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

**DOCKET NO. E-100, SUB 113**

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| **In the Matter of** | | |
| **Rulemaking Proceeding to Implement Session Law 2007-397** | ) ) | **NCSEA'S NOTICE OF APPEAL AND EXCEPTIONS** |

NOW COMES the North Carolina Sustainable Energy Association ("NCSEA"), pursuant to N.C. Gen. Stat. § 62-90 and Rule 18 of the North Carolina Rules of Appellate Procedure, and gives Notice of Appeal to the North Carolina Court of Appeals from the 6 June 2016 *Order on NCSEA's Request* ("Order") issued by the North Carolina Utilities Commission ("Commission") in the above-captioned proceeding. For purposes of N.C. Gen. Stat. § 62-90(a), the Order is unlawful, unjust, unreasonable and unwarranted for the reasons set out below and, as such, the Order should be reversed or remanded pursuant to N.C. Gen. Stat. § 62-94(b).

## EXCEPTIONS

NCSEA specifically sets forth the following ground(s) on which it considers the Order to be unlawful, unjust, unreasonable and unwarranted. In the Order, the Commission stated, "The Commission's decision in this matter relies on its interpretation of the statute … ." Order at p. 10. Accordingly, the focus of this appeal is on the Commission's interpretation of the statutory language set out in N.C. Gen. Stat. § 62-133.8(a)(1). N.C. Gen. Stat. § 62-133.8(a)(1) provides:

> "Combined heat and power system" means a system that uses waste heat to produce electricity or useful, measurable thermal or mechanical energy at a retail electric customer's facility.

The Commission erroneously interpreted the statute. The Commission concluded that "[t]he statutory definition of combined heat and power system [("CHP")] is clear that the electricity or useful measurable thermal or mechanical energy must be produced from waste heat." Order at p. 9. The Commission went on to elaborate:

> The definition of CHP system is clear that for purposes of Senate Bill 3, and for purposes of being deemed an energy efficiency measure, the electricity or useful, measurable thermal or mechanical energy must be produced from waste heat. In a bottoming cycle CHP, the waste heat from an industrial process is used to create electricity and potentially thermal energy. In a topping cycle CHP system, the electricity is not produced from waste heat, but rather is produced from a resource like natural gas, which also produces waste heat that is used to produce thermal or mechanical energy. *It is only the secondary thermal or mechanical energy that is produced from the waste heat that qualifies as an energy efficiency measure.*

Order at p. 10 (emphasis added). Based on these statements, the Commission entered an ordering paragraph holding

> [t]hat a topping cycle CHP system does not constitute an energy efficiency measure under G.S. 62-133.8(a)(4), except to the extent that the secondary component, the waste heat component[,] is used and meets the definition of energy efficiency measure in G.S. 62-133.8(a)(4).

Order at p. 11.

At the heart of this appeal is the fact that the italicized language quoted above, upon which the Commission based its ordering paragraph, does not logically flow from a plain reading of the statutory language at issue.

An analogy best illustrates the flaw in the Commission's reasoning. One can imagine a statutory definition of "radio" that reads: "'Radio' means a device that uses a speaker to produce sound." Reasonable readers of this definition will focus on the word "device," with the understanding that use of a speaker is required for the device to constitute a radio but that a radio is a complicated device that is comprised of more than

just the speaker used to produce sound. Similarly, reasonable readers of this definition will reject any interpretation that holds that a radio is nothing more than the speaker used to produce sound.

In the CHP context, the Commission has ordered that "a radio is nothing more than the speaker used to produce sound." It is worth repeating that N.C. Gen. Stat. § 62-133.8(a)(1) reads:

> "Combined heat and power system" means a *system* that uses waste heat to produce electricity or useful, measurable thermal or mechanical energy at a retail electric customer's facility.

(Emphasis added.) A plain reading of the definition ought to focus on the word "system" emphasized above, with the understanding that use of captured waste heat is required for a system to constitute a CHP system but also the understanding that a CHP system is more than just capturing waste heat to produce electricity or useful, measurable thermal or mechanical energy. Further, a plain reading ought to yield rejection of any interpretation that holds that a CHP system is nothing more than the waste heat capturing component of a complicated system. (Indeed, the very phrase "*combined* heat and power system" serves to emphasize how counter-intuitive it is to hold that the waste heat capturing component of a topping cycle CHP system, de-combined from its associated power component, is a CHP system unto itself.)

The Order explains that, "[i]n a topping cycle CHP system, the electricity is not produced from waste heat, but rather is produced from a resource like natural gas, which also produces waste heat that is used to produce thermal or mechanical energy." Order at p. 10. With this statement, the Commission acknowledged that a topping cycle CHP system is (1) a system that (2) uses captured waste heat to produce thermal or mechanical

energy. In other words, the Commission effectively conceded that a topping cycle CHP system qualifies as a "CHP system" under any reasonable reading of the plain language of the statutory definition.

Despite the foregoing, the Commission concluded that, in connection with topping cycle CHP systems, "[i]t is only the secondary thermal or mechanical energy that is produced from the waste heat that qualifies as [a CHP system and thus as] an energy efficiency measure." Given the plain language of the statutory definition, this Commission conclusion was *ultra vires* and represents an unlawful, unjust, unreasonable and unwarranted Commission interpretation of the statutory definition. *See, e.g., State ex rel. Commissioner of Ins. v. Integon Life Ins. Co.*, 28 N.C. App. 7, 11, 220 S.E.2d 409, 412 (1975) ("An administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law."); *see also, In re Town of Smithfield*, 749 S.E.2d 293, 296 (N.C. Ct. App. 2013) (Where a party's interpretation would "giv[e] to the statutory phraseology a distorted meaning at complete variance with the language used[,]" a court is "powerless to construe away [or create a] limitation just because [the court] feel[s] that the legislative purpose behind the requirement can be more fully achieved in its absence [or presence].").

## CONCLUSION

For the reasons set out in the foregoing exceptions, the Order is unlawful, unjust, unreasonable and unwarranted and, as such, the Order should be reversed or remanded pursuant to N.C. Gen. Stat. § 62-94(b).

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, 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 6th day of July, 2016.

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