

**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION  
DOCKET NO. SP-100, SUB 32**

**In the Matter of:** )  
**Request for a Declaratory Ruling by Col.** ) **NCSEA’S COMMENTS**  
**Francis X. De Luca USMCR (RET)** )

**NCSEA’S COMMENTS**

The North Carolina Sustainable Energy Association (“NCSEA”), an intervenor in the above-captioned proceeding, submits these comments in accordance with the *Order Requesting Comments* issued by the North Carolina Utilities Commission (“Commission”) on May 18, 2017. On May 17, 2017, Francis X. De Luca (Mr. De Luca) filed a *Request for Declaratory Ruling* (“*Request*”) seeking for the Commission to find that Fresh Air Energy II, LLC (“FAE II”) is a public utility pursuant to G.S. 62-3(23).

NCSEA’s comments set forth four arguments: (1) that North Carolina law is clear and unambiguous about what constitutes a public utility; (2) that the Commission has previously held that qualifying facilities (“QFs”) under the Public Utility Regulatory Policy Act of 1978 (“PURPA”) are not public utilities under North Carolina law; (3) that the costs that Mr. De Luca believes to be unknown are in fact known; and (4) that public policy should dictate that independent power producers are not public utilities. As explained in detail below, NCSEA requests that the Commission deny Mr. De Luca’s request to find that FAE II is a public utility.

**I. NORTH CAROLINA LAW IS CLEAR AND UNAMBIGUOUS**

Mr. De Luca asserts that FAE II is a public utility because it meets the definition under G.S. 62-3(23) and because it has applied for a certificate of public convenience and

necessity (“CPCN”) from the Commission to construct a new electric generating facility. For the reasons set forth below, NCSEA respectfully disagrees.

A. DEFINITION OF “PUBLIC UTILITY”

Mr. De Luca asserts that “Fresh Air Energy [sic] meets the definition of a public utility as defined under § 62-3(23) because the company will produce electricity ‘...to or for the public for compensation...’” *Request*, p. 1, and further states that “Fresh Air Energy does not fall under any of the exemptions from being a public utility in the statute.” *Id.* However, an analysis of G.S. 62-3(23) demonstrates that FAE II is not a public utility. Under G.S. 62-3(23)a., a public utility is defined as

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[.]<sup>1</sup>

Despite Mr. De Luca’s unsupported assertion, FAE II is not producing electricity “to or for the public.” “One offers service to the ‘public’ within the meaning of the statute when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in the connection, that his service is limited to a specified area and his facilities are limited in capacity.” *Utilities Commission v. Carolina Telephone and Telegraph Co.*, 267 N.C. 257, at 268, 148 S.E. 2d 100, at 109 (1966). FAE II is not holding itself out as

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<sup>1</sup> NCSEA does not dispute that FAE II will be compensated for the electricity that it produces.

“willing to serve all who apply up to the capacity of [its] facilities.” Instead, FAE II is holding itself out as willing to sell electricity to Duke Energy Carolinas, LLC (“DEC”).

“The most significant case addressing the issue of ‘sales to or for the public’ is State ex rel. Utils. Comm’n v. Simpson[.]” *Order Issuing Declaratory Ruling*, p. 18, Docket No. SP-100, Sub 31 (April 15, 2016) (internal citations omitted). In *Simpson*, the Supreme Court of North Carolina held that “The question is whether he is offering this service to the ‘public.’ Giving meaning to this term, which is not defined in Chapter 62 of the General Statutes, is therefore necessary for appropriate resolution of the case.” *State ex rel. Utilities Com. v. Simpson*, 295 N.C. 519, at 522, 246 S.E.2d 753, at 755. In giving meaning to the term “public,” the Court held that

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.”

*State ex rel. Utilities Com. v. Simpson*, 295 N.C. 519, at 524, 246 S.E.2d 753, at 756-757 (internal citations omitted).

In examining the *Simpson* factors, it is evident that FAE II is not selling electricity to the public.<sup>2</sup> The first factor identified by the Supreme Court of North Carolina is nature of the industry sought to be regulated. In the case at hand, FAE II is attempting to engage

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<sup>2</sup> Mr. De Luca even appears to concede that FAE II is not selling electricity to the public, stating that “Fresh Air Energy [sic] will sell the electricity it produces to Duke Energies [sic] Carolina LLC (Docket no. SP-2665 SUB 47) who will then provide the electricity for use by the public.” *Request*, p. 1

in the industry of electricity generation; FAE II is not attempting to engage in the industry of selling electricity to retail customers. The second *Simpson* factor is the type of market served by the industry. In the case at hand, there is a robust wholesale market for electricity in North Carolina encompassing investor-owned utilities, electric membership cooperatives, municipalities that provide electricity service, and non-utility generators. The third *Simpson* factor is the kind of competition that naturally inheres in that market. One of the stated rationales for PURPA is “to improve the wholesale distribution of electric generation[.]” Public Law 95-617, Sec. 2 (Nov. 9, 1978), codified at 16 U.S.C. 2601. In adopting PURPA, Congress is attempting to enhance the natural competition that exists in the wholesale electric generation market. The final *Simpson* factor is the effect of non-regulation or exemption from regulation of one or more persons engaged in the industry. In the instant case, the wholesale electric generation market is already regulated by the Federal Energy Regulatory Commission (“FERC”), so regulation by the Commission would be duplicative. Furthermore, while there are hundreds of independent power producers in North Carolina, the *Request* seeks to classify a single independent power producer as a public utility, which would have the effect of discriminating against a single person participating in the market. Based on an analysis of the *Simpson* factors, it is clear that FAE II is not offering service to the public.

Reaching the conclusion that FAE II is not selling electricity to the public is consistent with other decisions interpreting the *Simpson* test. *See generally, State ex rel. Utilities Com. v. Mackie*, 79 N.C. App. 19, 388 S.E.2d 888 (N.C. Court of Appeals 1986) and *State ex rel. Utils. Comm’n v. Buck Island*, 162 N.C. App. 568, 592 S.E.2d 244 (N.C. Court of Appeals 2004).

B. CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Mr. De Luca further asserts that “Fresh Air Energy, LLC [sic] is also applying for a certificate of public convenience and necessity consistent with § 62-3(2) for public utilities.” *Request*, p. 1. G.S. 62-110(a) clearly states that public utilities must obtain a certificate of public convenience and necessity prior to constructing new generating facilities, stating that “no public utility shall hereafter begin the construction or operation of 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[.]” However, G.S. 62-110.1(a) also requires non-utilities to receive a certificate of public convenience and necessity prior to constructing new generating facilities, stating that “no public utility or other person shall begin the construction of any steam, water, or other facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility service, even though the facility be for furnishing the service already being rendered, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction.”<sup>3</sup> The *Request* appears to misunderstand the issue of causation. While a public utility must receive a CPCN from the Commission prior to constructing a new generation facility, pursuant to G.S. 62-110(a) and G.S. 62-110.1(a), applying for a CPCN does not inherently render the applicant a public utility.

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<sup>3</sup> Certain small non-utility generators are not required to obtain a CPCN. *See*, G.S. 62-110.1(g).

## II. NORTH CAROLINA'S INTERPRETATION OF PURPA IS CLEAR

FAE II is a QF under PURPA. *See, Application for a Certificate of Public Convenience and Necessity and Registration as a New Renewable Energy Facility*, Exhibit 5, Docket No. SP-2665, Sub 47 (March 16, 2017) (“FAE II CPCN Application”). The instant case is not the first time that the Commission has been asked to determine whether a generator that is a QF under PURPA is also a public utility under North Carolina law. In 1983, the developer of six QFs sought a declaratory ruling from the Commission that the QFs were not public utilities within the meaning of G.S. 62-3(23). *Order on Request for Declaratory Ruling*, p. 1, Docket No. SP-100 Sub 0 (Feb. 29, 1984) (“Cogentrix Order”). One of the issues before the Commission in that proceeding was remarkably similar to the issue in the present proceeding:

As to the production of electricity, the issue can be narrowed to whether such production is “to or for” the public. Cogentrix and its affiliates will generate electricity and sell it to the local electric utilities, who in turn will deliver and sell the electricity to or for the public. We do not believe that subsection a was intended to cover the situation of a qualifying cogeneration facility under PURPA that furnishes electricity to another for distribution and sale to or for the public and has no other public utility attributes of its own.

*Id.*, pp. 2-3. The Commission went on to conclude “that the generation and sale of electricity by Cogentrix and its affiliates will not be ‘to or for’ the public so as to bring Cogentrix and its affiliates within the provisions of G. S. 62-3(23)a.” *Id.*, p. 3. As far back as 1984, the Commission has recognized that QFs that sell electricity to public utilities, who then sell it to the public, are not public utilities within the provisions of G.S. 62-3(23). The *Request* does not make any argument as to why FAE II is differently positioned from

Cogentrix or as to why the Commission should reach a different conclusion in the instant case from the decision reached in the *Cogentrix Order*.

### III. COSTS

Mr. De Luca argues that

as filed in REBUTTAL TESTIMONY OF KENDAL C. BOWMAN ON BEHALF OF DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC for DOCKET NO. E-100, SUB 148, the following statements are pertinent for issuing a declaratory ruling that Fresh Air Energy LLC [sic] is a public utility pursuant to G.S 62-3(23) for the purposes of the public utilities act. On page 6 of the filing the it [sic] is stated the North Carolina Electric Membership Corporation is concerned about the “undeniable” cost increases resulting from the influx of solar in North Carolina. On pages 11 and 31 of the filing it refers to “overpayment” of as much as \$1 billion by customers.

*Request*, p. 1.

However, Mr. De Luca fails to note that the accuracy of the alleged overpayment to which he refers is questionable.

Mr. Snider is not comparing what Duke's customers pay for QF power to what those customers pay for power supplied by generating units in DEC or DEP's rate base. He is not comparing the cost of QF power to the projected life cycle cost of power that would be generated by the nuclear units Duke still has under consideration. He is not comparing the QF rates to the estimated life cycle cost of power generated by one of the combined cycle or combustion turbine units which DEC and DEP has included in their Integrated Resource Plans, which are expected to be added to their rate base during the next 10 to 15 years.

*Direct Testimony of Ben Johnson*, pp. 87-88, Docket No. E-100, Sub 148 (March 28, 2017).

As was made clear by Duke's witnesses, the calculation of an overpayment is based on comparing two entirely different costs: marginal costs of electricity generation and the utility's avoided costs.

When I refer to an overpayment, I was not referring to just the marginal cost in 2015. I think that was just making a comparison of here's what we're paying and here's what our marginal cost of electricity was. And we had no incremental need for capacity in that year, so, yes, we were paying these prices while we were generating on the margin for these prices. We were not saying that that was the basis for the complete basis for overpayment risk. It was simply an illustration of what we're paying for QF energy and what we're generating for on the margin.

Mr. De Luca goes on to state that “By recognizing solar facilities such as Fresh Air Energy LLC [sic] as a public utility, North Carolina will have access to information to determine the true costs of solar power.” *Id.* However, the amount that DEC will pay to FAE II for the purchase of electricity will be known when DEC seeks to recover those costs, either in its rider proceedings or in a general rate case.

Lastly, Mr. De Luca argues that “We currently do not have access to information from any of the new qualifying facilities (QF) generators and, just like legacy generators, that information is crucial to determining what costs the ratepayer should bear.” *Request*, p. 2. However, FAE II has certified “that it consents to the auditing of its books and records by the Public Staff insofar as those records relate to transactions with North Carolina electric suppliers, and agrees to provide the Public Staff and Commission access to those books and records, wherever they are located, and access to the facility.” *FAE II CPCN Application*, p. 7. While it is true that certain financial information about FAE II may not be available to the general public, it is accessible to the pertinent state agency and to decision makers. Furthermore, not all financial information about legacy generators is available to the general public. *See generally, Application of Duke Energy Progress, LLC for Adjustment of Rates and Charges Applicable to Electric Service in North Carolina*, Docket No. E-2, Sub 1142 (June 1, 2017).



#### IV. PUBLIC POLICY

Finally, Mr. De Luca asserts that “A finding that Fresh Air Energy [sic], is a public utility is consistent with the stated declaration of policy under § 62-2 including inter alia, § 62-2(a)(1), to regulate public utilities in the interest of the public, § 62-2(a)(3a) regarding fixing of rates in a manner to result in the least cost mix of generation and § 62-2(a)(5).” *Request*, p. 1. However, a finding that FAE II is a public utility would be inconsistent with North Carolina’s stated declaration of policy “To promote the development of renewable energy and energy efficiency[,]” G.S. 62-2(a)(10) and to “Encourage private investment in renewable energy and energy efficiency.” G.S. 62-2(a)(10)c.

There are numerous QFs in North Carolina that are similarly situated to FAE II. For each and every QF to be declared to be a public utility is a nonsensical result. Furthermore, there are thousands of retail customers who receive electric service under the net metering tariffs offered by utilities, each of whom will inject excess generation onto the grid at various points in time. Under Mr. De Luca’s definition, each of these customers would also be considered a public utility, which is also a nonsensical result.

For the reasons set forth above, NCSEA requests that the Commission deny Mr. De Luca’s request to find that FAE II is a public utility.

Respectfully submitted, this the 2nd day of June, 2017.

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**CERTIFICATE OF SERVICE**

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing Comments by hand delivery, first class mail deposited in the U.S. mail, postage pre-paid, or by email transmission with the party's consent.

This the 2nd day of June, 2017.

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