NO. COA16-811

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF - NORTH CAROLINA UTILITIES COMMISSION; DUKE ENERGY CAROLINAS, LLC; DUKE ENERGY PROGRESS, LLC; VIRGINA ELECTRIC AND POWER COMPANY, d/b/a Dominion North Carolina Power Applicant; Appellees v. N.C. WASTE AWARENESS AND REDUCTION NETWORK, Appellants.	From the North Carolina Utilities Commission Docket No. SP-100, Sub 31

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**BRIEF OF APPELLEE PUBLIC STAFF -
NORTH CAROLINA UTILITIES COMMISSION**

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Appellees	)	
v.	)	
N.C. WASTE AWARENESS AND REDUCTION NETWORK,	)	
Appellants.	)	

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BRIEF OF APPELLEE PUBLIC STAFF - NORTH CAROLINA UTILITIES COMMISSION

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RESTATEMENT OF THE FACTS

Pursuant to Rule 28(c) of the North Carolina Rules of Appellate Procedure, Appellee Public Staff - North Carolina Utilities Commission (Public Staff) makes the following restatement of the facts.

On 14 December 2014, the North Carolina Waste Awareness and Reduction Network (NC WARN) and Faith Community Church of

Greensboro, North Carolina (FCC) entered into a Power Purchase Agreement (PPA), as part of a pilot project, wherein NC WARN agreed to sell the electricity produced from a solar photovoltaic (PV) system mounted on the roof of FCC at a price of $0.05/kWh for a term of three years. (R pp 18-19 and 21-22) On 17 June 2015, NC WARN filed a Request for Declaratory Ruling with the North Carolina Utilities Commission (the Commission), asking the Commission to rule that the PPA between NC WARN and FCC did not subject NC WARN to the Public Utilities Act, under Chapter 62 of the North Carolina General Statutes. In the request, NC WARN argued that the PPA was not a contract to sell electricity but a financing agreement in which FCC was merely paying NC WARN for the upfront costs of the PV system by purchasing the electricity generated by the PV system at the agreed upon price. (R pp 5-25) NC WARN characterized its request as a "test case" in furtherance of its desire to enter into similar funding mechanisms with other non-profit entities in the future.

The North Carolina investor owned utilities and North Carolina Electric Membership Corporation were made parties to the proceeding, and several other interested parties intervened. On 15 April 2016, the Commission entered an Order finding that the PPA between NC WARN and FCC was a third party sales agreement of electricity to or for the public, making NC WARN a public utility under N.C. Gen. Stat. § 62-2 and constituting a violation of N.C.

Gen. Stat. § 62-110. (R pp 308-339) Concluding that NC WARN had knowingly entered into a contract to sell electricity in the exclusive franchise area of a public utility and had sold electricity without permission from the Commission, subjecting itself to sanctions, the Commission determined that penalties should be issued. (R pp 336-37) The Commission further concluded, however, that penalties should be waived upon NC WARN refunding all billings to FCC and ceasing all future sales. (R p 337) From 30 June 2015 through 25 March 2016, NC WARN charged FCC a total of $245.27 for 4563 kWh of electricity produced from the PV system on the roof of FCC. (R p 346) NC WARN filed a Notice of Appeal with this Court on 16 May 2016, contending that the Commission failed to adequately weigh the facts of the case with the criteria set out in *State ex rel. Utilities Commission v. Simpson,* 291 N.C. 519, 246 S.E.2d 753 (1978), and therefore, the Commission's decision was arbitrary and capricious.

ARGUMENT

INTRODUCTION AND STANDARD OF REVIEW

"A rule, regulation, finding, determination, or order made by the Commission is deemed prima facie just and reasonable." *State ex re. Utils. Comm'n v. Public Staff,* 123 N.C. App. 43, 45, 472 S.E.2d 193, 195 (1996). This Court may only alter a decision of the Commission if the Commission's findings, inferences, conclusions or decisions are in excess of statutory authority or

its jurisdiction, affected by errors of law, unsupported by competent, material, and substantial evidence, or arbitrary or capricious. N.C. Gen. Stat. § 62-94(b). *See also State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1986). When determining whether the Commission has made such errors, this Court "shall review the whole record or such portions thereof as may be cited by any party[.]" N.C. Gen. Stat. § 62-94(c). *See also State ex rel. Utils. Comm'n v. Duke Power Co.*, 305 N.C. 1, 5, 287 S.E.2d 786, 789 (1982). This Court's function is not to decide "whether there is evidence to support the position the Commission did not adopt." *State ex rel. Utils. Comm'n v. Piedmont Natural Gas Co.*, 346 N.C. 558, 569, 488 S.E.2d 591, 598 (1997). "[T]he test is whether . . . the Commission's findings and conclusions are supported by substantial, competent, and material evidence." *Id. See also State ex rel. Utils. Comm'n v. City of Durham*, 282 N.C. 308, 322, 193 S.E.2d 95, 105 (1972). It is the Commission's function to determine the credibility and the weight to be given to the testimony provided. *Id.* The Court of Appeals should "presume that the Commission gave proper consideration to all competent evidence presented and "may not properly set aside the Commission's recommendation merely because different conclusions could have been reached from the evidence." *Id.*

The primary issue before the Commission in this case was a simple one: whether NC WARN's sales of electricity to FCC under the PPA, and future sales to non-profits under similar mechanisms, are sales "to or for the public" under North Carolina law. There was no dispute that NC WARN was furnishing electricity to FCC for compensation or that the electricity produced by its PV facility on FCC's roof was not for NC WARN's own use. The matter was therefore properly decided based upon a "paper" hearing and a record consisting of NC WARN's request for declaratory ruling, the PPA, and comments and reply comments of the parties.

As discussed in Section II.B. of this brief, the Commission based its decision in this case on the proper application of *Simpson* to the facts before it and, as the Order shows, set forth in considerable detail its reasoning in arriving at its ultimate conclusion that NC WARN's actions constituted sales of electricity "to or for the public" under North Carolina law.

NC WARN, nevertheless, contends that the Commission applied the wrong law to the facts when finding that the PPA was for the sale of electricity and not a financing arrangement for the equipment provided, the record in this case supports the conclusion reached by the Commission. Instead of applying the wrong law to the PPA, as NC WARN suggests, the Commission merely came to a conclusion different from the one desired by NC WARN, which does not constitute grounds for altering the Commission's Order.

Therefore, this Court should affirm the Commission's Order, holding that the Commission's findings and conclusions were supported by substantial, competent, and material evidence in the light of the whole record and are neither error of law nor arbitrary or capricious.

I. NC WARN's Power Purchase Agreement with Faith Community Church constitutes the sale of electricity to or for the public in violation of North Carolina law, and if allowed to continue, would have a negative effect on the using and consuming public.

A. The General Assembly has not authorized third party sales of electricity in the exclusive territory of a public utility.

Chapter 62 of the North Carolina General Statutes establishes a comprehensive set of regulations for public utilities in North Carolina. The North Carolina General Assembly has vested in the Utilities Commission the authority "to provide fair regulation of public utilities in the interest of the public" and "promote the inherent advantage of regulated public utilities" which allows for the "availability of an adequate and reliable supply of electric power . . . to the people, economy, and government of North Carolina[.]" N.C. Gen. Stat. § 62-2(a) and (b). A "public utility" is defined under Section 62-3(23)a as a person . . . [p]roducing, generating, transmitting, delivering, or furnishing electricity . . . to the public for compensation." The Commission must issue a certificate of public convenience and necessity before any person may construct, operate, or acquire ownership or control

of a public utility plant or system. N.C. Gen. Stat. § 62-110(a). This requirement reflects the policy adopted by the General Assembly that a regulated monopoly can serve the public in North Carolina better than competing suppliers of utility service. *State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 271, 148 S.E. 2d 100, 111 (1966).

There are numerous well-grounded policy reasons for why the General Assembly has thus regulated public utility service in our State. Allowing other electric suppliers into a public utility's exclusive territory would create wasteful duplication of facilities, weaken the inherent advantages of a regulated monopoly, and undermine the ability of many consumers to reap the benefits of the regulatory scheme adopted by the General Assembly. For this reason, under North Carolina law, "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." *Id.*

While the General Assembly has exempted facilities "for a person's own use" (N.C. Gen. Stat. § 62-3(23)a.1), it has not exempted third party sales of electricity, and it is the only body that has the authority and the ability to determine whether such sales are in the best interest of the citizens of North Carolina. This decision should be made with the entire market in mind after gathering the opinions of all stakeholders, not on the facts of

one disputed case with a limited number of parties. Only after all the requisite information is gathered can the General Assembly develop a regulatory framework that will ensure safe and reliable service and reasonable rates for all customers while allowing third party sales of electricity to grow in harmony with the public utility assigned to the territory.

NC WARN, nevertheless, contends that its agreement with FCC is supported by the general statutes because the General Assembly has declared that North Carolina's public policy includes protecting the environment, promoting renewable energy, and "promoting harmony between the utilities, their users, and the environment. N.C. Gen. Stat. § 62-2(a)(5) and (10). This declaration is part of Session Law 2007-397, in which the General Assembly adopted a Renewable Energy and Energy Efficiency Portfolio Standard applicable to public utilities, electric membership, corporations, and municipalities. This legislation, which includes a solar set-aside requirement, has been a significant factor in making North Carolina "one of the leaders in adding renewable generation, a large percentage being solar," as noted in the Commission's Order. (R p 335) This statutory provision is not a general directive superseding established policy favoring monopoly franchises for electric utilities and the statutory structure for regulating the rates and service of entities holding such franchises. Rather, it is set in the context

of a regulatory scheme that recognizes the public benefits of economies of scale, engineering expertise and operational experience, financial stability, and safe and reliable service at reasonable rates associated with public utilities under Commission oversight. Permitting NC WARN or any other entity to circumvent the Commission's authority will allow them to operate outside the regulatory safeguards currently afforded to public utility customers and erode the inherent advantages of the regulated monopoly.

As recently as the 2015-2016 legislative session, the General Assembly considered whether to adopt a bill that would permit third party sales of electricity from an on-site renewable energy facility, but the bill was not adopted. HB 245, 2015-2016 Sess. (N.C. 2015). Absent an enactment of legislation such as HB 245, or a showing that the public utility holding the certificate to provide electric service within the geographic area is not ready, willing, and able to serve all customers in that area, neither the Commission nor this Court has the authority to permit a third party to do so. The Commission's Order should be affirmed because NC WARN is producing and furnishing electricity in violation of North Carolina law and only the General Assembly can change the law to allow a third party to sell electricity within the exclusive service territory of a public utility.

B. NC WARN is providing electricity "to or for the public" under the circumstances described by the North Carolina Supreme Court in *Simpson*.

Under the express terms of the PPA, NC WARN is a *de facto* public utility because it is providing electricity to or for the public under the regulatory circumstances set out by the North Carolina Supreme Court in *Simpson*. In that case, William D. Simpson, a medical doctor and the owner of a two-way radio and beeper service provided to a county medical society, applied to the Commission for an exemption from regulation, claiming that he was not a public utility with the definition of that term in N.C. Gen. Stat. § 62-3(23). Dr. Simpson argued that his radio communications service was not offered to the public because it was only offered to members of the Cleveland County Medical Society. The Commission found that the doctor provided the service "to or for the public." This Court affirmed the Commission's Order, and Simpson appealed to the Supreme Court. *Simpson* at 520, 246 S.E.2d at 754.

Upon review, the Supreme Court held that "one offers service to the public within the meaning of [N.C. Gen. Stat. § 62-3] when he holds himself out as willing to serve all who apply up to the capacity of his facilities." *Id.* at 522, 246 S.E.2d at 755 (*citing Carolina Tel.*, 267 N.C. at 268, 148 S.E.2d at 109). Further, the *Simpson* Court held that "[i]t is immaterial, in this connection, that the service is limited to a specific area and his facilities

are limited in capacity." *Id.* The Court then stated that when determining what "the public" is in a certain instance "depends on the regulatory circumstance of that case" and that "[s]ome of the 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." *Id.* at 524, 246 S.E.2d at 756. In affirming this Court's decision, the Supreme Court stated that even if the entire market did not become completely unregulated, the possibility of an unregulated market could burden what is left of the regulated market with higher prices for the service. *Id.* at 525, 246 S.E.2d at 757.

Following the Supreme Court's reasoning in *Carolina Tel.* and *Simpson*, this Court should hold that NC WARN is providing electricity to the public up to the capacity of its facilities and, therefore, is a public utility under N.C. Gen. Stat. § 62-3(23)a.1 and is operating in violation of the requirements of N.C. Gen. Stat. § 62-110. NC WARN states that the electricity generated from the PV system is only for FCC use and that any excess electricity will be provided to DEC's grid. (Appellant Brief at 8) Therefore, NC WARN is selling electricity up to the capacity of its facilities at all times.

Applying the regulatory circumstances noted by the *Simpson* Court further illustrates that NC WARN is functioning as a public utility. The nature of the industry to be regulated and the type of market served in this case is the electric utility service/sales market. Pursuant to N.C. Gen. Stat. § 62-110, Duke Energy Carolinas (DEC) must serve all who request electricity service in its exclusive territory. Here, NC WARN is attempting to sell electricity to FCC in that same territory and has indicated that if allowed to do so it will continue to seek out other customers. Indeed, NC WARN states multiple times in its filings before the Commission and this Court that this is a "test case" and that a favorable ruling could create a revenue stream, allowing NC WARN to fund similar projects in the future. (R pp 5, 8-9, 57, 269, and 353). The PPA even states that this is a "pilot project." (R p 21). Further, if NC WARN is permitted to sell electricity to DEC's customers, other private entities may attempt to enter into the market and take advantage of this new business opportunity. This will upset the electric service/sales market that the General Assembly has established and determined to be best for the State.

The kind of competition that naturally inheres in the market and the effect of non-regulation or exemption are of particular concern in this case. There is no natural competition in the retail market for electricity, and if NC WARN and other third party generators are allowed to sell electricity to DEC customers, the

remaining body of DEC's rate payers could be significantly impacted. Competing electric providers would likely not hold themselves out as willing to provide service to the public at large, but instead would focus on luring the customers with the highest profit potential, such as commercial and industrial customers with large energy needs and ample rooftop space, a process otherwise known as "cream skimming" or "cherry picking." To make up for the displaced sales due to the loss in customer load, the utility would be forced to spread the same fixed costs across an ever smaller group, resulting in higher rates for customers whose service is still wholly regulated, mostly small commercial and residential customers. Additionally, as more customers leave a system for a third party supplier, the need for existing generation assets would become stranded with only the smaller customer base remaining to bear the costs. Such a scenario would create system inefficiencies and raise customer costs, which is precisely the outcome North Carolina's long-standing regulatory structure, the Commission, and the *Simpson* Court have sought to avoid.

C. The function of NC WARN's PPA is to provide electricity to FCC for compensation and not to provide a financing arrangement to pay for the PV system.

Both NC WARN and Amici Faith Groups argue that the Commission erred in considering only the form of the PPA and ignoring the substance. They further argue that this Court requires, and the

Commission neglected, to analyze "the function of the service provided" by NC WARN to FCC, rather than applying "a literal interpretation of the definition of a public utility." *BellSouth Carolinas PCS, L.P. v. Henderson Cnty.*, 174 N.C. App. 574, 578, 621 S.E.2d 270, 273 (2005). (Appellant Brief at 14; *Amici* Brief at 3) NC WARN further argues that the Commission did not analyze why the PPA was necessary. All of these arguments are without merit.

The teaching of *Simpson* is that whether an enterprise is a public utility within the meaning of a regulatory scheme "must 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.'" *Simpson*, at 524, 246 S.E.2d at 756-757. The "instruction" to emphasize the function of a service rather that the literal wording of the statute when analyzing the statutory definition of "public utility" comes not from *Simpson* but from a case having to determine whether a cellular telephone company was a "public utility" for purposes of building a tower under a municipal zoning ordinance. *Henderson Cnty.*, 174 N.C. App. at 578, 621 S.E.2d at 273. Although wireless telecommunications providers are regulated by the Federal Communications Commission, not the Utilities Commission, the Court found some guidance in *State ex rel. Utilities Commission* v. *Southern Bell Telephone and Telegraph Co.*, 326 N.C. 522, 527-28,

391 S.E.2d 487, 490 (1990), which in turn found guidance and quoted from *State ex rel. Utilities Commission* v. *Southern Bell Telephone and Telegraph Co.*, 307 N.C. 541, 544, 299 S.E.2d 763,765 (1983). Both cases involved the argument that publishing a yellow pages directory is not an essential part of transmitting messages across telephone lines and therefore is not a public utility function. The North Carolina Supreme Court rejected this argument in each case, saying it was a far too narrow interpretation of the statutory definition of public utility. None of these cases supports the arguments of NC WARN and *Amici* Faith Groups, which essentially advocate that the statutory definition of "public utility" in N.C. Gen. Stat. § 62-3(23)a be read out of the statute altogether.

While the NC WARN argues that the Commission did not analyze the PPA in great detail, it is clear from the terms of the PPA that NC WARN is selling electricity to FCC. The agreement, signed by representatives of FCC and NC WARN, is titled "Solar Freedom Project: Power Purchase Agreement." (R p 17) Page 2 of the agreement states that the "PPA term is for three years . . . with the option of extending the agreement from year-to-year if both parties agree." (R p 18) On page 2, the PPA states that "[a]t the end of the agreement term, if both parties agree, or at any time upon mutual agreement between the parties, FCC may assume ownership of the system from NC WARN at no cost." (R p 18) Section (c) on

page 3, provides that "FCC will purchase all the power the system produces" and "[w]hile the PPA is in effect the purchase price is [$0.05] per kWh." (R p 19) The PPA also sets out that "monthly payments will be the product of the price per kWh multiplied by the actual kWh output for the calendar month as determined by the web monitoring program." (R p 19) On page 5 of the PPA, section (d) states that "FCC acknowledges the system will remain the property of NC WARN and that this PPA does not constitute a contract to sell or lease any part of the PV system's equipment to FCC." (R p 21)

Thus, the entirety of the PPA establishes that NC WARN is producing, generating, transmitting, delivering, or furnishing electricity to FCC for compensation. Nothing in the PPA supports the conclusion that it is a financing agreement as NC WARN contends. The terms of the agreement, as the title indicates, establish a volumetric sale of electricity by NC WARN to FCC. Further, the agreement states plainly that it is not a contract for the sale or lease of the PV system. If this were a financing agreement to help FCC pay for the upfront cost of the PV System, the agreement would naturally include a total amount owed, the number of payments before the total is reached, and the conditions under which FCC would take ownership of the system after payment is complete. Instead ownership of the system is not transferred at the end of the PPA term or upon completion of payment but at

any time it is mutually agreed upon by the parties and for no cost. (R p 18) Even if FCC were to obtain ownership after paying off the cost of the system, based on the bill rendered between June 2015 and March of 2016, it would take just over 60 years to pay back the total system cost of approximately $20,000. (R pp 23 and 346) Clearly, the only thing of value FCC is obtaining for its payments under this agreement is the electricity created by the PV system owned by NC WARN.

The record shows, and the Commission correctly determined, that the PPA is an agreement for the sale of electricity. If the parties intend the PPA to function as a financing mechanism, they can change the PPA, as the Commission's Order describes, to permit payments that would be legal within the current regulatory framework, allowing FCC to repay NC WARN for the upfront costs of the PV system. NC WARN states that such financing options are not feasible and that the FCC and other non-profit entities cannot afford PV systems without financing through the sale of electricity. NC WARN, however, does not provide any support for these assertions, only citing to its own statements in its Request for Declaratory Ruling or Reply Comments before the Commission, without any documentation to confirm them. Therefore, unless and until the PPA is amended to conform to the current law, the Commission's analysis of the function of the PPA and NC WARN's status as a public utility must be affirmed.

D. This Court should not follow the Iowa Supreme Court's ruling in Eagle Point because of the differences in the PPA terms, statutory exemptions, and the prevailing case law in North Carolina.

NC WARN contends that this Court should follow the precedent set by the Iowa State Supreme Court, which held that a third-party PPA between a solar developer and a city government was lawful. *SZ Enters. LLC d/b/a Eagle Point Solar v. Iowa Utils. Bd.*, 850 N.W.2d 441(Iowa 2014). *Eagle Point*, as the Commission found, is distinguishable from this case. The PPA at issue in *Eagle Point* stated that at the end of the agreement the city would assume ownership of the facility. *Id.* at 445. NC WARN's PPA explicitly states that it is not a contract for sale or lease of the PV system. Statutorily, Iowa has a utilities regulation exemption for a person providing electricity to five or fewer customers from an alternative energy facility that produces electricity primarily for that person's own use. Iowa Code § 476.1 (2016). While N.C. Gen. Stat. 62-3(23)a.1 does enumerate an exemption for electric generating facilities for a person's own use, it does not allow that person to furnish that electricity to others. Lastly, the Iowa Supreme Court used factors from *Natural Gas Service Co. v. Serv-Yu Coop. Inc.*, 70 Ariz. 235, 237-38, 219 P.2d 324, 325-26 (Ariz 1950), to determine whether the solar generating facility was "sufficiently clothed with public interest to justify regulation." *Eagle Point*, 850 N.W2d at 466. Our Supreme Court

has provided a different test in *Simpson* to determine a company's public utility status.

CONCLUSION

For the foregoing reasons, the Public Staff respectfully requests that the Court affirm the Commission's Order denying NC WARN's Request for Declaratory Ruling.

Respectfully submitted, this the 19th day of December, 2016.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to Withdraw as Counsel has been served upon counsel for all parties by electronic mail, addressed as follows:

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This the 19th day of December, 2016.

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