BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. SP-100, SUB 31

In the Matter of: Petition by NC Waste Awareness and Reduction Network for a Declaratory Ruling Regarding Solar Facility Financing Arrangements and Status as a Public Utility	)	**REPLY COMMENTS**

NCSEA'S REPLY COMMENTS

The North Carolina Waste Awareness and Reduction Network's ("NC WARN") 17 June 2015 *Request for Declaratory Ruling* ("Request") in this docket prompted the North Carolina Utilities Commission ("Commission") to issue an *Order Requesting Comments* on 30 September 2015. The Commission's order asked interested parties to address four questions related to third-party sales and directed parties to file reply comments on or before 20 November 2015. Having intervened, the North Carolina Sustainable Energy Association ("NCSEA") respectfully submits these reply comments in accordance with the Commission's order.

I. THE COMMISSION'S FIRST QUESTION – LEGAL AUTHORITY

This proceeding requires the Commission to examine the extent of its legal authority. In the Commission's *Order Requesting Comments*, the Commission asked the parties to address the following question:

> 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 authority.

Order Requesting Comments at p. 2. As the Commission examines the extent of its legal authority, the Commission should consider a related question: **If NC WARN is <u>not</u> a public utility, does the Commission have the legal authority to prohibit NC WARN's enterprise?**

A. THE COMMISSION'S QUESTION

The Commission's question, quoted above, refers to "<u>express</u> legal authority to allow third-party sales." (Emphasis added). As several other commenting parties have noted in their initial comments,[1] North Carolina's Public Utilities Act does not specifically and <u>expressly</u> authorize the Commission to allow third-party sales of Commission regulated electric utility services.

However, the absence of a specific, <u>express</u> grant of legal authority to allow third-party sales should not end the Commission's examination of its legal authority. Instead, the Commission must go on to examine the extent of its authority (1) in the absence of a specific, express grant of authority to allow third-party sales[2] and, perhaps more importantly, (2) in the absence of a specific, express prohibition on all third-party sales.

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[1] *See, e.g., Comments of the Public Staff*, p. 5 (30 October 2015) ("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 … .").

[2] The General Assembly has granted the Commission broad, general authority to take action. *See, e.g.*, N.C. Gen. Stat. § 62-30. The absence of a specific, express grant of authority to take an action is not the legal equivalent of an absence of all authority to take the action. The Commission has long acknowledged this fact. Thus, for example, as long ago as November 1994, the Commission indicated it could allow economic development riders, despite the absence of a specific, express grant of legal authority to consider and approve such riders. *See Order Adopting Interim Guidelines for Economic Development Rates*, Commission Docket No. E-100, Sub 73 (28 November 1994). Similarly, as recently as last week, the Commission noted in an order that it has the power to order utilities to make smart grid investments under the more general language of N.C. Gen. Stat. § 62-42, despite the absence in the Public Utilities Act of a specific, express grant of authority to order smart grid investments be made by utilities. *Order Approving Smart*

B. N.C. GEN. STAT. § 62-2(b) AND THE EXTENT OF THE COMMISSION'S AUTHORITY TO PROHIBIT NC WARN'S ENTERPRISE.

The Commission has been given a broad, general grant of authority by the General Assembly, but the grant of authority has limits. In N.C. Gen. Stat. § 62-2(b), the General Assembly sets out the broad, general authority it has conferred and the limits of that authority:

> **[A]uthority shall be vested in the North Carolina Utilities Commission to regulate public utilities** generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements, and in the manner and in accordance with the policies set forth in … Chapter [62]. **Nothing in this Chapter shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission.**

(Emphasis added).

Simply put, the Commission has legal authority to regulate public utilities. Just as simply put, the Commission has no legal authority to exercise any kind of jurisdiction over an industry or enterprise that does not constitute a public utility unless there is a specific, express grant of authority to exercise said jurisdiction.[3] As set out above,

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Grid Technology Plans, Declining to Schedule a Hearing, and Requesting Comments on Rule Revisions, pp. 19-20, n. 5, Commission Docket No. E-100, Sub 141 (5 November 2015). It would set a bad precedent if the Commission were to conclude in this proceeding that its broad, general powers can be actualized only if accompanied by a specific, express grant of authority to take an action.

[3] This statement should guide the Commission in answering its third question: "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?" *Order Requesting Comments* at p. 3. Under N.C. Gen. Stat. § 62-2(b), to the extent a third-party seller is not a public utility, then the Commission can exercise only that authority over the third-party that has been specifically and expressly granted in the Public Utilities Act. Where a third-party seller is a public utility, NCSEA does not disagree with the analysis set forth in Duke Energy's answer to the Commission's third question. *Comments of Duke Energy Carolinas, LLC*

NCSEA believes N.C. Gen. Stat. § 62-2(b) – particularly the final sentence –should prompt the Commission to explore a question not articulated in its 30 September 2015 *Order Requesting Comments*: **If NC WARN is <u>not</u> a public utility, does the Commission have the legal authority to prohibit NC WARN's enterprise?** Several of the parties' initial comments addressed this latter question.

C. THE "PUBLIC UTILITY" ANALYSIS

As the Energy Freedom Coalition of America, LLC ("EFCA") pointed out on page 7 of its 30 October 2015 *Opening Comments*, the Public Utilities Act defines "public utility." Specifically, the Public Utilities Act provides:

> "Public utility" means a person … now or hereafter owning or operating in this State equipment or facilities for … [p]roducing, generating, transmitting, delivering or furnishing electricity … **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 … for sale to or for the public for compensation.

N.C. Gen. Stat. § 62-3(23)a.1. (emphasis added). For purposes of this proceeding, the Commission's examination of its legal authority should include an analysis of NC WARN's enterprise and whether it falls within the statutory definition of "public utility." In doing so, the Commission should specifically examine two similar, yet distinct, questions:

- Does NC WARN's enterprise involve a transaction with "the public," as the phrase is used within N.C. Gen. Stat. § 62-3(23)a.1.?

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and Duke Energy Progress, LLC in Opposition to NC WARN's Request for Declaratory Ruling at p. 11.

- Even if NC WARN's enterprise is found to involve a transaction with "the public," is Faith Community Church ("the Church"), via its agreement with NC WARN, actually "operating" an electric generating facility, the primary purpose of which is for the Church's own use?

    1. *IF, BY TRANSACTING WITH THE CHURCH, NC WARN IS NOT TRANSACTING WITH "THE PUBLIC," THEN NC WARN IS NOT A PUBLIC UTILITY.*

EFCA and North Carolina Interfaith Power and Light ("NCIPL") set out the appropriate factors the Commission should consider in determining whether NC WARN's transaction with the Church constitutes a transaction with "the public." NCSEA believes the Commission should hew to the "*Simpson* factors" test set out on page 8 of EFCA's *Opening Comments* and on page 8 of NCIPL's *Initial Comments*.

Additionally, NCSEA renews the request made in NCSEA's 6 July 2015 letter that, in considering the *Simpson* factors, the Commission review and reconcile its existing orders that touch on this topic. For example, NCIPL's analysis of the Commission's 22 December 1988 *Order on Request for Declaratory Ruling* in Commission Docket No. SP-100, Sub 1 merits Commission review and reconciliation. NCIPL states that the Commission allowed the transaction at issue in that proceeding, at least in part, "so that the company could 'utilize certain financing and tax advantages[.]'" *See Initial Comments of NCIPL* at pp. 10-11. As EFCA pointed out on page 3 of its *Opening Comments*, "PPAs are the only form of third-party ownership that allows the federal tax benefits associated with the investment tax credit to be realized when the host customer is a tax-exempt entity." Moreover, the ability/inability to utilize certain tax advantages appears to have been a factor considered by the Iowa Supreme Court in applying a

Simpson factors-like test in *SZ Enterprises, LLC d/b/a Eagle Point v. Iowa Utilities Bd.*, 850 N.W.2d 441 (Iowa 2014), a non-controlling, yet nonetheless instructive opinion cited by many of the parties in their initial comments.[4]

If, after applying the *Simpson* factors test, the Commission determines that NC WARN's enterprise does not present a transaction with "the public," the Commission should not prohibit the transaction.

2. If the Church, Via Its Agreement With NC WARN, Is Actually Self-Generating, Then Neither NC WARN, Nor the Church, Should Be Found To Be a Public Utility.

Even if the Commission determines that NC WARN's enterprise presents a transaction with "the public," the Commission should go on to examine whether the transaction falls within the self-generation exemption set out in N.C. Gen. Stat. § 62-3(23)a.1. If the transaction falls within the exemption, the Commission should find that neither NC WARN, nor the Church, is a public utility.

NCIPL argued that,

> [a]s a practical matter, a behind-the-meter solar PV system installed on a customer's property and paid for with a PPA **operates** in the same manner as a solar PV system installed on the customer's property and owned by the customer outright. The only difference is how the customer pays for the system.

Initial Comments of NCIPL at p. 5 (emphasis added). To the extent solar PV installed on a rooftop "operates" the same whether it is customer-owned or third-party-owned, the Commission should examine whether the Church, with NC WARN's assistance, is the

[4] *See, e.g., Comments of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC in Opposition to NC WARN's Request for Declaratory Ruling* at p. 10; *see also Initial Comments of NCIPL at 14-20.*

actual operator of the solar PV on its roof.[5] If so, the entire transaction may fit within the self-generation exemption.

In conducting this inquiry, the Commission may be tempted to draw a bright line and conclude that third-party-owned solar PV systems are *de facto* "operated" by the third-party owner, thereby making the systems ineligible for the self-generation exemption. The Commission should resist any such temptation; drawing such a bright line would throw into disarray multiple North Carolina customers' current use of leased, third-party-owned equipment to take advantage of the self-generation exemption. Instead, as recommended by ECFA, the Commission should reassure the market that third-party-ownership of a system, standing alone, does not make the transaction ineligible for the self-generation exemption. *See EFCA's Opening Comments* at pp. 13-16.

Instead of a bright line "ownership" test, the Commission should engage in a fact-based inquiry to determine if the Church can be said to be operating the system affixed to its roof. If so, the transaction should be eligible for the self-generation exemption and neither NC WARN, nor the Church, should be found to be a public utility.

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[5] Parties opposing NC WARN's Request have frequently cited the Commission's 1996 *National Spinning* case. *See, generally, In Re: Request for a Declaratory Ruling by National Spinning Company, Inc. and Wayne S. Leary, d/b/a Leary's Consultative Services,* Commission Docket No. SP-100, Sub 7. In *National Spinning*, the petitioner argued, in the alternative, that it was merely National Spinning's agent for purposes of constructing and operating the system and thus the system qualified for the self-generation exemption under the statutory "construct or operate" phrase. The Commission ultimately ruled, in a 22 April 1996 order, that the "construct or operate" phrase in N.C. Gen. Stat. § 62-3(23) should be narrowly construed, leading it to conclude that a system actually constructed and operated by the petitioner, rather than the customer, would not qualify for the exemption. Here, NC WARN's enterprise appears to be distinguishable in that the actual "operation" of a 5.2kW solar PV array mounted on a roof requires none of the hands-on, day-to-day operational work that a 7MW boiler-based system requires. To say that NC WARN actually "operates" the Church's solar PV array may be akin to saying Rent-a-Center "operates" the financed kitchen table sitting in one of its customer's kitchens.

II. THE COMMISSION SHOULD NOT RELY ON THE GENERAL ASSEMBLY'S FAILURE TO ENACT THIRD-PARTY SALES LEGISLATION AS A BASIS FOR RESOLVING NC WARN'S REQUEST.

For the reasons set out below, the General Assembly's failure to enact third-party sales legislation should not be used to divine any sort of legislative intent in this proceeding.

Both the Commission's 30 September 2015 *Order Requesting Comments* and the 30 October 2015 *Comments of the Public Staff* cited the General Assembly's failure to enact third-party sales legislation. The Commission's order recounted the following legislative history for Senate Bill 513, which was introduced during the 2015 Session of the General Assembly:

> On May 19, 2015, the North Carolina Senate passed Senate Bill 513 (SB 513). Section 21 of SB 513 provided for the establishment of a Renewable Energy Economic Development Study Committee. Under SB 513, one of the subjects to be studied was third-party sales of electricity. However, on September 30, 2015, SB 513 was adopted by the General Assembly after several amendments, including the deletion of the provision establishing a Renewable Energy Economic Development Study Committee.

Order Requesting Comments at p 2. Similarly, the Public Staff's comments included the following statement:

> This matter has been considered by the General Assembly in recent years, but no legislation has been enacted. 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 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.

Comments of the Public Staff at p. 5 (footnotes omitted).[6]

NCSEA believes it critically important for all of the parties to understand that the General Assembly's failure to enact third-party sales legislation should not be used as "evidence" that the General Assembly has made a policy decision with regard to third-party sales or that it has determined that a statutory amendment is necessary before a particular third-party sale can occur. As the North Carolina Supreme Court recently held,

> this Court has previously recognized the rule "that ordinarily the intent of the legislature is indicated by its actions, and not by its failure to act." *Styers v. Phillips*, 277 N.C. 460, 472-73, 178 S.E.2d 583, 589-91 (1971) ("'Courts can find the intent of the legislature only in the acts which are in fact passed, and not in those which are never voted upon in Congress, but which are simply proposed in committee.'" (quoting *United States v. Allen*, 179 F. 13, 19 (8th Cir. 1910), *aff'd as modified on other grounds by Goat v. United States*, 224 U.S. 458, 32 S. Ct. 544, 56 L. Ed. 841 (1912), *and by Deming Inv. Co. v. United States*, 224 U.S. 471, 32 S. Ct. 549, 56 L. Ed. 847 (1912))). **That a legislature declined to enact a statute with specific language does not indicate the legislature intended the exact opposite.** *Id.* at 472, 178 S.E.2d at 589 (declining "'to attribute any such attitude to the Legislature'" and noting that a party's argument as to why a bill failed to pass "'can be nothing more than conjecture'" and "'[m]any other reasons for legislative inaction readily suggest themselves'" (quoting *Moore v. Bd. of Chosen Freeholders*, 76 N.J. Super. 396, 404, 184 A.2d 748, 752, *modified on other grounds*, 39 N.J. 26, 186 A.2d 676 (1962))). Finally, "[i]n determining legislative intent, this Court does not look to the record of the internal deliberations of committees of the legislature considering proposed legislation." *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 657, 403 S.E.2d 291, 295 (1991).

N.C. Dep't of Corr. v. N.C. Med. Bd., 363 N.C. 189, 202, 675 S.E.2d 641, 650 (2009) (emphasis added).

Some might be tempted to argue that this proceeding is distinguishable because (1) the Commission affirmatively concluded in its 27 January 2015 order that the Public

[6] Duke Energy refers to these bills in its initial comments as well. *Comments of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC in Opposition to NC WARN's Request for Declaratory Ruling* at p. 10, n. 3.

Utilities Act "prohibits third-party sales of electricity by non-utility solar installers to retail customers[,]" *Order Approving Pilot Programs*, p. 3, Commission Docket No. E-100, Sub 90 (27 January 2015), and (2) the General Assembly declined to legislatively overrule the Commission's order during the 2015 legislative session. Such an argument stands on a dubious foundation for the following reason. It is true that the General Assembly did not legislatively overrule the Commission's 27 January 2015 order during the 2015 legislative session. However, it is equally true that the General Assembly has not legislatively overruled the *Simpson* factors test in the many legislative sessions since the test was first established by the North Carolina Supreme Court in 1978. In none of the intervening years has the General Assembly found the *Simpson* factors test merits being overturned. As such, if legislative inaction is representative of any intent, it represents the General Assembly's support for continued use of the *Simpson* factors test by the Commission and the courts in proceedings such as this one.

III. THE COMMISSION'S SECOND QUESTION – RESTRICTING ANY ALLOWANCE TO NON-PROFIT CUSTOMERS.

In the Commission's *Order Requesting Comments*, the Commission asked the parties to address the following question:

> 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?

Order Requesting Comments at p. 3. As a threshold matter, NCSEA reads the question as Duke Energy appears to have read it: Can the Commission use its authority to approve

third-party sales to a limited class of users such as non-profit organizations?[7] NCSEA did not read the question to be asking: Can the Commission use its authority to approve third-party sales by a limited class of sellers such as non-profit organizations?

In a 2 November 2015 letter filed in this docket, the Christian Coalition of North Carolina wrote:

> [I]f the Commission has the authority to allow third-party sales, it should certainly authorize such sales to non-profit organizations, including North Carolina's many Christian congregations. But, if the Commission has the authority to allow third-party sales, the Christian Coalition of North Carolina questions why the Commission would limit such sales to only non-profit organizations. We believe that all families should have access to renewable and alternative energy sources.

NCSEA echoes the Christian Coalition's question: Unless dictated by the results of the Commission's application of the *Simpson* factors test, why would the Commission limit its approval of such sales only to non-profit organizations? At its very core, NCSEA holds true 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. As the Christian Coalition put it, "We believe that all families should have access to renewable and alternative energy sources."

IV. THE COMMISSION'S FOURTH QUESTION – SHOULD THE COMMISSION DENY NC WARN'S PETITION, THE COMMISSION SHOULD DECLINE TO ASSESS CIVIL PENALTIES.

In the Commission's *Order Requesting Comments*, the Commission asked the parties to address the following question:

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[7] *Comments of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC in Opposition to NC WARN's Request for Declaratory Ruling* at p. 6 (asserting that the Commission "cannot approve such sales even to a limited class of users such as non-profit organizations").

> 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?

Order Requesting Comments at p. 3.

Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") argue that "[t]he Commission has assessed civil penalties to other *de facto* utilities and, the Companies respectfully assert that the Commission should likewise sanction NC WARN here for its willful violation of the provisions of Chapter 62 and Commission rules, orders and regulations." *Comments of DEC and DEP in Opposition to NC WARN's Request for Declaratory Ruling* at p. 12.

In the event the Commission denies the relief requested by NC WARN in its Request, the Commission should decline to assess civil penalties against NC WARN. From an equitable perspective, this is not a case in which NC WARN's actions injured DEC's grid in any way.[8] Moreover, had DEC truly believed the proposed transaction would injure its grid or otherwise form the basis for imposition of civil penalties, *it should not have enabled the proposed transaction to ripen by interconnecting it to the grid*. But it did and, in doing so, it essentially entered into an implicit agreement with NC WARN that NC WARN's proposed transaction would serve as a test case at the Commission.

The best evidence that DEC enabled the proposed transaction to ripen so that it could serve as a test case can be found in a letter from DEC to NC WARN's counsel:

[8] DEC and DEP make no allegation in their joint comments that NC WARN has, in violation of N.C. Gen. Stat. § 62-323, willfully injured DEC's property, work, or any matter or thing appertaining to DEC's property or work. In fact, NCSEA is unaware of any allegation – in the Companies' comments or elsewhere – that NC WARN's conduct willfully injured DEC in violation of N.C. Gen. Stat. § 62-323.

> In its filing, NC WARN states that it intends to donate the Generation Facility to Faith Community Church should its declaratory judgment request be denied. **In order to not inconvenience Faith Community Church in the ultimate timely operation of the Generation Facility, Duke Energy Carolinas will continue to process the referenced interconnection request, because that is a separate issue from NC WARN's stated intentions to engage in the unlawful provision of unregulated public utility service. Any interconnection ultimately completed for the Generation Facility should in no way be construed as Duke Energy Carolinas' approval of NC WARN's proposed unlawful activity.** Duke Energy Carolinas will assert its legal service rights in future filings with the Commission.

Comments of DEC and DEP in Opposition to NC WARN's Request for Declaratory Ruling at DEC Exhibit 1, pp. 1-2 (emphasis added). This letter essentially memorializes DEC's agreement to enable the very transaction to ripen that it now seeks civil penalties for. The Commission should decline, on the equities, to impose any sanction in such circumstances.

Respectfully submitted,

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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 filing, together with any exhibits attached thereto, 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 20th day of November, 2015.

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