

BEFORE THE NORTH CAROLINA

UTILITIES COMMISSION

DOCKET NO. SP-100, SUB 31

In the Matter of:

Request by NC WARN for a
 Determination that its Proposed
 Activities would not Cause it to be
 Regarded as a Public Utility Pursuant to
 N.C. Gen. Stat. § 62-3(23)

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**INITIAL COMMENTS OF
 INTERFAITH POWER & LIGHT**

Pursuant to the North Carolina Utilities Commission's (the "Commission") September 30, 2015 Order Requesting Comments in the above-referenced docket, North Carolina Interfaith Power and Light ("NCIPL") submits the following comments in support of a determination that the use of Power Purchase Agreements ("PPAs") to pay for the installation of solar photovoltaic ("PV") systems on a customer's property does not subject the third-party owner of such a system to regulation as a public utility.

INTRODUCTION

On June 17, 2015, NC Waste Awareness and Reduction Network ("NC WARN") filed a request for a declaratory ruling from the Commission that its solar financing arrangement with the Faith Community Church of Greensboro would not cause NC WARN to be regulated as a "public utility" under N.C. Gen. Stat. § 62-3(23). NC WARN seeks a declaratory ruling as to its particular power purchase agreement for the solar panels installed on the Faith Community Church. For many faith congregations

interested in installing solar panels, the up-front costs present a significant barrier that can be overcome with financing options like PPAs. NCIPL respectfully requests that the Commission issue a declaratory ruling that NC WARN's arrangement does not subject it to regulation as a public utility. Moreover, NCIPL seeks clarification that other third-party owners who supply PPA financing for solar PV systems on the property of and for the use of individual customers, including faith congregations, would not trigger regulation as public utilities, regardless of whether the third-party owner was a non-profit or for-profit entity.

In the comments that follow, NCIPL addresses the questions posed by the Commission in its September 30, 2015 Order.

I. THE COMMISSION HAS THE EXPRESS LEGAL AUTHORITY TO ALLOW THIRD-PARTY SALES OF ELECTRICITY FROM BEHIND-THE-METER SOLAR PV SYSTEMS THAT ARE AFFIXED TO THE PROPERTY OF A CONSUMER AND ARE FOR THAT CONSUMER'S USE

The central legal question before the Commission is whether a PPA used to finance behind-the-meter installation of a solar PV system on the property of—and for the use of—a religious institution or other nonprofit customer constitutes a sale of regulated electricity services “to the public.” As set forth in more detail below, North Carolina courts have long dictated a flexible—rather than a rigid or literal—approach to answering the question of whether any given transaction involves sale of regulated utility services to the public. Because a key component of that inquiry is the actual nature or function of the service being provided, NCIPL will first explain how the typical PPA operates.

A. A PPA Functions as a Method for Financing the Installation of Behind-the-Meter Solar PV Systems on a Customer's Property and for that Customer's Use

PPAs in which a third-party installs and owns the solar PV system on a customer's property and sells the power from that system back to the customer is a method of financing the installation of solar PV systems. *SZ Enterprises, LLC d/b/a Eagle Point v. Iowa Utilities Bd.*, 850 N.W.2d 441, 453-54 (Iowa 2014).¹ Under a typical PPA arrangement, much like the one initiated by NC WARN and attached to its Request in this proceeding, the developer installs a solar PV system on the property of the customer and for that customer's use. The solar PV system is installed behind the customer's meter, meaning that the power generated by the system primarily goes to meeting the energy needs of that customer, with any excess power delivered to the grid by standard net-metering arrangements. The developer or other third-party retains ownership of the solar PV system. Pursuant to the PPA, the on-site customer pays for the installation of the solar PV system by paying the owner a fixed per kilowatt hour rate—a rate that is typically lower than the retail rate paid by the customer to the local utility. The payments for electricity produced are collected by the third-party owner of the system over a fixed term, ranging anywhere from ten to twenty-five years. Those payments—along with any renewable energy tax credits or other incentives—allow the third-party owner of the system to recover the costs of installing the system and earn a return on the investment. At the end of the PPA term, a customer is often given the options of

¹ See also *Solar Power Purchase Agreements*, an overview from the Environmental Protection Agency, available at <http://www3.epa.gov/greenpower/buygp/solarpower.htm>; Solar Energy Industries Association: *Fact Sheet on Solar Power Purchase Agreements*, available at <http://www.seia.org/research-resources/solar-power-purchase-agreements>; National Renewable Energy Laboratory: *Fact Sheet Series on Financing Renewable Energy Projects: Power Purchase Agreement Checklist for State and Local Governments*, available at <http://www.nrel.gov/docs/fy10osti/46668.pdf>; Samuel Farkas, *Third-Party PPAs: Unleashing America's Solar Potential*, 28 J. Land Use & Envtl. L. 91, 98–100 (2012).

purchasing the system for a nominal fee, extending the term of the agreement, or having the third-party owner remove the system.

The PPA between Faith Community Church and NC WARN at issue in this proceeding follows the typical PPA arrangement. The contract is “for the installation and maintenance of a solar electric system” that is affixed to the property of Faith Community Church (the “Church”) and supplies electric power for its use. At no upfront cost to the Church, NC WARN provided the solar PV system. In exchange, the Church agreed to pay for the system by reimbursing NC WARN on a monthly basis based on the electrical output of the solar PV system. The per kilowatt hour rate set by NC WARN is less than the amount otherwise paid by the Church for electricity. Any excess power generated is supplied to the grid per standard net metering rules. NC WARN’s PPA is slightly different from a typical PPA in that NC WARN plans to only offer PPA financing to non-profit entities such as the Church and NC WARN has included, for the Church’s protection, an option to grant the solar PV system to the Church if the PPA is ultimately declared unlawful.

PPAs provide numerous benefits to customers, particularly to faith communities and other nonprofits that cannot take direct advantage of tax credits to help pay for the installation of solar PV systems. A PPA allows a church, synagogue, mosque, or other facility of a faith community to enjoy the benefits of the tax credits and other incentives in the form of lower and predictable electricity rates over the term of the contract. Just as important, a PPA allows such faith communities or nonprofits the ability to install solar PV systems on their facilities and for their use with little or no up-front costs.

Financing the installation with a PPA also limits the risk of installing an underperforming solar PV system. Because customer pay is related to performance of the system, third-party owners can only earn their expected return if the system produces as advertised. In other words, the owner has an incentive to offer only those solar PV systems that are reasonably assured of efficient production and to ensure optimal performance of the systems once installed. The PPA arrangement thus has a built-in consumer protection.

As 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 in how the customer pays for the system. As noted above, religious institutions and other nonprofits cannot directly benefit from tax credits to help make a solar PV system affordable. Many other North Carolinians do not earn sufficient income to benefit from renewable energy tax credits. Others do not have access to enough money to purchase the system outright, or do not have access to sufficient credit to borrow money to install a system. Thus many who would otherwise stand to benefit from the installation of solar PV systems are instead shut out of the market altogether, unduly limiting the deployment of low-cost, clean, renewable energy.

B. Third-Party Sales of Electricity Generated from Solar PV Systems that are Installed Behind the Meter and Affixed to the Property of the Consumer for that Consumer's Use do not Constitute Sales "to the Public"

1. North Carolina Courts examine the function of the service provided to determine whether a sale is to the public.

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.” A “public utility” is defined to include anyone “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.” N.C. Gen. Stat. § 62-3(23)(a)(1). This definition begins, but does not the end, the inquiry.

The term “public” is not defined by the North Carolina General Statutes. When determining whether a sale is to the public, the North Carolina Supreme Court has adopted a flexible approach: “whether any given enterprise is a public utility within the meaning of a regulatory scheme does not depend on some abstract, formulistic definition of ‘public’ to be thereafter universally applied.” *State ex rel. Utilities Commission v. Simpson*, 295 N.C. 519, 524, 246 S.E.2d 753, 756 (1978). The Commission instead is directed to place emphasis on the “*function* of the service provided, rather than a *literal interpretation* of the definition of a public utility.” *Bellsouth Carolinas PCS, L.P. v. Henderson County*, 174 N.C. App. 574, 578, 621 S.E.2d 270, 273 (2005) (citing *Utilities Comm. v. Southern Bell Tel. & Tel. Co.*, 326 N.C. 522, 527-528, 391 S.E.2d 487, 490 (1990))(emphasis supplied).

As set forth above, the function of the service provided pursuant to a PPA is an alternative method of paying for the deployment of solar PV systems. A PPA is a bargained for, specifically defined transaction between the owner of the system and a person or entity that desires to—or, as is the case with NCIPL’s affiliated faith communities, that are morally compelled to—install solar PV on their property and for

their use. It is not primarily a vehicle for selling electricity; in no event can any particular behind-the-meter installation on a given customer's property be used to sell electricity to the general public.

NC WARN's request for a declaratory ruling regarding its PPA with the Faith Community Church puts this legal question and accompanying facts and circumstances squarely before the Commission. Although the Commission has previously suggested that N.C. Gen. Stat. § 62 prohibits third-party sales of electricity, that statement was incidental to the issues in another proceeding, namely the authorization of two GreenPower pilot programs. *See In the Matter of NC GreenPower*, N.C.U.C. Docket No. E-100, Sub 90 (Nov. 18, 2014). Because the Commission's most recent statement regarding third-party sales was not essential to that proceeding and the issue had not been fully briefed by any party, that previous statement should not be considered binding on the Commission. *State, ex rel. Utilities Comm'n v. Cent. Tel. Co.*, 60 N.C. App. 393, 395, 299 S.E.2d 264, 266 (1983) (holding that a court is not bound by *obiter dictum* from a prior case that "was not decided on the issue that is central to the case" currently before it). More importantly, as set forth in more detail below, the Commission has previously allowed third-party sales of otherwise regulated services in particular contexts that closely mirror the PPAs that are at issue in this case. This proceeding provides an opportunity for the Commission to directly address this legal question.

2. The circumstances set forth in *Simpson* dictate a finding that behind-the-meter sales of solar power are not sales to the public.

The state Supreme Court has articulated circumstances that must be considered before deciding whether any particular transaction involves a sale to the public that

would render the seller a public utility. These factors inform the flexible, context-specific analysis that is required:

(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.

Simpson, 295 N.C. at 524, 246 S.E.2d at 756-57; *see also* 64 Am. Jur. 2d Public Utilities § 1 (setting forth additional criteria that courts or utilities commissions can consider when determining whether any given arrangement subjects an entity to regulation as a public utility, such as the entity's monopolization or intent to monopolize a geographical territory). No single factor controls. *Bellsouth Carolinas PCS, L.P. v. Henderson County*, 174 N.C. App. 574, 621 S.E.2d 270 (2005). Considering the *Simpson* factors, it would be improper to subject third-party owners of solar PV systems that are financed with PPAs to regulation as public utilities.

PPAs are merely a vehicle for paying for the installation and use of solar PV systems. In other words, the primary purpose or nature of a business that utilizes a PPA as a method of payment is the installation of solar PV systems for the use of individual customers. The method customers use to pay for alternative, self-generating energy sources, when such installations serve on-site energy needs and otherwise comport with North Carolina law, does not inherently require Commission oversight and regulation. For example, residential customers are free to install solar PV systems on their houses. For a system with a rated capacity of less than two megawatts, all that is required is the filing of a Report of Proposed Construction with the Commission and an application for interconnection with the incumbent utility. *See* N.C. Gen. Stat. § 62-110.1(g); NCUC

Rule R8-65 (2015). Whether such a PV system is paid for out of pocket, financed with a loan from a bank, or paid for with a PPA to a third-party, it need not trigger public utility regulation.

This Commission came to a similar conclusion in the Progress Solar Investments docket. *In Re: Request by Progress Solar Investments, LLC, and Progress Solar Solutions, LLC, for a Determination*, N.C.U.C. Docket No. SP-100, Sub 24 (Nov. 25, 2009).² The Commission determined that Progress Solar would not be treated as a public utility for its business of selling solar-powered street lighting. The Commission ruled that Progress Solar does not provide solar lighting to the general public, but instead provides solar-powered lighting “only as a result of bargained for transactions and pursuant to agreed-upon terms and conditions.” *Id.* The same is true of a PPA entered into between the owner of the solar system mounted on the customer’s property and the customer who desires to pay for that system. It is a bargained for exchange pursuant to agreed-upon terms and conditions, supplies usually only a portion of that customer’s power needs, and does not remove the customer from the incumbent utility’s reach. Typically, third-party owned solar PV systems compliment, rather than supplant, existing markets for the sale of electricity.

Unlike public utilities, which must serve everyone in their service territory, solar PV systems are not suitable for every location. Factors limiting solar PV suitability

² As set forth and distinguished in NC WARN’s Request for Declaratory Ruling, a seemingly different result was reached by the Commission in *Request for a Declaratory Ruling by National Spinning Company, Inc. and Wayne S. Leary, d/b/a Leary’s Consultative Services*, N.C.U.C. Docket SP-100, Sub 7 (April 22, 1996).

include rooftop shading, orientation, and tilt.³ Even those that have suitable roof space and install solar PV systems typically remain an electricity customer of their incumbent utility.

As set forth above, the PPA is a particularly attractive vehicle for financing the provision of solar PV systems to religious institutions and nonprofits because those entities cannot utilize otherwise available tax credits to help offset the cost of such systems. The Commission has previously taken into account such financing and tax advantages when ruling that the sale of steam to an industrial facility from a third-party owned boiler in that customer's facility does not involve regulated sales to the public. *In re Natural Power, Inc. et al*, Order on Request for Declaratory Ruling, N.C.U.C. Docket No. SP-100, Sub 1 (Dec. 22, 1988); *see also In re Iredell Landfill Gas LLC*, Orders Ruling on Public Utility Status, N.C.U.C. Docket No. SP-100, Sub 19 (Aug. 14, 2000, Dec. 21, 2001, June 21, 2002) (allowing third-party sales of landfill gas after considering *Simpson* factors and public interest in encouraging productive use of landfill gas). In the *Natural Power* proceeding, Natural Power and Raleigh Landfill Gas Corporation requested a ruling that they would not be treated as public utilities after entering into an agreement to sell natural gas from a Raleigh landfill to a nearby pharmaceutical plant—one otherwise served by an incumbent natural gas public utility. At the pharmaceutical plant, Natural Power would use the landfill gas to operate a boiler that it owned and operated to produce steam for sale to the pharmaceutical company. Natural Power's use

³ National estimates incorporating these limitations show that only twenty-two to twenty-seven percent of residential rooftop area is suitable for hosting a solar PV system on site. *See* National Renewable Energy Laboratory, Supply Curves for Rooftop Solar PV-Generated Electricity for the United States (Nov. 2008), available at <http://www.nrel.gov/docs/fy09osti/44073.pdf>.

of the landfill gas would meet approximately two-thirds of the plant's steam requirements.

When considering the *Simpson* factors in the *Natural Power* proceeding, the Commission found as an initial matter that Raleigh Landfill was engaged in the sale of natural gas to Natural Power, and that Natural Power was the third-party owner of a boiler operated on the site of the customer and for the customer's end use. The Commission followed the dictates of *Simpson* and considered the underlying nature of the transaction before deciding the ultimate issue of whether either entity was operating as a public utility. The Commission found relevant that the transaction was structured as it was in part so that the company could "utilize certain financing and tax advantages." *Id.* In addition, the landfill gas was not being sold to other customers, and the steam produced from the gas was not distributed to other parties. The Commission also found it significant that Natural Power would not meet all of the industrial customer's need for steam and natural gas. Finally, the Commission considered the public benefits of making productive use of otherwise harmful landfill gas. These considerations closely mirror those that inhere to third-party owned solar PV systems. The PPAs used to finance such PV systems are designed to take advantage of financing and tax advantages not otherwise available to all consumers. Like the natural gas and steam provided to the pharmaceutical company, the solar electricity generated from any given PV system is used only for the customer on whose property the system has been installed. Like the arrangement between Natural Power and its customer, a solar installation financed with a PPA does not typically meet all of the customer's needs for electricity.

In *Simpson*, the issue before the Court was whether the operator of two-way radio communications—an industry otherwise regulated as a public utility—could escape designation as a public utility by only providing radio services to the members of a particular medical society. In concluding that the operator was selling services to the public, the Court paid particular attention to the competition in the market and the effect of non-regulation on other participants in the market. The state Supreme Court found that there was a small market for radio services, and exempting any one service provider because it purported to have a limited class of customers, such as physicians, would quickly lead to an unregulated market, defeating the clearly stated public policy of the state. Such is not the case when a third-party owner offers a PPA as a means of financing a solar PV system on a customer's property. Instead, third-party owners of solar PV systems are subject to the same regulatory regime as those entities that own the solar panels on their property. Unlike in *Simpson*, in which the radio operator sought to carve-out an exception that would allow it to compete unfairly against other regulated radio operators, the third-party owner is not competing against the incumbent utility, which typically retains the customer served by the PPA. The PPA provider is instead providing a kind of service otherwise not made available by the utility. Competitors to third-party installers operate in the same regulatory environment.

Moreover, allowing PPAs to finance third-party owned solar PV systems would have little or no effect on those engaged in the relevant industry. Currently, neither installers of solar PV systems that are purchased outright by consumers nor those consumers who buy such solar PV systems for their own use are regulated as public utilities. Those who use solar PV systems to generate electricity for their own use who

reside in the territory of a public utility may do so without infringing on that utility's exclusive franchise. Nor is there any statutory limit on the amount of self-generation that is allowed under state law. *See* N.C. Gen. Stat. §§ 62-3(11). Unlike the radio operator in *Simpson*, exempting third-party owners of solar PV systems financed with PPAs would not have the effect of leaving the market completely unregulated. It would instead level the playing field between those who can afford to install systems with cash (or personal loans) and faith institutions, other nonprofits, or those without the upfront cash to purchase such systems.

For comparison, behind-the-meter installations of energy efficient appliances, insulation, or other energy savings measures have some impact on the demand for electrical service in any given territory. The marginal effect of such efficiency measures on aggregate demand for public utility electrical services does not change depending on how the customer pays for those investments. Whether such investments in cost-saving and energy-saving efficiency measures are paid for out-of-pocket by the consumer, or financed by a third party and repaid out of a portion of those savings, would not vary the impact of those efficiency measures on the electric system.

So it is with solar PV systems. A customer initiated solar PV system may have a marginal impact on the need for electrical services provided by a public utility—just like behind-the-meter investments in energy efficiency— whether paid for out of pocket or financed with a PPA. Such customer-initiated, behind-the-meter investments do not subject the provider of those ancillary services to regulation as public utilities.

3. Under nearly identical circumstances—and considering a nearly identical definition of a public utility—the Iowa Supreme Court held that third-party sales of behind-the-meter solar PV electricity are not sales to the “public.”

In 2014, the Iowa Supreme Court decided a case directly analogous to the proceeding currently before the Commission. The similarities between the two cases and the relevant law warrant a detailed review of the Iowa decision. The Iowa Supreme Court ruled that a PPA to pay for behind-the-meter installation of solar PV electricity does not constitute a sale of electricity to the public and that third-party owners of such solar PV systems are not subject to regulation as public utilities. *SZ Enterprises, LLC d/b/a Eagle Point Solar v. Iowa Utilities Bd.*, 850 N.W.2d 441 (Iowa 2014). Much like NC WARN in this docket, Eagle Point Solar brought a declaratory action before the state utilities commission—the Iowa Utilities Board (“IUB”)—seeking a determination that it would not be considered a “public utility” or “electric utility” as a consequence of entering into a PPA to supply a solar PV system to the city of Dubuque. Though the IUB initially ruled that such a PPA did subject Eagle Point to regulation as a public utility, this ruling was reversed by the Iowa courts.

Because the Iowa statute at issue in *Eagle Point* is functionally identical to North Carolina law, and because the Iowa Supreme Court has adopted a similar approach to North Carolina courts when defining the “public,” this ruling provides particularly persuasive authority for the Commission.

The definition of public utility at issue in *Eagle Point* is identical in all material respects to the definition under North Carolina law. Under Iowa law, a “public utility” includes “any person, partnership, business association, or corporation...owning or

operating any facilities for...[f]urnishing...electricity to the public for compensation.”

Iowa Code § 476.1 (2011). The definition involves three basic components: (1) an entity that owns or operates a facility (2) for furnishing electricity (3) to the public for compensation. The Iowa statute mirrors the North Carolina definition of public utility. Like the Iowa statute, the North Carolina law defines a public utility to include any entity that “owns or operates” any “equipment or facilities” for producing or “furnishing electricity to... the public for compensation.” N.C. Gen. Stat. § 62-3(23)(a)(1).

As in North Carolina, the Iowa courts have adopted a functional approach to determining whether a particular service ought to be regulated as a public utility. Indeed, the Iowa and North Carolina Supreme Courts have cited each other’s decisions for the proposition that “a ‘practical,’ multifactored approach [is] required to determine” whether “a certain activity [is] clothed with sufficient public interest to qualify as sales ‘to the public.’” *Eagle Point*, 850 N.W.2d at 455 (citing *Simpson*, 295 N.C. at 524, 246 S.E.2d at 757 (which itself cited a previous Iowa Supreme Court decision in *Northern Natural Gas Co.*, 161 N.W.2d 111 (Iowa 1968), noting with approval that this “type of flexible interpretation...is necessary to comport legislative purpose with the variable nature of modern technology”).

Adopting this practical, context-specific approach, the Iowa Court rejected the IUB’s overly-simplistic determination that the PPA subjected *Eagle Point* to regulation as a public utility because it was engaged in the sale of electricity on a per-kilowatt hour basis. Instead, the Court in *Eagle Point* analyzed the functional aspects of the PPA in light of eight factors established by the Arizona Supreme Court in *Natural Gas Service Co. v. Serv-Yu Co-op.*, 219 P.2d 324 (Ariz. 1950).

These *Serv-Yu* factors echo the functional considerations that North Carolina courts use to determine whether any given transaction involves the sale of regulated utility service to the public. *See Simpson, et al, supra*. The Iowa courts have turned to these factors to help examine “the nature of the actual operations conducted and its effect on the public interest.” *Eagle Point*, 850 N.W.2d at 463 (*quoting Northern Natural Gas II*, 679 N.W.2d at 634). Informing this analysis is the recognition that the primary purpose of utility regulations is to protect the public interest in receiving essential services, not to protect incumbent utilities from all manner of competition. *Cf. State ex rel. Utilities Comm’n v. Gen. Tel. Co. of Se.*, 285 N.C. 671, 680, 208 S.E.2d 681, 687 (1974) (“[The] primary purpose of [the North Carolina Public Utilities Act] is not to guarantee to stockholders of public utility constant growth in value of and in dividend yield from their investment, but is to assure public of adequate service at a reasonable charge.”). The Iowa Supreme Court’s analyses of those factors in *Eagle Point* are instructive and are set forth below:

a. A Pragmatic Assessment of Nature of the Transaction

The Iowa Court determined that the Eagle Point PPA was an arms-length, individualized, and negotiated transaction between a willing buyer and seller to pay for the installation of a solar PV system. Important to the Court’s analysis was the reality that “behind-the-meter solar facility had the same impact on the customer’s demand of the utility supplied electricity as behind-the-meter energy efficiency technologies.” *Id.* at 447 (citing *In re Interstate Power & Light Co.*, Iowa Utils. Docket No. EEP–2008–0001 (June 24, 2009)). It is not appropriate for the IUB to regulate a financing mechanism to pay for a solar PV system when it would not regulate such customer-initiated efficiency

upgrades. The Consumer Advocate intervened in the case and argued that utilities are not required to provide solar financing to customers. The Iowa Court agreed that providing financing for solar PV systems “should not draw an entity into the fly trap of public regulation” when incumbent, regulated utilities are not required to provide such a service themselves.

b. Dedication to Public Use

The Iowa Court found that the solar panels on a city building were not for public use any more than energy efficient windows or extra insulation in the building were for public use. Electricity provided by third-party owned solar PV system is similarly behind the meter and represents a private transaction.

c. Articles of Incorporation and Purposes

The Court declined to evaluate this factor because it is inconclusive, not weighing in favor of either side.

d. Service of a Commodity in which Public Generally Held to Have Interest

The Court determined that the PPA was not an indispensable service “crying out for public regulation.” To the contrary, solar technology is still very much a “take it or leave it” technology. Solar energy and financing are not essential commodities that everyone needs. Eagle Point was offering a service completely “behind-the-meter” and the city building remained connected to Interstate Power’s grid for additional service.

e. Monopolizing or Intending to Monopolize Territory with Public Service Commodity

The Court concluded that Eagle Point does not have the size or force of a traditional monopoly. The PPA was a limited, “low-risk transaction” that would benefit

the city because it owes nothing to Eagle Point unless the solar panels actually produce electricity.

f. Ability to Accept All Requests for Service & Reserving Right to Discriminate

The Iowa Court analyzed factors six and seven together. Eagle Point was not producing a “fungible commodity” that everyone needs. Instead, it offers a customizable service to individual customers. With regard to the right to discriminate, on-site solar PV generation is not possible or appropriate at every location. Shade or other obstructions, the size (and orientation) of the rooftop, and the customer’s electric use are all variables that make it impossible to mandate the availability of PPAs at every location. Moreover, customers who are not served by Eagle Point are “not left high and dry.” They are free to seek an alternative vendor or be served by the regulated electric utility. This combination of characteristics is not generally associated with activity that would clothe the operation with a public interest and thus subject the third-party seller to IUB regulation. (citing *Iowa State Commerce Comm. v. Northern Natural Gas Co.*, 161 N.W.2d 111, 115 (Iowa 1968)).

g. Actual or Potential Competition

The IUB’s concern that PPAs would undermine the traditional electricity monopolies was unfounded on the record. The Court found “mitigating factors” and “countervailing benefits” associated with solar PPAs that weighed against IUB and utility concerns over introducing potential competition through PPAs. Mitigating factors included the fact that Eagle Point was not trying to replace the traditional electric supplier, but instead provided a financing mechanism for solar PV that has the effect of reducing demand. The countervailing positive impacts of the arrangement included

reducing the need for peak hour generation and furtherance of statutory goals for electric utilities to provide adequate service and to encourage energy efficiency and renewable energy programs.

Also informing the Iowa court's analysis were public utility commission rulings from other states that determined behind-the-meter third-party sales did not subject the owner of the solar PV system to regulation as a public utility. *See In re Application of SolarCity Corp.*, Ariz. Corp. Comm'n, Docket No. E-20690A-09-0346, at 69-70 (July 12, 2010); Order, Pub. Utils. Comm'n of Nevada, Docket No. 07-06027, at 12 (Nov. 26, 2008); *In re A Declaratory Order Regarding Third-Party Arrangements for Renewable Energy Generation*, N.M. Pub. Reg. Comm'n, Case No. 09-00217-UT, at 13 (Dec. 30, 2009); *Honeywell Int'l, Inc. v. PacifiCorp*, Pub. Util. Comm'n of Oregon, Docket No. DR 40, Order No. 08-388, at 15 (July 31, 2008); *but see PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 283-84 (Fla.1988) (the one contrary authority identified by the Iowa court).

In the Arizona proceeding, SolarCity sought clarification that it would not be subject to regulation as a public utility for its Solar Services Agreement ("SSA")—which functions in essentially the same manner as a PPA. As an initial matter, the Arizona Corporation Commission determined that SolarCity met the literal definition of the public utility provisions of the state Constitution because it was furnishing electricity to a customer. But, as in North Carolina, a literal application of the language of the utility law is not the end of the inquiry. The Commission in Arizona determined that SolarCity is not principally in the business of selling electricity, but rather is "in the business of designing, financing, installing, and monitoring solar systems for residential and commercial customers." *Eagle Point*, 850 N.W.2d at 458 (quoting *In re Application of*

SolarCity). Understanding SolarCity's functional business, and much like the Court itself in *Eagle Point*, the Arizona Commission then turned to the *Serv-Yu* factors to determine whether SolarCity's third-party sales business was so "clothed with the public interest" to trigger regulation. *Id.* The Iowa Court summarized the Arizona Commission's analysis of the *Serv-Yu* factors:

(1) SolarCity did not "affect so considerable a fraction of the public," did not seek to "stand in the place of the underlying utility," and did not provide continued service to the customer; (2) the activity of SolarCity was "not integral to the public at large"; (3) SolarCity's articles of incorporation did "not reflect an intent to act as a public service corporation"; (4) SSAs never generated more than fifty percent of the power of the host and the ramifications of a shutdown were far less than that of a regulated utility; (5) SolarCity did not hold itself out to all customers and was not capable of providing comprehensive service that could expand into a monopoly; (6) SolarCity must compete with other suppliers and thus did not accept most, if not all requests for service; (7) SolarCity used individualized contracts counterbalanced by broad business solicitation; and (8) although SolarCity providers displaced power sales by incumbent utilities, they did not replace existing utilities and assist them to reach distributed generation goals.

Id. The Iowa court found a similar conclusion by the New Mexico Public Regulation Commission. *Id.* at 458-59.

In sum, nearly identical PPA cases from other states, particularly Iowa, demonstrate that the totality of circumstances weigh in favor of ruling that PPAs do not compel regulation of third-party owners as public utilities.

4. Solar PPAs offered by third-party owners provide power only at the host's location and cannot be made available to all.

In addition to the *Simpson* factors, North Carolina courts consider whether the facilities of the seller are open to the use of all members of the public. An electrical

service is offered to the public under North Carolina law when the seller “holds himself out as willing to serve *all* who apply up to the capacity of his facilities.” *Simpson*, 295 N.C. at 522, 246 S.E.2d at 755 (quoting *State ex rel. Utilities Commission v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 268, 148 S.E.2d 100, 109 (1966)); *see also* 64 Am. Jur. 2d Public Utilities § 2 (the “principal *determinative* characteristic of a public utility is that of service to, or readiness to serve, an indefinite public *who has a legal right to demand and receive its services or commodities*) (emphasis supplied). These fundamental characteristics of public utilities—readiness to serve all who apply and the public possessing a right to demand the third-party’s services—are lacking in the PPA arrangement.

In the case of a PPA for solar PV power from a system installed on the property of the consumer, the electricity produced by the solar PV installation is for the end use of that property owner only. The facility is not available for sales to the public. The system is installed behind the meter of the consumer and for that consumer’s use.⁴ But even if the third-party’s service is considered more broadly to encompass all potential installations of solar PV, the installations financed with PPAs nevertheless fall outside this determinative characteristic of a public utility. A third-party installer and owner of solar PV is not able to serve an indefinite public. As noted above, installing viable solar PV systems involve several site-specific considerations, most notably adequate exposure to sufficient sunlight, at appropriate angles and directions, to make the system financially viable. The third-party owner of a solar PV system financed with a PPA must also

⁴ While it is true that any excess solar electricity generated by the facility will flow to the grid under standard net-metering rules, such net-metered electricity is not “sold” to the public. Instead, net metering off-sets that consumer’s electricity use.

consider the customer's electricity usage profile before determining whether a solar PV system is appropriate at any given location. Because of these site-specific considerations, no solar PV installer, whether selling systems to the customer or financing such systems with a PPA, can responsibly promise to serve all who wish to make use of their services.

5. The meaning of "public" must ultimately be consistent with established public policy.

Finally, the North Carolina Supreme Court held that the meaning of the word "public" in any given context must accomplish the General Assembly's purpose and comport with its public policy. *Simpson*, 295 N.C. at 524, 246 S.E.2d at 756-57.

Allowing PPAs that finance the adoption of solar PV systems accomplishes the longstanding public policy goals of promoting "harmony between public utilities, their users, and the environment." N.C. Gen. Stat. § 62-2(a). Allowing PPAs as a funding mechanism to deploy solar PV energy for religious organizations and other nonprofits also furthers the articulated public policy of the State for increased investments in renewable energy. Since 2007, state law has explicitly sought the promotion of renewable energy by, among other things, diversifying the energy resources used to meet the needs of North Carolinians, using more indigenous energy resources, encouraging private investment in renewable energy, and improving air quality—which results when less electricity is derived from the burning of fossil fuels. N.C. Gen. Stat. § 62-2(a)(10); *see also In the Matter of Request by Progress Solar Investments, LLC, and Progress Solar Solutions, LLC*, N.C.U.C. Docket No. SP-100, Sub 24 (Nov. 25, 2009) (determining that the supply of solar-powered street lighting was "consistent with the recently enacted policy of the State to promote the development of renewable resources").

The importance of state policy was underscored in the Commission's 2009 ruling in *In the Matter of Application of FLS YK Farm, LLC for Registration of a New Renewable Energy Facility*, N.C.U.C. Docket No. RET-4, Sub 0 (Feb. 13, 2009). In that proceeding, the Commission determined that FLS YK Farm, LLC was not a public utility under N.C. Gen. Stat. § 62-3(23) and the *Simpson* factors. FLS YK Farm entered into an arrangement to install and own solar thermal panels on the roof of the Kanuga Conference Center Inn and ten other buildings on site, and to then sell the British thermal units (BTUS) and kilowatt hour-equivalent production from the system to the Kanuga Conference Center for Kanuga's use on site. Important considerations included that the arrangement was a "bargained for" transaction, serving a single customer, for that customer's on-site use. Significantly, the Commission also noted that FLS's arrangement and similar proposals are "consistent with the recently enacted policy of the State to promote the development of renewable energy." *Id.* NC WARN's PPA and similar financing arrangements for solar PV systems that are bargained-for transactions, for a single customer, for that customer's on-site use serve the same renewable energy public policy goal and legislative intent as the FLS and Kanuga solar thermal arrangement.

II. BECAUSE THE COMMISSION HAS THE AUTHORITY TO ALLOW BEHIND-THE-METER THIRD-PARTY SALES OF SOLAR PV ELECTRIC SERVICE, IT SHOULD APPROVE SUCH PPAS BY ALL ENTITIES DESIRING TO ENGAGE IN SUCH SALES RATHER THAN LIMITING THIRD-PARTY SALES AUTHORITY TO NON-PROFIT ORGANIZATIONS

For NCIPL and the faith congregations it serves, making the transition away from fossil fuels to cleaner, renewable sources of energy is a moral imperative. Doing so furthers a commitment to caring for Creation and leaving a healthier planet for future generations. Installing solar PV panels presents a way for faith communities to not only

lower electricity bills in the long run, but also to directly participate in the shift to a cleaner energy future. In NCIPL's work, it has found that upfront costs are a concern for a majority of faith congregations that are interested in installing solar PV panels. These cost concerns range from having limited funds to spend on building improvements, not qualifying for tax credits, lacking grant or donor support, and needing solar financing options. Even though in the long term solar PV panels can reduce electricity costs for faith congregations, paying for panels in one upfront sum continues to pose a barrier.

NCIPL's primary concern with this proceeding is clarifying that non-profit organizations, such as churches, synagogues, mosques, and the facilities of other non-profit and religious organizations, have the freedom to contract for solar PV systems owned and operated by third parties, regardless of the third-party owner's status as a non-profit or for-profit entity. Limiting approval to only non-profit installers and operators of solar PV systems will unduly constrain financing options in the solar market, allowing fewer faith communities to take advantage of solar energy. As set forth in NCIPL's Petition to Intervene, absent third-party sales, faith-based non-profit organizations have limited options for the installation and use of clean, renewable, solar PV systems.

Without readily available PPA financing in North Carolina, NCIPL has had to suggest alternatives for faith congregations wanting to install solar PV systems. Namely, the congregations could rely on donations or adopt a complicated limited liability company ("LLC") model that requires recruiting willing investors, entering into a lease agreement with the congregation for roof space, developing the solar project on the congregation's property, and only then entering into an interconnection agreement with the incumbent utility. This complex LLC arrangement involves high transaction fees, the

presence of volunteer investors who are willing to wait several years for a return on capital, and it requires the faith community to wait for those investors to recoup their costs before it can benefit from the cheaper solar energy generated by the PV system. It is not a viable solution for most congregations or cash-strapped nonprofits. Pursuing new financing options will become even more pressing for North Carolina faith congregations after the end of 2015 because the North Carolina renewable energy tax credit is set to sunset. Donors who contributed to a congregation-hosted solar PV system were able to utilize the state tax credit, but will no longer be able to after December 31, 2015. See N.C. Gen. Stat. § 105-129.16a, § 105-129.16h.

In analyzing PPA financing arrangements under the *Simpson* factors, there is no immediately apparent rationale for limiting the Commission's decision to third-party owners that are nonprofits. Because PPAs function as a method of paying for the installation of solar PV systems, and all power generated by such systems is sold to the church or resident on whose property the system is installed, such private contractual arrangements do not subject the owners of these systems to regulation as public utilities. This proceeding provides the Commission with an ideal opportunity to clarify this perceived ambiguity and expand opportunities for the faith community and other nonprofits to embrace clean, renewable energy. As a legal and as a practical matter, there is no justification for limiting the ability of third-party for-profit entities from installing and operating solar PV systems that are paid for with PPAs.

III. THE COMMISSION CAN REGULATE THIRD-PARTY SALES IN THE SAME FASHION THAT IT REGULATES SOLAR PV SYSTEMS THAT ARE OWNED BY THE CONSUMER

Because PPAs are a financing mechanism for the installation of solar, the Commission can continue to employ its regulatory regime for solar PV systems that are owned by the consumer. For example, systems with a rated capacity of less than two megawatts would still require a Report of Proposed Construction with the Commission and an application for interconnection with the incumbent utility. *See* N.C. Gen. Stat. § 62-110.1(g); NCUC Rule R8-65 (2015). However, since third-party owners are not subject to the statutory definition of “public utility,” there is no need for the additional Commission regulation required for public utilities. This approach would not be unique to North Carolina. Power purchase agreements are allowed in at least 25 states across the country, in addition to Washington D.C. and Puerto Rico, most of which do not regulate third-party owners as public utilities.⁵

Though third-party owners of PV panels are not subject to the Commission’s “public utility” regulations, they are not without additional State regulation and oversight. In North Carolina, as in other states, consumer protection laws, the Attorney General’s office, and the Better Business Bureau are available to address consumer affair concerns.⁶ Because PPAs are contractual arrangements, solar purchasers also have remedies available under relevant contract law for any disputes that arise. Finally, solar customers with PPAs in other states have demonstrated overall satisfaction with those arrangements. In a recent California study, 81% of residential customers were very satisfied with their

⁵ *See* NC Clean Energy Technology Center, DSIRE, U.S. Dept. of Energy, 3rd Party Solar PV Power Purchase Agreement, http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2015/08/3rd-Party-PPA_072015.pdf (July 2015).

⁶ *See, e.g.*, N.C. Department of Justice, Consumer, <http://www.ncdoj.gov/Consumer.aspx>.

solar lease or PPA and 84-91% would recommend their solar financing options to a friend.⁷ Most customers surveyed were paying lower prices for solar power with their lease or PPA than if they had bought a solar PV system outright.⁸ In total, the study's findings showed that lease and PPA arrangements "have not created any widespread consumer protection issues ... and most customers have likely benefited financially from their arrangement."⁹ Solar financing companies are incentivized to provide quality products and services to their customers. Not only do they face competition among other financing companies, but solar panels and solar financing are discretionary products. No customer is forced to install solar panels or use a particular method of paying for them.

In sum, the Commission can regulate third-party owned solar PV installations in the same way that it regulates customer-owned solar PV installations. And although not subject the Commission's public utility regulations, PPA providers would still be subject to PPA contract provisions; market competition and pressure for customer satisfaction; and consumer protection laws, oversight, and enforcement.

IV. BECAUSE THE COMMISSION CAN AUTHORIZE THIRD-PARTY SALES, THE COMMISSION SHOULD NOT DISTURB NC WARN'S SALES IN THIS DOCKET

As described above, the Commission has the authority to allow for PPA financing of behind-the-meter solar PV installations. Because PPAs do not trigger public utility regulation, NC WARN and the Faith Community Church should be permitted to proceed with their PPA for the length of their contract, which provides the Church with lower-

⁷ Navigant Consulting, California Solar Initiative: *Third-Party Ownership (TPO) Market Impact Study* (May 2014), available at <http://www.cpuc.ca.gov/NR/rdonlyres/55A4BF20-875A-4B40-AD7C-3C768104211E/0/CSIThirdPartyOwnershipImpactReportFINAL.pdf>.

⁸ *Id.* at xviii.

⁹ *Id.* at xiv.

cost solar PV electricity to meet a portion of its energy needs. Ideally, the legal clarity resulting from this proceeding will allow more members of North Carolina's faith community to install solar panels using financing mechanism that work for their congregations, including PPAs.

CONCLUSION

For NCIPL, the issue before the Commission is one of moral imperative. The Commission has an opportunity in this proceeding to clarify previous uncertainty and perceived ambiguity in North Carolina law by allowing behind-the-meter installations of solar PV systems owned by third parties to proceed without being deemed public utilities. NCIPL respectfully requests that the Commission issue a declaratory ruling that NC WARN's arrangement does not trigger regulation as a public utility and that similar PPA providers, whether non-profit or for-profit entities, would not be subject to the public utility definition at N.C. Gen. Stat. § 62-3(23).

Respectfully submitted this 30th day of October, 2015.

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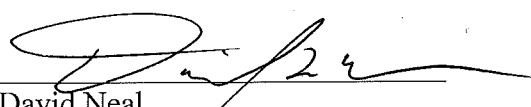
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VERIFICATION

I, David Neal, verify that the contents of the foregoing Initial Comments of Interfaith Power and Light are true to the best of my knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true. I am authorized to sign this verification on behalf of North Carolina Interfaith Power & Light.


David Neal

Date: 10/30/15

Orange County, North Carolina

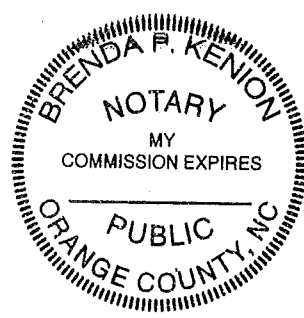
Sworn to and subscribed before me this day by David Neal.

This the 30 day of October, 2015


Signature

Brenda P. Kenion, Notary Public

My commission expires: 4-19-16



VERIFICATION

I, Lauren Bowen, verify that the contents of the foregoing Initial Comments of Interfaith Power and Light are true to the best of my knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true. I am authorized to sign this verification on behalf of North Carolina Interfaith Power & Light.

Lauren Bowen
Lauren Bowen

Date: 10/30/15

Orange County, North Carolina

Sworn to and subscribed before me this day by Lauren Bowen.

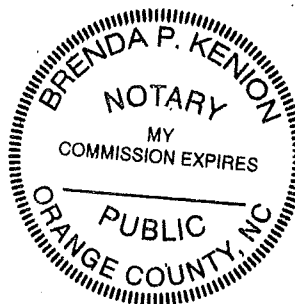
This the 30 day of October,
2015

Brenda P. Kenion
Signature

Brenda P. Kenion, Notary Public

My commission expires:

4-19-16



CERTIFICATE OF SERVICE

I certify that the persons on the service list have been served with the foregoing Petition to Intervene either by electronic mail or by deposit in the U.S. Mail, postage prepaid.

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This the 30th day of October, 2015.

s/ Pat Dunlop

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