities Act. If the Commission determines that third-party sales of electricity does not constitute public utility activity, the Commission would not have any authority to regulate such sales and/or the rates and terms of service of the third party provider, although new construction of electric generating facilities may require Commission certification. Lastly, DNCP states that if the Commission determines that NC WARN has acted as a public utility without first applying for and receiving a certificate to do so, there are a number of actions that the Commission can take, including seeking an injunction against NC WARN for violating Duke's exclusive franchise and imposing fines pursuant to G.S. 62-310 of up to $1,000 per day for violations of the Public Utilities Act.

NCSEA

In response to the Commission's questions, NCSEA agrees in its reply comments with other parties that the Public Utilities Act does not expressly authorize the Commission to allow third-party sales of Commission-regulated electric utility service. In NCSEA's opinion, however, the absence of a specific, express grant of legal authority to allow third-party sales should not end the Commission's examination of its legal authority. Instead, the Commission should go on to examine the extent of its authority in the absence of such express grant and in the absence of an express prohibition on all third-party sales. NCSEA recommends that the Commission review and reconcile each of its previous orders applying the Simpson factors. If, after applying the Simpson factors, the Commission determines that NC WARN's proposal does not present a transaction with "the public," the Commission should not prohibit the transaction. NCSEA further suggests that the transaction may fall within the self-generation exemption set out in G.S. 62-3(23)a.1. Ultimately, NCSEA argues that North Carolina is better off with clean energy and that policymakers should not, without compelling reasons, opt to limit customers' ability to choose clean energy alternatives. Lastly, NCSEA states that the Commission should decline to assess civil penalties against NC WARN because NC WARN's actions did not injure Duke and because, as NCSEA interprets Duke's correspondence with NC WARN, Duke implicitly agreed to NC WARN's actions.

Public Staff

In responding to the Commission's questions in its comments, the Public Staff states that there is no provision in the Public Utilities Act that expressly authorizes the Commission to allow third-party sales of Commission-regulated electric utility services to the public for compensation. Indeed, the Commission's express legal authority to allow

resale of Commission regulated electric utility services is limited to the exemption from regulations of campgrounds and marinas pursuant to G.S. 62-3(23)h and the authority granted in G.S. 62-110(h) for lessors of residential buildings or complexes, both of which apply only under specific conditions.[5] Without a specific grant of such authority, the Commission is prohibited from allowing sales of Commission-regulated electric utility services.

In National Spinning, the Commission considered an arrangement whereby National Spinning, an industrial customer, would own a wood gasifier and sell gas to an unrelated third party. The second entity would, in turn, own and operate a high pressure boiler that would use the purchased gas to produce high pressure steam. The steam would then be sold back to National Spinning and used in a turbine owned by National Spinning to produce up to seven megawatts of electricity for National Spinning's on-site use. In support of this arrangement, the parties argued that it was the functional equivalent of self-generation, an exception to the definition of public utility and the certificate requirements in G.S. 62-110. The Commission rejected this argument based on the test set forth in Simpson. In so doing, the Commission expressed a particular concern that if the proposed arrangement was permitted, other customers and suppliers would inevitably pursue similar arrangements and take customers from regulated electric utilities, thereby negatively impacting the rates of remaining residential, commercial, and smaller industrial customers as a result of significant stranded investment. According to the Public Staff, despite the differences in generating capacity of the facilities involved, similar arrangements are precisely the result envisioned by the scenario presented by NC WARN as the test case.

In North Carolina it is well established law that while the requirement of a certificate is not an absolute prohibition of competition between public utilities rendering the same service, the Commission will not grant another certificate authorizing a different, competing public utility to provide service in the same geographic area in the absence of a showing that the utility in the field is not rendering or cannot render the specific service in question. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

In addition, the Public Staff observes that this matter has been considered by the General Assembly in recent years, but that no legislation has been enacted. For example, Senate Bill 694, Energy Independence & Job Creation in North Carolina, was introduced in April 2011, and the Third Party Sale of Electricity Committee, authorized by the Legislative Research Commission, met twice in 2012 before the legislature returned for its short session. Two years later, Section 27 of S.L. 2014-4, the Energy Modernization Act, directed the State Energy Office to study, among other things, the impact to the electric grid and to the economy of allowing third-party sales of electricity on the State's

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[5] A campground or a marina that resells electricity under circumstances or terms other than those prescribed in G.S. 62-3(23)h would be considered a public utility regardless of whether the underlying supplier of the electricity is a Commission-regulated utility. Similarly, the Commission has the authority to allow a lessor to charge for electric service under the circumstances and terms prescribed in G.S. 62-110(h) regardless of whether the underlying supplier of electricity is a Commission-regulated utility.

military installations. Most recently, HB 245, which was introduced in 2015, would exempt certain third-party sales of electricity from on-site renewable energy facilities from certification and Commission regulation. According to the Public Staff, absent enactment of such legislation or a showing that the certificated service provider in the geographic area is not ready, willing, or able to provide electric service, the Commission is without authority to allow a third party to do so.

Finally, the Public Staff states that, since the Commission has no authority to allow third-party sales of Commission-regulated electric service, it should deny the petition and immediately order NC WARN to cease and desist providing and billing for electric service to the Church. The Commission should also encourage NC WARN to honor its commitment made in the PPA and to assist the Church in filing the report of proposed construction with the Commission pursuant to Commission Rule R8-65 and, if the Church so desires, a registration statement pursuant to Commission Rule R8-66.

## DISCUSSION AND CONCLUSIONS

### I.
### NC WARN Identifies A Program For Third Party Sales To Or For The Public

NC WARN classifies its petition as a “test case” to determine if the up-front costs of solar equipment and installation can be financed through the sale of electricity generated by PV panels. NC WARN cites its history of providing financing to consumers to install PV facilities, but maintains that it is restricted in following this program without an ability to sell to retail customers the power from the facilities it installs. Under the mechanism at issue in this “test case,” NC WARN “will bill the church monthly for electricity generated by the [PV] system.” NC WARN represents that an adverse ruling would restrict its ability to enter into similar funding mechanisms with other churches and non-profits. From these recitations it is clear that NC WARN seeks approval to engage in a program to facilitate the installation and sale from PV facilities to consumers in addition to the Church up to the limits of its ability to do so. Parties other than NC WARN have intervened seeking a ruling authorizing third party sales well beyond the electric sales NC WARN is making to the Church. Consequently, the Commission has before it a request to determine on a generic basis the extent to which third party sales from PV facilities are permissible under Chapter 62 of the General Statutes and the North Carolina appellate court decisions providing guidance in this area.

No party disputes that NC WARN is furnishing electricity under its program for compensation or that the electricity produced from its PV facilities is not for NC WARN’s own use. Therefore, the dispositive issue raised by this request is whether, under G.S. 62-3(23)a.1, the sales under NC WARN’s program are sales “to or for the public” based on North Carolina law as it exists today.

## II.
## Chapter 62 And North Carolina Appellate Court Decisions Prohibit Unregulated Electric Sales To Or For The Public

The most significant case addressing the issue of "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 that case, as an adjunct to his telephone answering service, Simpson offered two-way radio and beeper service to a 55- to 60-member county medical society. The Court determined that Simpson was providing service to the public subject to regulation by the Commission under Chapter 62.

Among its determinations, the Court concluded that there should be a flexible definition of the "public" that focuses on the preservation of the legislatively-mandated regulatory framework:

> "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."

Id. at 522, 246 S.E. 2d at 755 (quoting State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 268, 148 S.E. 2d 100, 109 (1966)). The Court stated that Carolina Telephone did not foreclose consideration of whether a service offered only to a selected class of persons might also be considered an offering to the public. Among the cases from other jurisdictions cited with approval by the Court were those concluding (1) that a taxi cab company was a common carrier offering its services to the public even though its services were, by contract, limited to patrons of several hotels and a railroad station; and (2) that a bus service operator offering service only to tenants of certain apartments pursuant to contracts with this landlord was providing service to the public. The Court cited these cases for the proposition that services offered to some sub-classification of the general populace had been uniformly held to be offers made to the public. According to the Court, the teaching from these cases from other jurisdictions is:

> What is the "public" in any given case depends rather on the regulatory circumstances of that case. Some of these circumstances 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. The meaning of "public" must in the final analysis be such as will, in the context of the regulatory circumstances, and as already noted by the Court of Appeals, accomplish "the legislature's

> purpose and comport with its public policy." 32 N.C. App. at 546, 232 S.E. 2d at 873.

Id. at 524, 246 S.E.2d at 756-57.

In concluding that Simpson's service was offered to the public and, therefore, unauthorized, the Court held:

> The radio common carrier industry is therefore a small one whose users fall into definable classes. 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 unregulated one. A service could be operated for doctors or realtors or builders, escape regulation and still capture a substantial portion or even a majority of the market. For example, while Dr. Simpson is offering the service to only ten subscribers, the record indicates there are only 22 radio common carrier subscribers in the whole of Cleveland County. Dr. Simpson is therefore serving over 45 percent of the available market. The end result of the kind of exemption Dr. Simpson argues for could well be that the only subscribers left in the regulated market would be those who fit in no easily definable class. Even if this extreme situation were not reached, unregulated radio services might focus on classes which are easier and more profitable to serve. The result would be to leave burdensome, less profitable service on the regulated portion resulting inevitably in higher prices for the service.

Id. at 525, 246 S.E.2d at 757.

III.
NC WARN's Program Constitutes
Electric Sales To Or For The Public

Based on Simpson and the Commission's previous decisions addressing the issue of service to the public, the Commission determines that the NC WARN program in this case constitutes service to the public and is thus impermissible. Under Chapter 62 and Commission orders implementing the Public Utilities Act, the service area in Greensboro has been assigned exclusively to Duke, and other service areas in North Carolina have been assigned exclusively to other electric suppliers.[6] Setting aside for the moment the differences between the telecommunication service at issue in Simpson and the electric service at issue here and the differences under the statutes relating to the two distinct services, unlike a number of states, North Carolina by statute does not permit retail electric competition. The prohibition is based on the economic principle that provision of public utility service for compensation is a service fixed with a public interest, and competition results in duplication of investment, economic waste and inefficient service,

[6] G.S. 62-110.2

and high rates. Carolina Telephone, 267 N.C. at 271, 148 S.E.2d at 111 ("nothing else appearing, the public is better served by a regulated monopoly than by competing suppliers of the service.")[7] 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.[8]

In addition, the General Assembly in G.S. 62-3(23) has identified differences in the provision of electric utility service and telecommunications services at issue in Simpson that circumscribe the phrase "for the public" for electric service moreso than telecommunications service. Subsection 62-3(23)a.1, addressing electric service, includes a significant and limiting proviso to the definition of "to or for the public" that is conspicuously absent from subsection 3(23)a.6, which defines "to the public" for telecommunications service:

> [P]rovided, however, 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 … for sale to or for the public for compensation.[9]

This proviso is a clear legislative declaration that the provision of electric service for compensation to a third party, e.g., NC WARN's service to the Church, is service to the public and proscribed as an encroachment upon the certificated utility's exclusive service rights. The North Carolina Court of Appeals has held that a similar limiting proviso should be strictly construed. Shepard v. Bonita Vista Properties L.P., 191 N.C. App. 614, 664 S.E.2d 338 (2008), aff'd, 363 N.C. 252, 675 S.E.2d 332 (2009) (G.S. 62-3(23)(h), exempting campground owners from regulation if they resell electric service to occupants through individual meters with no mark-up, must be strictly construed.)

The fact that NC WARN's "test case" involves a non-profit seller and a non-profit buyer of electric power does not justify a determination that the sale is not to or for the public. This is the type of subclassification addressed and rejected by the Court in Simpson. Also, when the General Assembly wishes to make exceptions in Chapter 62 for

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[7] Technological and market changes have resulted in legislative alterations in the regulation of telecommunications service subsequent to Simpson and Carolina Telephone. Significantly, those were changes the General Assembly enacted, not this Commission.

[8] See, e.g., NCUC Web Page on Electric Industry Restructuring; US Energy Information Administration – NC Summary; S.L. 1997-40 (Senate Bill 38); RTI October 1998 Report to the Legislative Study Commission; Study Commission on the Future of Electric Service in North Carolina Report to the 1999 General Assembly of North Carolina 2000 Regular Session.

[9] Theoretically, at least, the Commission could have declared Simpson to be a public utility, requiring him to obtain a certificate of public convenience and necessity to operate and regulating his rates and service in competition with the incumbent telecommunications supplier if, for example, the incumbent was unable or unwilling to provide the service Simpson offered. As Duke has the exclusive franchise in Greensboro and is providing electric service, unless NC WARN is free of regulation under Chapter 62, the Commission has no such option here.

non-profit buyers and sellers of electricity, it has done so explicitly. See G.S. 62-3(23)(d) (exempting non-profit organization serving only its members from public utility classification for persons who serve employees or tenants on a metered basis).

The General Assembly has been successful in determining the best policy for the state resulting in consistently low electric rates compared to the nation. This policy is one of providing regulated exclusive service area franchises to a utility to provide electric service. Until the General Assembly amends Chapter 62, it is not the Commission's role to alter the paradigm. Indeed, the 2015 Session of the General Assembly addressed potential legislation that would have authorized in one fashion or another third-party sales,[10] and the General Assembly will reconvene later in 2016 in further deliberations of the 2015 Session, at which time it may further consider any third-party sales bills. Existing law does not give the Commission the authority to permit NC WARN to compete with Duke in its exclusive franchise territory. Only the legislature can act on the policy arguments NC WARN makes in this docket.

As indicated above, NC WARN's request seeks approval of a program introducing third-party sales to an indefinite number of non-profit consumers. Others wish to expand the third-party sales beyond those to non-profit consumers like the Church.[11] The Commission understands that large commercial establishments 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. If carried to its logical extension, authorization of third-party sales presents the real probability that the public interest 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 harm identified by the Court in Simpson. In exchange for their exclusive right to serve, the incumbent providers have an obligation to provide service to all, irrespective of the cost of doing so, at prices established through the regulatory, not the competitive, process. Third-party providers bear no such responsibility.

Under the Commission's ruling, consumers like the Church should not be impeded from taking advantage of rooftop PV facilities such as those already installed on its building and on many other structures in North Carolina under the "customer-owned" generation exception in G.S. 62-3(23)a.1. 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 facilities will generate. Financing PV facilities with savings achieved does not involve making electric sales. NC WARN certainly makes no effort to support its conclusory assertion that sales are necessary for its program.

An effort to justify third-party sales as a financing mechanism removing the sale aspect of the transaction from regulation under Chapter 62 is unavailing. Financing of PV installations and sales of capacity and energy need not be linked. Should savings to

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[10] House Bill 245

[11] October 30, 2015 Comments of NCIPL; November 20, 2015 Reply Comments of EFCA.

the electric consumer result, they can be used to repay over time any loan taken out to defray the upfront construction costs. NC WARN, as it states in its petition, up until its arrangement with the Church, has helped non-profit entities install PV facilities solely through a loan without taking ownership. While NC WARN asserts it needs to combine the financing aspect of its program with a sale of power, it does not explain why sales of power are a necessary feature of its program. 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. 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.

Most regulated electric utilities borrow funds to construct generating facilities. The borrowings are repaid through the capacity and energy charges in the rates consumers pay. Taken to its logical extreme, Dominion Resources or Southern Company could build a generating facility financed by borrowed funds in Duke's franchised service area in North Carolina and sell power to the public in competition with Duke without a franchise and beyond this Commission's jurisdiction on the theory that the plant was financed by borrowings, not internally generated funds. Financing the construction of generating 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 is financed.

Nor does the availability of tax credits convert the sale of power from PV facilities into a nonregulated transaction. Should a for-profit entity take part in construction or development of PV facilities, any tax credits available to that entity should be used to reduce the upfront construction costs and, consequently, the price of the installation to the consumer on whose building the PV facilities are installed. In this case, neither NC WARN nor the Church is a for-profit organization. They pay no income taxes and are unable themselves to take advantage of tax credits. From the petition, YES! Solar Solutions[12] appears to be nothing more than a contractor to NC WARN and, nothing else appearing, unable to take advantage of tax credits. If the program is designed to sell the tax credits to one or more other tax-paying partners, the petition makes no reference thereto. As far as the Commission is aware, any existing tax credits are lost if the system is sold. Consequently, the NC WARN "program" as laid out in the petition is not a prototypical program designed to take advantage of solar tax credits.

[12] YES! Solar Solutions is a solar installation company operating in North Carolina.

## IV.
## Past Commission Decisions Support A Determination That NC WARN's Program Constitutes Sales To Or For The Public

The Commission's decisions determining whether a service was being provided to or for the public have been consistent with the requirements of Simpson in that they analyze the regulatory circumstances of each case rather than applying any strict, inelastic standard. While the cases have precedential force, they address discrete installations, and not part of a comprehensive program for which a "test case" was filed. Also, for the most part, the cases did not concern installations that were resisted by an incumbent supplier as a usurpation of its exclusive service rights and an interference with the public service obligations. The Commission's prior decisions are likewise consistent with the Commission's determination in this case that NC WARN's program of selling power from PV facilities to as many building owners as its resources permit constitutes a sale to or for the public.[13] In any case in which the owner of electric generating facilities has sought to sell electricity to consumers otherwise served by the incumbent electric supplier so as to bypass the incumbent, the Commission has determined that the proposed service is to or for the public.

The case most analogous to the instant case is National Spinning. In that case the generator sought to sell electric service to a consumer otherwise served by the incumbent electric utility. Contrary to assertions by NC WARN and others that this case is more closely analogous to Progress Solar, the commodity to be sold by the petitioner in Progress Solar was space lighting, a commodity distinct from the sale of electric service.[14]

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[13] Even if NC WARN's test case was limited to a sale of electricity solely to the Church and not more broadly to other consumers, under Simpson, there would be an unauthorized sale to or for the public as NC WARN would be serving the Church up to the capacity of its facilities.

[14] In National Spinning, Leary built, owned and operated a steam boiler positioned between a biomass gasifier producing gas that heated the boiler and a turbine generating electricity, all of its electrical output used for a textile plant. All of the components of this system (except the boiler) were owned by the textile plant, National Spinning. The Commission rejected a claim that Leary was exempt from regulation as a public utility because the steam boiler was an essential and integral part of the electric generating equipment and was owned by a third party, not National Spinning, the consumer of the electricity. The self-generation exemption, therefore, did not apply. Also, the electricity generated by the generating equipment would displace the incumbent utility which held the exclusive right to serve.

Moreover, NC WARN blatantly mischaracterizes National Spinning, stating:

> In National Spinning, the company wanted to sell excess power to an adjacent manufacturing company and came to the Commission for a declaratory ruling. … [The] Commission … concluded that direct sale of power from one industrial facility to another made the initial industry a public utility.

Petition, p.6. As noted above, National Spinning did not involve the sale of electricity from one industrial facility to another, but the bifurcated ownership of the generating facility's boiler and turbine-generator.

V.
The Iowa Eagle Point Decision
Is Inconsistent With North Carolina Law

Relying on Chapter 62 and Simpson, the Commission declines to authorize third-party sales. In so doing, the Commission finds Eagle Point,[15] a divided 2012 opinion of the Iowa Supreme Court, to be inapposite, non-controlling, and contrary to existing North Carolina law. The Commission must base its decision on Chapter 62 of the North Carolina General Statutes as interpreted by the North Carolina appellate courts. While Chapter 62 exempts only consumer-owned generation from the definition of an electric public utility, the Iowa statute permits the consumer-owned generator to make a limited number of sales to other consumers. Moreover, the Commission is not persuaded that the Iowa court's analysis comports with current law in North Carolina.

In the first place, the power purchase agreement (PPA) at issue before the Iowa Utilities Board under which Eagle Point sold electricity to the City of Dubuque had been converted into a financing/lease transaction under which no sales had occurred by the time the court addressed the case.[16] The North Carolina courts customarily deem cases so altered as moot and, therefore, refuse to address the merits.[17]

Eagle Point was a for-profit enterprise in the business of constructing, installing, interconnecting, and financing PV generating facilities from which to sell electricity on a metered basis to end users. NC WARN primarily is an advocacy group. NC WARN's purposes and functions are multifaceted and change from time to time, but historically, at least, selling PV output has never been listed among them. Indeed, NC WARN must depend on a third party, YES! Solar Solutions, to fulfill most of the functions Eagle Point provides in Iowa. Both NC WARN and the Church are non-profit entities unable to utilize tax credits from installing PV facilities.

Careful review of the Iowa court's rationale in disagreeing with the Iowa Utilities Board leaves the Commission unpersuaded that its decision should be followed. Much is made of the fact that Eagle Point's generating facilities are placed behind the incumbent certificated electric utility's electric meter installed to measure service to the City of Dubuque's building. This makes Eagle Point's sales to the building, so the argument

[15] SZ Enterprises, LLC v. Iowa Utilities Board, 850 N.W. 2d 441 (2014)

[16] Id. at 466 n.6, 468.

[17] Angell v. Raleigh, 267 N.C. 387, 389-90, 148 S.E.2d 233, 235 (1966) ("'[T]he inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations.'" (citation omitted)); J.S.W. v. Lee Cty. Bd of Educ., 167 N.C. App. 101, 104, 604 S.E.2d 336, 337-38 (2004) ("[W]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." (citation omitted)); see also Pearson v. Martin, 319 N.C. 449, 451-52, 355 S.E.2d 496, 497-98 (1987).

goes, analogous to consumption from customer-owned facilities or to demand response or energy efficiency actions undertaken by the consumer.

The Commission finds this analysis incomplete. Were the City of Dubuque to consume power from its own generating facilities, it would not be in the electricity sales business, free to build generating facilities elsewhere in open competition with the incumbent and free to sell the power it did not need to others. Demand response (DR) involves shifting electrical use from on-peak to off-peak periods, under tariffs making such usage shifting economical, saving the necessity for the incumbent to construct central power plant facilities and transmission lines. Energy efficiency (EE) is the permanent reduction in demand or energy use serving a similar purpose. Third-party sales from a PV installation, an intermittent resource with a low capacity factor such as that at issue in Eagle Point, could not be counted upon to replace DR and EE functions. Contrary to the Iowa court's unsupported conclusions, winter peak demand is in the morning before the sun has risen. In the summer, even on clear days, the peak demand occurs well after maximum output of PV facilities, and there is no electrical output at all on cloudy days or when the PV facilities are out of service.

While Eagle Point's generating facilities are behind the incumbent's meter, these facilities are in front of Eagle Point's meter to the City of Dubuque that is used by Eagle Point to measure on a kilowatt-hour basis its sales to the City.

The Iowa court cites the fact that the City's building remains connected to the incumbent's lines and still relies on the incumbent for service as a factor supporting its conclusion that Eagle Point's competitive service should be authorized.[18] In the Commission's view, and in reliance in Simpson, this is a factor supporting the incumbent and the Iowa Utility Board's decision, not the competitive supplier. The incumbent must have generation and transmission capacity available to serve peak demand from the City's building, i.e., when the incumbent's costs are likely to be highest, but many of its sales over which to recover its costs are supplanted by Eagle Point. This increases the costs borne by the incumbent's other customers. The Iowa court's ruling is not limited to the single building at issue. The whole point of the request for the declaratory ruling was to establish precedent where the third-party electric sales could be repeated elsewhere without limit. No one should ignore that the objective of those favoring third-party sales is to limit them to city buildings consuming all the power from the PV facilities or to a non-profit church. The ultimate objective is for large commercial and industrial electric customers to buy electricity from third-party owners or to install large PV facilities for sale to others in addition to their own use.

The Iowa court measures the benefits of the sales from Eagle Point to the City from the perspective of the savings the City will experience.[19] Individual consumers able to bargain among competitors always benefit from and advocate for competition. The holding of Simpson is that the harm proscriptions against competitive electric sales is

[18] Eagle Point, 850 N.W. 2d at 467.

[19] Id.

designed to avoid is the harm to consumers not able to purchase power from third-party suppliers. The dilution of sales from the incumbent means fixed costs must be recovered from those remaining without opportunity to purchase elsewhere.

In applying the various Serv-Yu[20] factors to conclude that Eagle Point is not a public utility, the Iowa court focuses on the "market" subject to competition at issue as the market for installing PV facilities.[21] The Commission determines that this is not the market that should be addressed. The market in determining whether the "public" is being served is the retail market in which electric capacity and energy is bought and sold. The market for buying and selling solar panels is competitive, but that is not the market in which the incumbent electric supplier and those seeking to sell electric service in its exclusive service area compete. The market in which Duke chooses vendors to construct fossil fuel generating facilities is competitive, too, but that competition has nothing to do with whether those competing to sell electric power from those facilities in competition with Duke are selling to the public.

The Iowa court spends substantial analysis on the historical development of electricity production, the benefits of renewable/solar generation, and its perceived changes in the legislative/regulatory context in Iowa and elsewhere in support of its determination that Eagle Point should not be classified as a public utility. The court refers to a number of scholarly publications in support of its conclusions, none of which appear in the record established before the Iowa Utilities Board. Paradoxically, the court dismisses the Iowa Utility Board's expert justifications to the contrary – that to agree with Eagle Point results in cherry picking, a reduction in incumbent sales, and a foisting in costs stranded thereby on remaining customers – out of hand because the court finds no support in the record.[22]

The Commission finds the scholarly publications cited by the Iowa court to present only one side of the debate and to be out of date. The issue of "Value of Solar" has received widespread scholarly analysis. Two sides to the debate exist. Solar advocates maintain that "distributed renewable generation" provides system support, reduces the need for incumbent transmission and distribution facilities, reduces demand on peak, and provides a clean source of power beneficial to the environment. On the other side, advocates maintain that distributed renewable generation results in stranded investment, cannot be dispatched because of its intermittent nature, costs more than alternative sources of power, and must be subsidized by taxpayers and those such as renters who cannot invest in distributed generation.[23] The debate continues. The point is that the Iowa

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[20] Natural Gas Service Co. v. Serv-Yu Cooperatives, Inc., 70 Ariz. 235, 219 P.2d 324 (1950). Simpson post dates Serv-Yu and makes no reference to the case or the factors it lists. The Simpson factors are not the same as the Serv-Yu factors.

[21] Eagle Point, 850 N.W. 2d at 467.

[22] Id. at 468.

[23] Steve Mitnick, Before the Death Spiral, Public Utilities Fortnightly, Nov. 2015, at 41-44; Edward Cazalet & David MacMillan, Solar at High Noon, Public Utilities Fortnightly, Dec. 2015, at 27; Chris Vlahoplus, John Pang, Paul Quinlan & John Sterling, Community Solar, Public Utilities Fortnightly, Dec. 2015, at 33-36; Charles J. Cicchette and Jon Wellinghoff, Solar Battle Lines, Public Utilities Fortnightly, Dec. 2015, at 18-25; Charles E.

court's discussion is incomplete and one-sided. Consequently, the Commission will not rely on Eagle Point as precedent as NC WARN requests. Issues such as the Value of Solar in the context of authorizing third-party sales should be addressed in the legislative context where such issues can be thoughtfully examined and resolved on a complete record where all interested parties may participate, not in this request for a declaratory ruling based on atypical facts, and where the generator is an advocacy group and the buyer is a non-profit.

## VI.
## North Carolina Is Not An Outlier In Its Treatment Of Third Party Sales

NC WARN contends that "North Carolina is one of only four states that does not have a clear policy statement encouraging third-party funding of renewable energy, either through legislation or court order." In the first place, as indicated above, it is not funding, but sales that is the dispositive issue in dispute in this case. NC WARN does not provide the source for this assertion. The Commission, however, takes note, that the United States Department of Energy publishes a map regarding "3rd Party Solar PV Power Purchase Agreement (PPA)" policies of the states, as referenced by NCEMC in its comments.[24] The July 2015 map indicates that third-party solar PV PPAs are "apparently disallowed by state or otherwise restricted by legal barriers" in five states. The key also indicates that the status of the policy regarding the use of third-party solar PV PPAs in twenty states is "unclear or unknown." Thus, the Commission finds that at the time of NC WARN's filing potentially twenty-five states, as opposed to four states, do not have a clear policy statement encouraging third-party funding of renewable energy, either through legislation or court order.[25] Moreover, in North Carolina it is the General Assembly's policy that determines the advisability of third-party solar.

Claims that North Carolina has no policy encouraging the funding of third-party solar are patently inaccurate. In 2007 the General Assembly enacted Senate Bill 3 authorizing North Carolina electric utilities to pay incentives to encourage renewable generation. Solar generation was one of three set-aside requirements established in the law and entitled to priority treatment. For years, North Carolina provided a 35% state tax credit encouraging the installation of renewable generation. These state-sponsored

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Bayless, Piggybacking on the Grid, Public Utilities Fortnightly, July 2015, 39-42; Ashley Brown, Letter to the Editor, Response to Cicchetti and Wellinghoff Re: Net Metering, Public Utilities Fortnightly, at 8-9; Charles Cicchetti, Letter to the Editor, Response to Brown Re Net Metering, Public Utilities Fortnightly, at 8-9.

[24] See "3rd Party Solar PV Power Purchase Agreement," DSIRE, July 2015, available online at http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2015/08/3rd-Party-PPA072015.pdf (last accessed October 13, 2015) (citing N.C.G.S. 62-3(a)(23) for the basis that third-party sales of electricity are "apparently disallowed by state or otherwise restricted by legal barriers").

[25] A current DSIRE map dated April 2016 indicates that eight states apparently disallow or otherwise restrict by legal barriers and that seventeen states the status is unclear or unknown. See"3rd Party Solar PV Power Purchase Agreement," DSIRE, April 2016, available online at http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2015/01/3rd-Party-PPA_0302015.pdf.

"encouragements" have resulted in North Carolina being one of the leaders in adding renewable generation, a large percentage being solar. Since the beginning of 2007, North Carolina has installed 1,286 MW of solar capacity. The Commission has authorized net metering tariffs under which owners of PV facilities receive credit for power they provide to the utility equal to the price they pay the utility for electricity they consume.

## VII.
## NC WARN Has Violated North Carolina's Prohibition Of Third-Party Sales Subjecting Itself To Sanctions

On August 28, 2015, without obtaining a certificate from the Commission as required by law to provide public utility service, NC WARN billed the Church for sales of electricity for the period June 30, 2015, through August 27, 2015. Despite the fact that it had filed the request for a declaratory ruling on June 17, 2015, in which it acknowledged that its program "may be restricted under North Carolina law," and with knowledge that the General Assembly had before it proposed legislation addressing the possibility of lifting the ban on third-party sales, NC WARN willfully undertook to provide public utility service.

As recently as January 27, 2015, the Commission has stated unequivocally that third-party sales are unlawful in North Carolina:

> The Commission disagrees with [Southern Environmental Law Center] that Chapter 62 allows for power purchase agreements between utility customers and nonutility solar installers. Rather the Commission concludes that Chapter 62 of the North Carolina General Statutes prohibits third-party sales of electricity by non-utility solar installers to retail customers.

In Re Order Approving Pilot Programs, NCUC Docket No. E-100, Sub 90 (January 27, 2015)

NC WARN is represented by counsel and is a frequent participant in Commission proceedings as well as a vocal and persistent critic of Commission orders. NC WARN knows or is presumed to know the law. It is the General Assembly that has provided Duke its exclusive service rights, pursuant to a CPCN issued by this Commission, and NC WARN is not free to violate those rights as it has blatantly undertaken to do. NC WARN has been so bold as to suggest that the State Constitutional prohibition against illegal monopolies and emoluments is inconsistent with Duke's exclusive franchise when decades of North Carolina appellate court opinions not only acknowledge these franchise rights, but repeat that they best protect the interests of the using and consuming public.

As Duke correctly asserts, when NC WARN billed the Church for electric service it acted as a de facto, but not a de jure public utility subject to penalties for violations of the

provisions of Chapter 62.[26] Among these penalties is a fine of up to $1,000 per day for each violation. G.S. 62-310.

The Commission concludes that DNCP accurately characterizes NC WARN's actions:

> NC WARN's actions and public statements before and subsequent to the filing of its Declaratory Ruling Request, the unsupported legal arguments used to support NC WARN's Request, and the fact that NC WARN has proceeded to make retail electric sales to [the Church] prior to the Commission ruling on NC WARN's Request, all point to the Declaratory Ruling Request being frivolous and subterfuge in NC WARN's ongoing public campaign against Duke Energy and North Carolina's traditional regulated utility model.

Having so concluded, the Commission, in response to NC WARN's willful conduct, requires NC WARN to refund its charges to the Church and determines to impose upon NC WARN a fine of $200 per day for each day NC WARN has provided and continues to provide electric service to the Church. The Commission would have been justified in fining NC WARN the statutory maximum of $1,000 per day. However, the financing[27] as opposed to the sales features of NC WARN's program are beneficial to Faith Community Church and justify mitigation of the otherwise justifiable penalty. Furthermore, the Commission, as set forth below, has permitted NC WARN to avoid penalties altogether upon compliance with reasonable conditions most of which NC WARN has agreed to comply with in advance in the event of an adverse ruling on the merits. Consequently, the monetary penalty comes into play only upon NC WARN's decision to choose penalties instead of conditions beneficial to Faith Community Church. The Commission requires that the Public Staff audit NC WARN's books of account to determine the extent to which NC WARN has in fact billed the Church, the amount of such billings, and the amount to be refunded. The Public Staff shall file periodic reports of the results of its audit to the Commission until the full amount plus interest is refunded to the Church.

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[26] State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 25-31, 338 S.E.2d 888, 893-898 (1986), aff'd as modified, 318 N.C. 686, 351 S.E.2d 289 (1987); State ex rel. Utils. Comm'n v. Buck Island Inc., 162 N.C. App. 568, 572-579, 592 S.E.2d 244, 247-253 (2004).

[27] NC WARN represents "[t]he PPA also clearly states that if it is determined by the NC Utilities Commission, or a court with jurisdiction over the matter, that NC WARN cannot sell the Church the output of the panels, NC WARN is committed to donating the PV system to the Church." June 15, 2015 petition, p. 4. As such, the donation equates to 100% financings of the Church's PV facilities by NC WARN.

The requirement of the fines, but not the refunds and the Public Staff audit, shall be suspended upon the following conditions:

(1) NC WARN shall refund to the Church with 10% interest[28] all billings it has made to the Church and all further billings until it ceases to so bill.

(2) NC WARN shall file with the Commission a verified representation that it has ceased and desisted and, until further notice of the Commission, will continue to cease and desist any further attempt to provide electric service for compensation to any consumers in North Carolina.

(3) NC WARN shall cease and desist from advertising and promoting any facet of its solar program that contains as a factor the sale of electric power.

(4) NC WARN shall comply with the representation in its petition to donate the solar PV system installed on the Church's building to the Church.

## VIII.
## Requests for Oral Argument are Denied

Both EFCA and NC WARN requested that the Commission provide the opportunity to present oral argument. Although both parties recognized that the Commission has adequate information to make the declaratory ruling without oral argument, NC WARN states that the Commission would benefit in the understanding of nuanced arguments of the parties and EFCA contends an oral argument would maximize transparency and allow for development of the record. The Commission is not persuaded. As both parties concede, the Commission determines that the issues have been adequately addressed in the parties' written filings and an oral argument is not necessary.

## IX.
## Summary of Discussion and Conclusions

In summary, the Commission finds and concludes:

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 this

[28] G.S. 62-130 (e).

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.

IT IS, THEREFORE, ORDERED as follows:

1. That NC WARN's petition shall be, and is hereby, denied.

2. That NC WARN's and EFCA's request for oral argument are denied.

3. That NC WARN shall refund its charges to the Church, with a fine of $200 per day for each day that NC WARN has provided and continues to provide electric service to the Church.

4. That the Public Staff shall audit NC WARN's books of account to determine the extent to which NC WARN has in fact billed the Church, the amount of such billings, and the amount to be refunded.

5. That the Public Staff shall file periodic reports of the results of its audit to the Commission until the full amount plus interest is refunded to the Church.

6. The requirement of the fines but not the refunds and the Public Staff audit, however, shall be suspended upon the following conditions:

a. NC WARN shall refund to the Church with 10% interest[29] all billings it has made to the Church and all further billings until it ceases to so bill.

b. NC WARN shall file with the Commission a verified representation that it has ceased and desisted and, until further notice of the Commission, will continue to cease and desist any further attempt to provide electric service for compensation to any consumers in North Carolina.

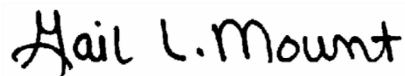
c. NC WARN shall cease and desist from advertising and promoting any facet of its solar program that contains as a factor the sale of electric power.

d. NC WARN shall comply with the representation in its petition to donate the PV system installed on the Church's building to the Church and assist the Church in filing a new docket to amend the report of proposed construction with the Commission and, if the Church desires, a registration statement pursuant to Commission Rule R8-66.

ISSUED BY ORDER OF THE COMMISSION.

This the _15th_ day of April, 2016.

NORTH CAROLINA UTILITIES COMMISSION



Gail L. Mount, Chief Clerk

[29] G.S. 62-130 (e).