

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. SP-100, SUB 31

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition by North Carolina Waste Awareness)	
and Reduction Network for a Declaratory)	COMMENTS OF THE
Ruling Regarding Solar Facility Financing)	PUBLIC STAFF
Arrangements and Status as a Public Utility)	

NOW COMES THE PUBLIC STAFF – North Carolina Utilities Commission, by and through its Executive Director, Christopher J. Ayers, and pursuant to the Commission’s *Order Requesting Comments* issued September 30, 2015, respectfully submits the following comments on the petition filed on June 17, 2015, by North Carolina Waste Awareness and Reduction Network (NC WARN) in the above-captioned docket.

By its petition, NC WARN seeks a declaratory ruling regarding whether State law prohibits third parties, such as NC WARN, from installing a solar photovoltaic (PV) electric generating facility on the roof of a non-profit entity and financing the upfront costs of the solar equipment and installation through the sale of electricity generated by the PV facility to the non-profit entity for on-site usage pursuant to a purchased power agreement.

In its September 30 Order, the Commission requested that the parties address four questions as part of their comments. The Public Staff’s responses to these questions are as follows:

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?*

The Commission does not have express legal authority to allow third-party sales of Commission regulated electric utility services. Indeed, the Commission's express legal authority to allow even the *resale* of Commission regulated electric utility services is limited to the exemption from regulation 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.¹

G.S. 62-2(a)(1) declares it to be among the policies of the State of North Carolina “[t]o promote the inherent advantage of regulated public utilities.” To this end, G.S. 62-2(b) vests in the Commission authority “to regulate public utilities generally . . . in the manner and in accordance with the policies set forth in [the Public Utilities Act].” G.S. 62-3(23)a.1 provides, in part: “Public utility means a person . . . [p]roducing, generating, transmitting, delivering or furnishing electricity . . . to or for the public for compensation.” Further, G.S. 62-110(a) provides, in part:

Except as provided for bus companies in Article 12 of this Chapter, no public utility shall hereafter begin the construction or operation of

¹ A campground or marina that resells electricity under circumstances or on 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 the electricity is a Commission regulated utility.

any public utility plant or system or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition or operation[.]

In its *Order Denying Petition for Declaratory Ruling*, issued April 22, 1996, in Docket No. SP-100, Sub 7 (*National Spinning*), the Commission considered the public utility status of National Spinning Company, Inc., an industrial customer served by Carolina Power & Light Company (CP&L, now Duke Energy Progress, LLC) and an unrelated third party, Wayne S. Leary, d/b/a Leary's Consultative Services, under an arrangement whereby National Spinning would own a wood gasifier and sell the gas to Leary, who would own and operate a high pressure boiler that would use the gas purchased from National Spinning to produce high pressure steam, which 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 their petition for a declaratory ruling, National Spinning and Leary argued that this arrangement was the functional equivalent of self-generation, which is an exception to the definition of a "public utility" and the certificate requirements of G.S. 62-110.1. See G.S. 62-3(23)a.1 and G.S. 62-110.1(g). The Commission rejected this argument and concluded that Leary's involvement constituted a public utility activity regulated pursuant to Chapter 62 of the General Statutes. In reaching this conclusion, the Commission applied the following analysis set forth by the North Carolina Supreme Court in *State ex rel. Utils. Comm'n v. Simpson*, 295 N.C. 519, 522, 246 S.E.2d 753, 755 (1978) (citation omitted):

[W]hether any given enterprise is a public utility within the meaning of a regulatory scheme does not depend on some abstract, formalistic definition of "public" to be thereafter universally applied. 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."

Applying this analysis, the Commission reasoned that

given the nature of the electric industry in North Carolina, the importance of large industrial customers to that industry, the competition for such customers, and the effect on the industry that the requested declaratory ruling might have, the Commission cannot declare that no regulated utility would result from the proposed activities.

National Spinning at 7. The Commission expressed particular concern that if the proposed arrangement were permitted, other suppliers and customers would inevitably pursue similar arrangements and take customers from the regulated electric utilities, thereby negatively impacting the rates of remaining residential, commercial and smaller industrial customers as a result of significant stranded investment. *National Spinning* at 7. Despite the differences in generating capacity of the facilities involved, similar arrangements are precisely the result envisioned by the "test case" presented by NC WARN's petition.

It is well established that while

the requirement of a certificate is not an absolute prohibition of competition between public utilities rendering the same service, . . . inherent in the requirement [is] the concept that, since a certificate is granted which authorizes the holder to render the proposed service within the geographic area in question, a certificate will not be

granted to a competitor in the absence of a showing the utility already in the field is not rendering and cannot or will not render the specific service in question.

State ex rel. Utils. Comm'n v. Carolina Tel. and Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

This matter has been considered by the General Assembly in recent years, but no legislation has been enacted.² Most recently, House Bill 245, "The Energy Freedom Act," which was introduced in the 2015 Session of the General Assembly, would have exempted certain third-party sales of electricity from on-site renewable energy facilities from G.S. 62-110.2 and Commission regulation. Absent enactment of some such legislation, or a showing that the public utility holding the certificate to provide the proposed electric service within the geographic area is not ready, willing, and able to provide it, the Commission is without authority to allow a third party to do so.³

At present, 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 in contravention of these well-established legislative policies and legal principles. Without such a grant of authority, the Commission is prohibited from authorizing third-party sales of

² See, e.g., Senate Bill 694, "Energy Independence & Job Creation in NC", introduced in the 2011 Session of the General Assembly; the Third Party Sale of Electricity Committee that was authorized by the Legislative Research Commission in 2011; and Sec. 27 of S.L. 2014-4, the "Energy Modernization Act," (Senate Bill 786), which among other items, directed the State Energy office to study the impacts of allowing third-party sales of electricity on the State's military installations.

³ Some years ago, prior to the enactment of G.S. 62-3(23)h., the Commission granted a certificate of public convenience and necessity to Shipyard Power and Light Company to provide electric utility service at a marina in New Bern. See Order issued October 12, 1989, in Docket No. E-47, Sub 0. In that instance, the surrounding electric power suppliers indicated they would not extend service into the territory. The certificate was subsequently canceled after the utility's electrical facilities were destroyed by a hurricane.

Commission regulated electric utility services. See *General Tel. Co. v. Public Service Comm'n*, 238 Ind. 646, 150 N.E.2d 891 (1958).

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?*

See response to Question No. 1.

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?*

See response to Question No. 1.

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?*

As indicated in NC WARN's petition and the attached Power Purchase Agreement (PPA) between it and Faith Community Church, if the sale of electricity under the PPA is not permitted by law, NC WARN will donate the solar PV facility to the church, refund any payments made by the church pursuant to the PPA, and indemnify the church for all costs associated with the project. Since the Commission has no authority to allow the electricity sales in question, the Commission should deny the petition and order NC WARN to immediately cease and desist from providing electric service to the church and billing for electricity generated by the solar PV facility. The Commission should also encourage NC

WARN to honor its commitments to the church and to assist the church in filing a report of proposed construction with the Commission pursuant to Commission Rule R8-65 and, if the church desires, a registration statement pursuant to Commission Rule R8-66.

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

PUBLIC STAFF
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Electronically submitted
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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing COMMENTS on all parties of record in this proceeding in accordance with NCUC Rule R1-39 by causing the same to be deposited in the United States Mail, first class postage prepaid, or delivered by hand delivery or by means of facsimile or electronic delivery upon agreement of the receiving party.

This the 30th day of October, 2015

Electronically submitted
/s/ Antoinette R. Wike