NC SUSTAINABLE ENERGY ASSOCIATION

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Clerk's Office
N.C. Utilities Commission

Chief Clerk
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
4325 Mail Service Center
Raleigh, NC 27699-4325

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Re: NC WARN's Request for Declaratory Ruling (Commission Docket No. SP-100, Sub 31)

Dear Honorable Chief Clerk and Commissioners:

On June 17, 2015, NC WARN filed a *Request for Declaratory Ruling* in this docket. By this letter, the North Carolina Sustainable Energy Association ("NCSEA") respectfully asks the Commission to review, in any final order on NC WARN's *Request*, the Commission's existing orders on the topic of third party sales (see below). NCSEA believes (a) the Commission's existing orders may be contributing to uncertainty in the marketplace and (b) a reconciliation of the Commission's existing orders will provide a greater degree of certainty to clean energy service providers (both solar and non-solar) and their customers regarding the dividing line between a permissible transaction and an impermissible one.

To aid the Commission in any review it chooses to undertake, NCSEA sets out below in chronological order a number of Commission orders related to third party sales that merit review and reconciliation (as appropriate):

- ***Order*,[1] Commission Docket No. SP-100, Sub 1 (December 22, 1988)**

  In this 1988 order, the Commission concluded that the use of landfill gas by one entity to produce process steam for sale to a single manufacturer under a bargained for transaction did not fall within the definition of a public utility. This order could be read to be an example of a Commission order approving a specifically-defined third party sale transaction.[2]

[1] While this order itself is not accessible via the Commission's website, reference is made to the contents of the order in at least two subsequent Commission orders that are accessible on its website: *Order on Request for Declaratory Ruling*, p. 1, Commission Docket No. SP-100, Sub 9 (July 31, 1996) and *Order Allowing Expansion*, p. 1, Commission Docket No. SP-100, Sub 1 (June 18, 1997).

[2] The Commission re-approved this specifically-defined transaction in 1997. *Order Allowing Expansion*, Commission Docket No. SP-100, Sub 1 (June 18, 1997).

- ***Order Denying Petition for Declaratory Ruling*, Commission Docket No. SP-100, Sub 7 (April 22, 1996)**

  The Commission's 1996 order denying National Spinning Company, Inc.'s request for a declaratory ruling has been cited by NC WARN on page 6 of its *Request*. NCSEA will not spend more time on the order except to say that it could be read to be an example of a Commission order prohibiting a specifically-defined third party sale transaction.

- ***Order on Request for Declaratory Ruling*, Commission Docket No. SP-100, Sub 9 (July 31, 1996)**

  A mere three months after the Commission's 1996 *National Spinning* order, the Commission issued this second 1996 order. In this order, the Commission concluded that, where "[i]n conjunction with [a landfill] gas system, Enerdyne [IV, LLC] will own and maintain a boiler that uses landfill gas purchased from [Wake Landfill Gas Company, LLC] as fuel to provide process steam for sale to Mallinckrodt Chemical, Inc., which is located adjacent to the landfill, pursuant to a steam sale agreement[,]" neither "Wake Landfill Gas Company, LLC, [n]or Enerdyne IV, LLC, shall be a public utility as defined in G.S. 62-3(23)[.]" This order could be read to be an example of a Commission order approving a specifically-defined third party sale transaction.[3]

- ***Order Accepting Registration of New Renewable Energy Facility and Ruling on Public Utility Issue*, Commission Docket No. RET-4, Sub 0 (April 22, 2009)**

  Thirteen years to the day after the Commission's 1996 *National Spinning* order, the Commission issued this 2009 order that could be read to be an example of a Commission order approving a specifically-defined third party sale transaction. In this order, in response to FLS YK Farm's registration, the Commission concluded "that the sale of BTUs by the owner or operator of solar thermal panels located on-site to a single entity pursuant to a 'bargained for' transaction for the purpose of heating water for the entity's on-site use does not constitute the provision of utility service to or for the public and, therefore, such an owner or operator would not fall within the definition of a public utility under G.S. 62-3(23)(a)."

[3] The Commission has re-approved this specifically-defined transaction several times. *See, e.g., Order on Request for Amendment to Declaratory Ruling,* Commission Docket No. SP-100, Sub 9 (November 3, 2005); *Order on Request for Supplemental Declaratory Rulings and Registration of New Renewable Energy Facility*, Commission Docket Nos. SP-100, Sub 9 and SP-967, Sub 0 (July 5, 2011).

- ***Order on Request for Determination of Public Utility Status*, Commission Docket No. SP-100, Sub 24 (November 25, 2009)**

  The Commission's 2009 order holding that Progress Solar Investments, LLC ("PSI") was not a public utility has been cited by NC WARN on pages 6-7 of its *Request*. In the order, the Commission concluded, in response to PSI's request for a written determination, that "based upon the facts and representations made in PSI's filing and the regulatory circumstances of this case, PSI's ownership, installation, operation, and maintenance of solar lighting systems on the property of a landowner or leaseholder to provide outdoor street, parking, and area lights, when the landowner or leaseholder obtains the solar services pursuant to a bargained for transaction, does not constitute the provision of utility service to or for the public, and, therefore, PSI does not fall within the definition of a public utility under G.S. § 62-3(23)(a) or the Commission's rules and regulations." NCSEA will not spend more time on the order except to say that it could be read to be an example of a Commission order approving *a generic third party sale transaction so long as a Commission-vetted contract form is used.*

While the Commission has – as evidenced by the orders referenced above – generally approved "bargained for," specifically-defined third party sale transactions, it has recently entered three orders that have introduced uncertainty into the marketplace as to whether any "bargained for," specifically-defined third party sale transactions will be approved going forward (assuming no legislative action approving or prohibiting such transactions). These three orders are identified below:

- ***Order Approving Merger Subject to Regulatory Conditions and Code of Conduct*, Commission Docket Nos. E-2, Sub 998 and E-7, Sub 986 (June 29, 2012)**

  In this 2012 order approving the merger of Duke Energy Carolinas, LLC and Progress Energy Carolinas, Inc., the Commission declined to "support[] third party sales of energy by solar generators directly to PEC's and DEC's customers," concluding instead that "the establishment of third party sales . . . [is a] matter[] more appropriately addressed by the General Assembly." *See Order* at pp. 96, 99.

- ***Order on Request For Declaratory Ruling and Notice of Intent to Revoke Registration of New Renewable Energy Facility*, Commission Docket No. SP-729, Sub 1 (September 17, 2012)**

  This second 2012 order could be read to be an example of a Commission order prohibiting a specifically-defined third party "sale" transaction even where the "sale" is a "free of charge" donation. Despite its earlier orders approving other specifically-defined third party sale transactions, the Commission indicated in this order that approval of the transaction proposed by W.E. Partners I, LLC ("WEP") would have opened up a "Pandora's box of [gaming] scenarios[,]" and thus the

Commission prohibited the transaction. Specifically, the Commission wrote:

> The primary issue is whether WEP's proposal to donate its electrical output, free of charge, to Perdue, would allow WEP's facility to avoid classification as a public utility as defined in G.S. 62-3(23)a.1. The Commission agrees with the Public Staff that such a scenario does not exempt WEP from regulation as a public utility under G.S. 62-3(23)a.1. WEP has existing financial arrangements with Perdue; it would be impossible for the Commission to identify if compensation for electricity provided "free of charge" could exist in other financial agreements between an electric generator and a third party. The Commission agrees with the Public Staff that the question of compensation for the electric service cannot be looked at in isolation. In the proposed scenario an electric generating facility would, theoretically, be recovering the cost of its electric production, whether through the sale of steam or through other financial mechanisms; otherwise, there would be no financial incentive for such a project. A generator could build this cost recovery into other contracts with the third party and, as the Public Staff notes, "the party receiving the service will often have a strong incentive to provide hidden or indirect compensation to the party providing the service." The Commission has previously interpreted G.S. 62-3(23)a to provide that a sale of electricity (or steam with which to generate electricity) to a single customer would constitute a sale to or for the public. *See, e.g.,* Order Denying Petition for Declaratory Ruling, Docket No. SP-100, Sub 7 (1996). Additionally, there is a statutory exemption in the definition of a public utility in G.S. 62-3(23)a.1 for "persons who construct or operate an electric generating facility, the primary purpose of which facility is for such person's own use and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation." This exemption does not apply under the proposed circumstances since WEP will be providing the electrical output to Perdue, rather than generating it for its own use. WEP proposes to produce electricity and provide it free of charge to a third party with which it has existing and future financial arrangements. The Commission finds that, because compensation could be built into the financial arrangements with Perdue and because WEP could recover the costs of its electric generation, that the proposed scenario must be considered "[p]roducing, generating, transmitting, delivering, or furnishing electricity ... to or for the public for compensation" under G.S. 62-3(23)a.1. Thus, WEP would be classified as a public utility. Were the Commission to rule otherwise it would open a Pandora's box of scenarios in which an electric generator

could provide electrical services "free of charge" to a third party and build in compensation to recover its costs via other arrangements, thus, avoiding the statutory definition of a public utility in G.S. 62-3(23)a.1.

Order at p. 4.

- ***Order Approving Pilot Programs*, Commission Docket No. E-100, Sub 90 (January 27, 2015)**

Finally and most recently, in this 2015 order, the Commission – despite not having been presented with a specifically-defined third party sale transaction for review – made the following statement: "The Commission disagrees with the [Southern Environmental Law Center] that Chapter 62 allows for power purchase agreements between utility customers and non-utility solar installers. *Rather, the Commission concludes that Chapter 62 of the North Carolina General Statutes prohibits third-party sales of electricity by non-utility solar installers to retail customers*." *Order* at p. 3 (emphasis added).

Given the foregoing Commission orders, NCSEA asks the Commission to review, in any final order on NC WARN's *Request*, the criteria utilized by the Commission in analyzing whether a given "bargained for," specifically-defined third party sale transaction is permissible or not. A review and reconciliation, where appropriate, of the Commission's existing orders will provide a greater degree of certainty to clean energy service providers (both solar and non-solar) and their customers as to where the dividing line currently lies between a permissible transaction and an impermissible one.

Sincerely,

Michael D. Youth
Counsel and Director of Regulatory Affairs

CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing letter, 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, 2015.

Michael D. Youth
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