KEYES, FOX & WIEDMAN LLP

November 20, 2015

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

Via Electronic Filing

Re: NCUC Docket No. SP-100, Sub 31
REPLY COMMENTS of the ENERGY FREEDOM COALITION OF AMERICA, LLC and REQUEST FOR ORAL ARGUMENT.

Dear Ms. Mount,

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

With best regards,

/s/ Thadeus B. Culley

Thadeus B. Culley
Keyes, Fox & Wiedman, LLP
401 Harrison Oaks Boulevard
Suite 100
Cary, NC 27513
(510) 314-8205
tculley @kfwlaw.com

Attorney for Energy Freedom Coalition of America, LLC

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

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. SP-100, Sub 31

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

The Energy Freedom Coalition of America, LLC ("EFCA") appreciates the opportunity to reply to comments submitted on October 30, 2015 on the questions presented by the Commission's September 30, 2015 *Order Requesting Comments.*

The Commission must determine whether a contract to facilitate the installation of a small-scale, rooftop solar facility has a distinctly private characteristic or whether this activity will have such a significant impact on the public that it may be considered "clothed in the public interest" and appropriate for government intervention. The particular facts of this case do not establish a public characteristic for the underlying transaction—or satisfy a traditional justification for government regulation—for NC WARN or any other entity engaged under similar circumstances. As a matter of state policy, it is essential for the Commission to distinguish public from private activities and to weigh the individual's right to contract for financing and installation of solar energy systems on their own private property against the government's need to regulate the provision of electricity to protect the public interest. Here, the public's interest in encouraging individual freedom and the utilization of demand-side renewable generation substantially outweighs the utilities' interest in limiting the market forces and emerging technologies that are giving customers greater control over their electricity consumption.

I. INTRODUCTION

As EFCA discusses in this reply, rooftop solar providers lack the traditional indicia of regulated monopoly utilities and do not trigger the justifications for regulation cited by Dominion Power North Carolina ("Dominion"), Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively "Duke Energy" or "Duke"), ElectriCities, and Public Staff. Contrary to those parties' arguments, third-party solar providers:

- do not impact the regulatory compact, as they merely provide a financing mechanism to enable customers to exercise their lawful right to self-generate (discussed in **Section III**);
- are only prohibited from selling electricity at retail if they are determined to be an "electric supplier," which remains an open question presented for Commission determination at this time (discussed in **Section III**);
- do not negatively impact the inherent advantages of regulated public utilities because solar providers do not create duplicative infrastructure and do not present ruinous competition to regulated utilities (discussed in **Section IV**); and

In **Section V**, EFCA responds to arguments that the General Assembly's consideration of and inaction on a broad third-party sales exception is dispositive that all third-party sales are currently prohibited. The North Carolina Supreme Court's decision in *State ex rel. Utilities Com. v. Simpson*, 295 N.C. 519, 524 (1978) requires the Commission to apply analysis to the facts at bar before concluding that a particular transaction is or is not a sale *to or for the public*.

In **Sections VI and VII**, EFCA addresses parties' discussion of the application of the *Simpson* factors to the facts of this case and supports North Carolina Interfaith Power & Light's ("NCIPL") conclusion that the character of service offered by NC WARN, and

by other similar rooftop solar PPA arrangements,[1] evidences private characteristics and does not demonstrate an express or implied dedication of private property to a public use. Given the similarities in Iowa and North Carolina law, Iowa case law carries compelling persuasive authority on an issue of first impression in this state.

REQUEST FOR ORAL ARGUMENT

EFCA respectfully requests that the Commission provide the opportunity to present oral argument on the issues raised in the *Order Requesting Comments*. It is clear that there is a fundamental threshold disagreement among parties whether the Commission has the discretion to determine the scope of its own jurisdiction. EFCA agrees with North Carolina Interfaith Power & Light ("NCIPL") that Section 62-2(23) and the North Carolina Supreme Court's decision in *Simpson* give the Commission sufficient authority to determine that NC WARN does not offer service *to or for the public*. Additionally, given the high level of public interest in this case, EFCA suggests that it will serve the interest of maximizing transparency to allow parties to present their arguments and be available to answer any questions the Commission feels is necessary for development of the record.

II. It is Erroneous to Assert that the Commission Lacks the Discretion to Allow Third-Party Sales from Rooftop Solar Facilities.

[1] As NCIPL discussed in its opening comments, "[a] third-party owner of a solar PV system installed behind the meter and affixed to the property of a consumer for their own use is not subject to regulation as a public utility under the North Carolina Public Utilities Act because the owner is not providing electricity service 'to the public.'" NCIPL's Initial Comments at p. 6.

The opening comments of EFCA and NCIPL clearly explain that the Commission has the discretion, consistent with the requirements of *Simpson*, to interpret the definition of public utility in Section 62-2(23) to determine whether a service is of such a nature to constitute a service *to or for the public.* Indeed, all parties agree that this phrase in the statute is determinative of NC WARN's status and that *Simpson* is the authoritative case guiding the Commission's resolution of this question. Despite the inherent flexibility built into the controlling law of *Simpson*, other parties dogmatically assert that the Commission lacks the authority to allow third-party sales (i.e., to exercise its discretion to determine that NC WARN is or is not a public utility). EFCA understands, however, that the Commission's framing of the question seemed to guide these parties to skip the threshold step and to conclude NC WARN **was** a public utility providing "regulated electric service." This framing is clearly erroneous as the Commission cannot conclude that NC WARN is a public utility, according to *Simpson*, without first applying the regulatory circumstances test to the specific record before it.[2]

II. Authorizing Third-Party Sales of Electricity to Finance a Customer-Sited, Behind-the-Meter Rooftop Solar Facility Does Not Upset the Regulatory Compact and Does Not Violate the Territorial Assignment Act of 1965.

Allowing customers to choose to finance a rooftop solar facility through a solar PPA does not unhinge the traditional "regulatory model" set forth in the Public Utility

[2] For this reason, EFCA agrees with NCIPL that the Commission's statement in *In the Matter of NC GreenPower*, Order Approving Pilot Programs, NCUC Docket No E-100, Sub 90 that "Chapter 62 of the North Carolina General Statutes prohibits third party sales of electricity by non-utility solar installers to retail customers" was dicta. There were no specific facts before the Commission to make such a determination, the Commission did not provide a *Simpson* analysis, and it was not necessary to address that issue in order to resolve the contested issues in that case.

Act.[3] The state's regulatory model is based on the traditional concept of the "regulatory compact." Under the regulatory compact, a utility is obligated to provide adequate, reliable and affordable service to all who apply. In return, a utility is guaranteed the opportunity to recover at a fair rate of return the prudent and reasonable costs incurred in providing that service.[4]

Importantly, the Commission and the State of North Carolina have defined the regulatory compact in terms of financial viability, not in terms of **absolute** rights to provide a defined commodity. The Territorial Assignment Act extends the logic of the regulatory compact[5] by granting "electric suppliers . . . the right to serve all premises located wholly within the service area assigned to it . . .".[6] The statute defines an electric supplier as "any public utility furnishing electric service or any electric membership corporation." [7] An electric supplier's "right to serve" is not, however, an absolute grant of an exclusive right to serve because the Territorial Assignment Act only bars electric suppliers from providing electric services to a customer within the exclusive territory of another electric supplier.[8]

---

[3] Dominion Initial Comments at pp.3-4.

[4] *Order Approving Deferral Accounting with Conditions,* Docket No. E-7, Sub 874 (March 31, 2009) ("The Company is obligated to provide adequate, reliable and reasonably priced service to all customers; in return, the Company is entitled to recover its prudent and reasonable costs of providing that electric service.")

[5] Duke Initial Comments at p. 8 ("As part of the regulatory company Duke Energy Carolinas is granted the exclusive franchise to serve customers within its assigned territory.").

[6] N.C. Gen. Stat. 62-110.2(b).

[7] N.C. Gen. Stat. 62-110.2(a)(3).

[8] *See, e.g., Domestic Electric Service, Inc. v. Rocky Mt.*, 285 N.C. 135, 143 (1974) (holding that because the City of Rocky Mount did not meet the definition of a public utility or an electric membership corporation it was not prohibited from serving premises

The argument that the regulatory compact entitles utilities to sell every kilowatt-hour that a customer consumes,[9] therefore fails by virtue of the clear statement of the legislature. Customers are allowed self-generation options, including net metering or emergency back-up generation, and are permitted to contract with a third party as long as the third party is not a public utility. This case is about whether customers exercising their private right to contract are permitted to utilize financing tools that allow them the convenience and ability to optimize the benefits of having a solar facility on their property to generate power for personal consumption.

The record does not suggest that a single 5 kW solar facility, or even a series of such systems, will impede any utility's opportunity to earn a fair return on its investment. As EFCA stated in opening comments, net metering customers are typically net consumers and still contribute significant revenue to the operations of the grid.[10] Because the regulatory compact is not the same thing as territorial exclusivity to provide *all* sales of electricity, the simple fact that a private third-party sale occurs behind the meter is not sufficient to show that utilities will be deprived of the opportunity to earn a fair return. Allowing third-party solar PPAs has not turned the regulatory compact on its head in

---

in the Domestic territory solely on the basis of Domestic Electric having been granted an exclusive service territory, City prohibited from serving the premises on other grounds); *In the Matter of Request for a Declaratory Ruling by National Spinning Company, Inc and Wayne S. Leary d/b/a Leary's Consultative Services*, NCUC Docket SP-100, Sub 7 (1996) (holding that in order to determine whether petitioners' activities violated Carolina Power & Light's exclusive right to provide electric service, it was necessary to determine whether the petitioners' proposed sales would render either petitioner a public utility).

[9] *See* Duke Initial Comments at 8 "[h]ere, Duke Energy Carolina's has the exclusive right under North Carolina law . . . as the regulated public utility to serve the Greensboro customer".

[10] EFCA Initial Comments at p. 18.

other jurisdictions, as utilities in those places continue to maintain financial integrity and provide affordable, reliable service.

Moreover, in allowing third-party sales to proceed where they carry the hallmark of private activity (e.g., private transaction, behind-the-meter), the Commission is not, as Dominion alleges, unilaterally upsetting the legislature's regulatory scheme.[11] However, *Simpson* acknowledges that the Commission needs the flexibility of a regulatory circumstances test to account for the "variable nature of modern technology"[12] in interpreting the long-standing definition of public utility. In light of the fact that this case involves a technology and an application of a technology that were not a consideration at the time the definition of "public utility" was crafted, it is perfectly appropriate for the Commission to determine whether or not NC WARN and similar third-party providers of rooftop solar are indeed public utilities. Determining that the Commission cannot regulate third-party sales of this nature does not upset the current regulatory scheme, it merely exercises the current discretion built into that scheme to respect the distinction between inherently private and inherently public activities.

III. Authorizing Third-Party Sales of Electricity to Finance Customer-Sited, Behind-the-meter Rooftop Solar Facilities Does Not Impede the "Inherent Advantage of Regulated Public Utilities."

As many parties recognize, an important policy of the Public Utility Act is to promote the inherent advantage of regulated public utilities.[13] Of course, promoting the

[11] Dominion Initial Comments at p. 17.

[12] *Simpson,* 295 N.C. at 524.

[13] N.C. Gen. Stat. § 62-2.

inherent advantage of utilities is just one of several important policies in Section 62-2 with some relation to customer-sited renewable energy:

> (3a) To assure that resources necessary to meet future growth through the provision of adequate, reliable utility service include use of the entire spectrum of demand-side options, including but not limited to conservation, load management and efficiency programs, as additional sources of energy supply and/or energy demand reductions…
>
> […]
>
> (5) To encourage and promote harmony between public utilities, their users and the environment;
>
> (6) To foster the continued service of public utilities on a well-planned and coordinated basis that is consistent with the level of energy needed for the protection of public health and safety and for the promotion of the general welfare as expressed in the State energy policy;
>
> (7) To seek to adjust the rate of growth of regulated energy supply facilities serving the State to the policy requirements of statewide development;
>
> […]
>
> (10) To promote the development of renewable energy and energy efficiency through the implementation of a Renewable Energy and Energy Efficiency Portfolio Standard (REPS) that will do all of the following:
>
> > (a) Diversify the resources used to reliably meet the energy needs of consumers in the State.
> >
> > (b) Provide greater energy security through the use of indigenous energy resources available within the State.
> >
> > (c) Encourage private investment in renewable energy and energy efficiency.
> >
> > (d) Provide improved air quality and other benefits to energy consumers and citizens of the State.

In arguing that third-party sales should be prohibited because they would impact the "inherent advantage" of public utilities, parties concede that this argument rests on weighing the policy goals of the state.[14] If parties could point to a bright-line rule that prohibits third-party sales as a matter of law, they would not rely on these types of policy

[14] *See* Dominion's Initial Comments at p. 17.

arguments. As the list above illustrates, there are multiple objectives to consider beyond the "inherent advantages" of utilities in resolving the question before the Commission.

Even if the Commission focused on the "inherent advantage" of public utilities, this objective is not intended to promote the advantage of the regulatory scheme to the public utilities, but promote the inherent advantages to the people of North Carolina of having regulated monopolies. The focus of Section 62-2 is on the best interests of the citizens of the state, not the shareholders of the multi-state corporations operating as public utilities within the state. The *inherent* advantage of having regulated utilities, as with any natural monopoly, is avoiding uneconomic duplication of facilities and to avoid ruinous competition. There is nothing in the record to indicate that there will be any duplication of facilities or that allowing third-party solar PPAs will lead to ruinous competition.

More importantly, rooftop solar furthers many of the other stated policies promoted and encouraged by Section 62-2. The subsections of Section 62-2 excerpted above provide that it is the policy of the state to encourage demand side reductions and to support the addition of more renewable generating capacity. This means that additional rooftop solar capacity does not result in duplicative generating capacity, as such incremental additions are required as part of the Renewable Energy Portfolio Standard.

Rooftop solar PPAs, thus, present facts to the Commission that easily distinguish the concern about protecting the "inherent advantage" of the utility in *National Spinning*.[15] For example, unlike a rooftop solar facility serving a church, the steam turbine in *National Spinning* meant the potential loss of baseload capacity, as a profitable,

[15] *National Spinning* at p. 5.

high load factor customer was opting to self-generate a large portion of its onsite electricity needs, leading to significant demand curtailment and thereby potentially stranding utility assets developed to serve that particular customer.[16] A rooftop solar facility's generation will generally serve onsite load or export to the grid at times of system peak demand. There is no basis in the record for concluding that rooftop solar will result in the uneconomic curtailment of baseload generation. The risk of duplication of facilities and "ruinous" competition are de minimis with rooftop solar, standing in stark contrast to the circumstances in *National Spinning*.

Table 1. Comparison of Facts Between NC WARN and *National Spinning*

	National Spinning	NC WARN
Agreement Type	Agreement for construction, O&M of certain facilities	PPA for $0.05/kWh for all production
Host Customer's Class	Industrial	Church (presumably Small General Service)
Customer Size	58 to 60 Million kWh/year ($3.1M/1994)	**Unavailable** (presumably low)
Load Factor	High	**Unavailable** (presumably low)
Displacement of Utility Service	"Much of National Spinning's" electricity purchases	**Unavailable** (presumably low displacement)
Generator Type	Steam-Powered Turbine (Dispatchable)	Solar PV (Intermittent)
Generator Size (kW)	7,000 (approx.)	5.2
Location	Washington (rural)	Greensboro (urban)
Exported Power	Sold at avoided cost	Net metered

[16] *See* Transcript of Oral Argument in SP-100, Sub 7 at pp. 28-30, argument of Giselle Rankin for Public Staff (December 18, 1995). Ms. Rankin noted that, if the Commission was going to reconsider its prior reasoning, "it may be better to allow industrial customers and other customers to seek alternatives to utility service at the time that our regulated utilities need to build additional capacity."

This table reveals that many of the facts that were key to the Commission's consideration of the *Simpson* factors in *National Spinning* are simply not known or are not currently before the Commission in this case. The Commission should consider the inherent differences in the two situations, based on the information that it does have, but it should not attempt to construct a factual equivalency between these two cases where there is no basis in the record to do so.

IV. Legislative Consideration and Inaction of an Explicit Exemption for Third-Party Sales Is Not Dispositive of the Current Legal Status of Every Third-Party Provider of Rooftop Solar.

The regulatory status of third-party owners of rooftop solar PV facilities is a matter of first impression for this Commission. Neither the Commission nor any state court has ever applied the *Simpson* analysis to facts similar to the specific facts in this case. Accordingly, the General Assembly may be aware that there is uncertainty regarding the resolution of the question of public utility status (upon any given set of facts), but it cannot be presumed that the General Assembly understands all third-party sales of electricity to be strictly prohibited under the current authoritative construction of Section 62-3(23) required by *Simpson*.

House Bill 245, which would have created an express exception from public utility status for third-party owners of certain renewable generation facilities, was introduced and considered in the past legislative session. While a legislature may be presumed to be aware of the administrative or judicial construction given to a statute, and then that construction becomes part of the law,[17] it cannot be presumed that the General

[17] *See, e.g., Bridges v. Taylor*, 102 N.C. 86, 89 (N.C. 1889).

Assembly assumed that all third-party sales are prohibited simply because House Bill 245—or any prior bill on the subject—was introduced.

Simpson remains the law of the land in terms of how the Commission must determine the scope of its jurisdiction. In light of the Commission's consistent pattern of applying the regulatory circumstances test to **each unique case** before it (until at least 2011),[18] the General Assembly can only presume that third-party providers of electricity from any type of generation source face significant regulatory uncertainty when pursuing a project. *Simpson* requires a case-by-case determination of whether the third party is a public utility under Section 62-3(23). There is no construction of Section 62-3(23) consistent with *Simpson* that establishes an absolute prohibition against all third-party sales.

Moreover, in this case, there has never been a prior construction by the Commission or the courts applying the *Simpson* test to the specific facts of rooftop solar, or more specifically, to an arrangement such as the one presented here. Accordingly, the General Assembly's action or inaction is not dispositive on the current regulatory status of third-party owners of rooftop solar and is not indicative of any recognition by the General Assembly that third-party sales are **categorically** prohibited. The requirements of *Simpson* remain in place for the Commission's determination on the facts before it.

A closer examination of the substance of HB 245 shows that the legislation would have exempted a broad swath of situations and system sizes—far beyond the more discrete exception for rooftop solar facilities sought by NC WARN. HB 245 would allow a customer-sited system of any size, so long as it did not exceed 125% of the customer's

[18] Section 62-2(23) was last amended in 2011, with House Bill 129.

annual onsite load, and of any generation profile (i.e., intermittent wind /solar or dispatchable qualifying biogas/biomass/fuel cell generators). Even if HB 245 had been enacted, the Commission might still be called upon to consider whether facilities that do not fit within the exception crafted by HB 245 are public utilities under state law.

In sum, the introduction of a bill to create an exception from public utility status for certain entities engaged in third-party sales is not dispositive of the General Assembly's understanding that such sales are currently prohibited. Rather, it is reasonable to imply that the General Assembly is aware of the *ad hoc* nature of the Commission's application of the *Simpson* regulatory circumstances test and was creating a broad exemption for owners of renewable generation to alleviate uncertainty for solar providers and investors in furtherance of state renewable energy goals.

V. North Carolina Interfaith Power & Light's Comments Provide the Commission a Compelling Discussion of the Relevance of the Iowa Supreme Court's Decision in *SZ Enterprises*.

As demonstrated in NCIPL's comments, application of the *Simpson* regulatory circumstances test leads to the conclusion that the activity in question here is wholly private and does not invoke the public interest concerns necessary to trigger public utility status under *Simpson*. EFCA agrees with NCIPL's analysis that the relevant parts of Iowa and North Carolina law are strikingly similar and that the Iowa Supreme Court's reasoning to find that a provider of a solar PPA was not a public utility provides useful guidance in applying analogous factors required by *Simpson* to the facts of this case.

SZ Enterprises, LLC v. Iowa Utilities Board[19] ("*SZ Enterprises*") is instructive for three primary reasons. First, the configuration of the third party solar PPA arrangement in *SZ Enterprises* is substantially the same as the arrangement between NC WARN and Faith Community Church. Second, the North Carolina and Iowa statutes defining "public utility" and the exceptions that both statutes apply to that definition are nearly identical. Third, like the judicial review of an Iowa Utility Board ("IUB") interpretation of statute, the deference afforded an agency interpretation of statute in North Carolina is also limited.[20]

In *SZ Enterprises*, Eagle Point Solar ("Eagle Point") sought a declaratory ruling from the Iowa Utilities Board that Eagle Point's construction of a solar system on a city owned building to supply a portion of the building's electric needs through a PPA did not subject Eagle Point to regulation as a public utility in Iowa. In the instant case, NC WARN has filed a petition for a declaratory ruling that the construction of a solar system on a Faith Community Church owned building to supply a portion of the building's electricity needs through a PPA does not subject NC WARN to regulation as a public utility in North Carolina.

The operative language for the definition of what constitutes a public utility, and the exemption from regulation for self-generators from public utility regulation, is nearly identical in North Carolina and Iowa. Similar to Section 62-3(23), the Iowa statute defines a public utility as "any person . . . owning or operating any facilities for: (a)

---

[19] *SZ Enters., LLC v. Iowa Utils. Bd.*, 850 N.W.2d 441 (Iowa 2014).

[20] *See, e.g., Wells v. Consol. Judicial Ret. Sys.,* 354 N.C. 313 (2001) (citing *State ex rel. Utilities Com. v. Public Staff-North Carolina Utilities Com.*, 309 N.C. 195, 211 (1983) ("…it is ultimately the duty of the courts to construe administrative statutes and they may not defer that responsibility to the agency charged with administering those statutes.").

furnishing . . . electricity to the public for compensation."[21] The statute explicitly excludes persons from regulation as a public utility if the person constructs an alternative energy production facility primarily for their own use.[22]

The Iowa Supreme Court determined that the IUB committed legal error in its interpretation of the statute and failure to apply that state's regulatory circumstances test, and found that Eagle Point was **not** a public utility.[23]

A Commission order construing the definition of "public utility" under Section 62-3(23) to determine the scope of its jurisdiction is a mixed question of law and fact. North Carolina law provides that North Carolina courts shall "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action."[24] Failure to include all necessary findings of fact and details is an error of law and a basis for remand.[25] The Commission's application of the *Simpson* factors to the circumstances of this case must also consider legislative policy priorities and explicit exemptions from regulation as a public utility provided in the statute.[26]

VI. Dominion's *Simpson* Analysis Fails to Apply the Regulatory Circumstances Test To The Facts Of This Case.

---

[21] Iowa Code Section 476.1(3)(a).

[22] Iowa Code Section 476.1(5).

[23] *SZ Enterprises,* 850 N.W.2d at 444.

[24] N.C. Gen. Stat. Section 62-94(b).

[25] *State ex rel. Utilities Com. v. AT&T Communications, of Southern States, Inc.*, 321 N.C. 586, 588 (1988).

[26] *Simpson*, 295 N.C. at 524 (holding that "the meaning of pubic in the final analysis be such as will, in the context of the regulatory circumstances, . . . accomplish the legislature's purpose and comport with its public policy goals").

In contrast to NCIPL's thorough analysis of the *Simpson* factors, and the analogous persuasive *Serv Yu* factors considered by the Iowa Supreme Court in *SZ Enterprises*, Dominion's discussion of the *Simpson* factors overlooks the facts specific to this case—and the facts pertinent to rooftop solar PPAs generally. Dominion instead provides a summary of past Commission decisions and concludes that NC WARN's activity is illegal merely because it involves a sale of electricity.[27]

While EFCA agrees with Dominion's statement that the utility provision of electricity to customers is "the most highly regulated of all public utility services in North Carolina,"[28] EFCA reiterates that in order to be regulated as a public utility in North Carolina an entity has to offer services that render that entity a public utility.

In applying the first *Simpson* factor (nature of the industry sought to be regulated), Dominion fails to acknowledge that the service offered by NC WARN is qualitatively different than the service offered by a regulated public utility in this state. Public utilities, as part of the regulatory compact, must stand ready to serve all of a customer's electric requirements. Third-party solar providers, in contrast, provide individual customers—through a private contract—the ability to purchase solar energy on an as-available basis. The electricity that Faith Community Church purchases from NC WARN is generated "behind-the-meter" and does not go through Duke's publicly dedicated distribution network to reach the Church property. Furthermore, the provision of rooftop solar panels is not an indispensible service and NC WARN, like other third party solar providers, does not have an obligation to serve all of a customer's electric requirements.

---

[27] Dominion Initial Comments at p. 16.

[28] *Id.*

In considering the second and third *Simpson* factors (the type of market served by the industry and the kind of competition that naturally inheres in the market), there can be no credible dispute regarding the competitive nature of the rooftop solar industry. Indeed, many utilities have unregulated affiliates that have entered this industry to compete head to head with non-utility third-party providers. Just in the past year, Duke Energy Renewables acquired a majority share of the third-party solar provider REC Solar. Third party solar providers participate in voluntary, competitive industry and, unlike a regulated electric utility, do not receive a guaranteed rate of return. Utilities are well aware that the nature of the rooftop solar business is competitive and largely unregulated by utility commissions across the country.

In considering the fourth *Simpson* factor (effect of non-regulation or exemption from regulation of one or more persons engaged in the industry), Dominion alleges that the effect of non-regulation of third-party providers of rooftop solar would be "shifting costs between customers and the potential for stranded utility investment…."[29] This argument is unsupported by evidence and relies solely on there being factual equivalence between NC WARN's PPA with Faith Community Church and the third-party arrangement contemplated in *National Spinning.* As discussed above, these cases present starkly different sets of facts to such an extent that the precedential value of *National Spinning* to this case is limited. The Commission should recognize these differences in its analysis, including the difference between the 5.2 kW rooftop solar system on the Faith Community Church and the 7,000 kW steam generating plant proposed for the National

[29] *Id.* at 18.

Spinning factory, in determining whether the sale from NC WARN to Faith Community Church is "to or for the public."

VII. Conclusion

EFCA appreciates the opportunity to reply to the opening comments of parties on the Commission's questions. EFCA reiterates that the Commission possesses the full discretion to weigh the particular facts before it to determine whether NC WARN's third-party sale of rooftop customer-sited solar is a sale *to or for the public* and whether the scope of the Commission's jurisdiction includes entities engaged in activities like NC WARN. It is critical to consider that the third-party ownership of rooftop solar calls into question the fundamental rationale for exerting government control over private activities. The characteristics of rooftop solar PPAs are distinctively private in nature and lack the common indicia of public utility service and of matters said to be "clothed with the public interest." EFCA respectfully request that the Commission provide an opportunity for oral argument on this matter.

Dated November 20, 2015

Respectfully submitted,

Thadeus B. Culley (NC Bar No. 47001)
KEYES, FOX & WIEDMAN LLP
401 Harrison Oaks Blvd., Suite 100
Cary NC, 27513
Tele: 510-314-8205
Email: tculley@kfwlaw.com

ATTORNEY FOR ENERGY FREEDOM COALITION OF AMERICA

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. SP-100, Sub 31

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served via facsimile, electronic mail or first-class mail to all parties of record in this proceeding on this 20th day of November, 2015.

Thadeus B. Culley