McGuireWoods LLP
434 Fayetteville Street
Suite 2600
PO Box 27507 (27611)
Raleigh, NC 27601
Phone: 919.755.6600
Fax: 919.755.6699
www.mcguirewoods.com

E. Brett Breitschwerdt
Direct: 919.755.6563

McGUIREWOODS

bbreitschwerdt@mcguirewoods.com

October 30, 2015

VIA ELECTRONIC FILING

Mrs. Gail L. Mount, Chief Clerk
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, North Carolina 27603-5918

Re: Docket No. SP-100, Sub 31

Dear Mrs. Mount:

On behalf of Virginia Electric and Power Company, d/b/a Dominion North Carolina Power, enclosed for filing in the above-referenced docket is the *Initial Comments of Dominion North Carolina Power*.

Thank you for your assistance in this matter. Please do not hesitate to contact me if you need any additional information.

Very truly yours,

s/ *E. Brett Breitschwerdt*

EBB:asm

Enclosure

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. SP-100, SUB 31

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition by North Carolina Waste Awareness and Reduction Network for a Declaratory Ruling Regarding Solar Facility Financing Arrangements and Status as a Public Utility	))))))	INITIAL COMMENTS OF DOMINION NORTH CAROLINA POWER

In response to the North Carolina Utilities Commission's ("Commission") September 30, 2015, *Order Requesting Comments*,[1] Virginia Electric and Power Company, d/b/a Dominion North Carolina Power ("DNCP" or the "Company"), hereby provides its comments on the North Carolina Waste Awareness and Reduction Network's ("NC WARN") June 17, 2015, petition for a declaratory ruling that its proposed "solar facility financing arrangement" and sale of electricity to the Faith Community Church ("FCC") does not make it a public utility under Chapter 62 of the General Statutes ("the Public Utilities Act") (the "Declaratory Ruling Request" or the "Request"). As further addressed in the following comments, the Company recommends the Commission answer NC WARN's Declaratory Ruling Request by finding:

1) NC WARN's retail sale of electricity to FCC constitutes public utility activity under the Public Utilities Act's definition of public utility set forth in N.C.G.S. § 62-3(23);

[1] The Commission's Order Requesting Comments made DNCP a party to this proceeding without the necessity of filing a petition to intervene.

2) NC WARN's retail sale of electricity to FCC violates Duke Energy Carolinas, LLC's ("Duke") exclusive franchise to provide retail electric service within its assigned service territory under N.C.G.S. § 62-110.2 and is, therefore, unlawful; and

3) If FCC were to own the solar generating facility now installed on its roof, that activity would constitute self-generation, which is exempt from the definition of "public utility" under the Public Utilities Act.

Upon transfer of ownership of the solar generating facility to FCC, FCC would be self-generating electricity and properly fit within the self-generation exclusion from the definition of public utility under the Public Utilities Act. The Company further addresses how the Commission should respond to NC WARN's unlawful retail sale of electricity in the Company's response to Question four below.

COMMENTS OF DOMINION NORTH CAROLINA POWER

The Commission's *Order Requesting Comments* identified and requested comments on four specific legal questions implicated by NC WARN's Declaratory Ruling Request. Before addressing these legal questions, the Company provides the following introductory comments on the broader policy issue presented in the Declaratory Ruling Request.

I. Introductory Comments

a. North Carolina has become a national leader in installed solar energy capacity without modifying the State's traditional regulatory model.

While NC WARN's Declaratory Ruling Request creates the impression that solar energy development is being stifled in North Carolina, this assertion is incorrect. In 2007, North Carolina became the first state in the southeast to enact a Renewable Energy

and Energy Efficiency Portfolio Standard ("REPS") through 2007 Session Law 397 ("Senate Bill 3"). Starting in 2010, the REPS required DNCP and the State's other electric power suppliers to invest in solar power and/or solar renewable energy credits ("RECs") as part of REPS compliance. For example, since 2010, DNCP has purchased and received delivery of more than 11,000 RECs from solar generators and anticipates purchasing at least 90,000 solar RECs for REPS compliance between now and 2025.[2] In addition to enacting the REPS, Senate Bill 3 also directed the Commission to consider whether expanding net metering opportunities to all renewable energy generators of one megawatt ("MW") or less would be in the public interest. *See* N.C.G.S. § 62-133.8(i)(6). Through Docket No. E-100, Sub 83, the Commission investigated and, in May 2009, expanded net metering opportunities for utility customers in the State.[3]

North Carolina has also become a national leader in non-utility generator ("NUG") solar energy development. Through the support of the REPS and other state and federal policies, North Carolina ranked second in the nation for installed solar capacity in calendar year 2014 and fourth for cumulative solar capacity installed through 2014.[4] In DNCP's service territory alone, the Company has interconnected over 200 MW of new solar generators. Statewide, over 4,000 MW of additional solar generating capacity is proposed to come on line over the next few years.

Importantly, North Carolina has achieved this substantial growth in solar energy without modifying the State's traditional regulatory model, as set forth in the Public

---

[2] DNCP intends to purchase in-state solar RECs unless out-of-state RECs are available at a lower price.
[3] *See In the Matter of Investigation of Net Metering*, Order Amending Net Metering, Docket No. E-100, Sub 83 (Mar. 31, 2009).
[4] *See* http://www.seia.org/research-resources/2014-top-10-solar-states. According to SEIA's website, "North Carolina has more solar capacity than all other Southeast states combined." [Is this a quote from the link just provided? if so say Id. If not provide cite.]

Utilities Act. While the REPS established a State policy to promote increased renewable energy development in North Carolina, the General Assembly did not modify the State's overarching mandate for electric utilities to furnish adequate, reliable and economic retail electric service to all customers within their assigned service territories in exchange for receiving just and reasonable rates. *See* N.C.G.S. §§ 62-2; 62-131. Senate Bill 3 also did not modify the Commission's mandate to regulate the service and rates of all public utilities under the Public Utilities Act. *See* N.C.G.S. § 62-30. The REPS is a "self-contained" policy mandate established in N.C.G.S. § 62-133.8 that complements North Carolina's comprehensive approach to regulating electric service providers as public utilities. Third party NUG development of solar also fits within the existing regulatory model as the Company is mandated to pay only its Commission-approved avoided cost for power purchased from solar NUGs. In sum, North Carolina's energy policies have successfully promoted solar energy development, while maintaining electric utilities' singular responsibility – subject to Commission oversight – for providing adequate, reliable and economic retail electric service to the citizens of the State.

b. Solar energy has an increasing role in providing future least cost electric service to DNCP's customers.

Today, solar energy is playing an increasing role in the Company's long-term resource planning. In the Company's 2015 integrated resource plan filed July 1, 2015, in Docket No. E-100, Sub 141 ("2015 Plan"), DNCP identified 400 MW (nameplate) of NUG solar planned to come on line in DNCP's service territory by 2017. The 2015 Plan further identified the need to construct 400 additional MW of solar photovoltaic ("PV") capacity by 2020 as part of the Company's generating resource portfolio. The Company has also been studying impacts of distributed solar generation on the Company's

distribution system through the Company's Virginia Solar Partnership Program. Finally, the Company's 2015 Plan identified that deployment of utility-scale solar – potentially up to 3,000 MW by 2030 – could prove to be a major component of the Company's long-term, least-cost strategy to serve customers' future electricity needs. In sum, DNCP is increasingly including solar PV as an important component of its long-term resource planning portfolio to serve customers.

Moreover, as DNCP continues to evaluate the costs and benefits of solar as a generating resource, the Company also must take into account *how* to deploy solar generation to best serve DNCP's customers. As with other generation technologies, deployment of solar generation is more cost-effective when optimized and constructed at scale. A recent July 2015 study by The Brattle Group evaluated the relative cost of "utility-scale" versus "residential-scale" solar photovoltaic systems in Xcel Energy Colorado's service area ("Brattle Study").[5] This analysis looked at the cost to customers of adding 300 MW of solar PV through distributed 5-kW residential-scale (rooftop) installations versus 300 MW of utility-scale power plants that sell their output to the utility under long-term power purchase agreements ("PPAs"). From a price perspective, the Brattle Study determined

> [U]tility-scale PV power costs in Xcel Energy Colorado range from $66/MWh to $117/MWh (6.6¢/kWh to 11.7¢/kWh) across the scenarios, while residential-scale PV power costs range from $123/MWh to $193/MWh (12.3¢/kWh to 19.3¢/kWh) for a typical residential-scale system owned by the customer. For leased residential-scale systems, the costs are even larger and between $140/MWh and $237/MWh (14.0¢/kWh to 23.7¢/kWh). The generation cost difference between the utility- and residential-scale systems owned by the customer ranges from 6.7¢/kWh to

[5] The Brattle Group, Comparative Generation Costs of Utility-Scale and Residential-Scale PV in Xcel Energy Colorado's Service Area, (July 2015), *available at*: http://brattle.com/system/publications/pdfs/000/005/188/original/Comparative_Generation_Costs_of_Utility-Scale_and_Residential-Scale_PV_in_Xcel_Energy_Colorado%27s_Service_Area.pdf.

> 9.2¢/kWh solar across the scenarios. To put this in perspective, national average retail all-in residential electric rates in 2014 were 12.5¢/kWh.

Brattle Study, at 1. The Brattle Study then concluded that a "utility-scale PV system is significantly more cost-effective than residential-scale PV systems when considered as a vehicle for achieving the economic and policy benefits commonly associated with PV solar." *Brattle Study*, at 2. The Brattle Study's conclusions align with the Company's own experience that developing power generation projects at "utility scale" can provide cost savings for all customers.[6]

c. Only the General Assembly may permit retail sales of electricity by non-public utilities in North Carolina.

The Public Utilities Act long has declared that the policy of the State is to promote the inherent advantages of regulated public utilities, to promote adequate, reliable and economic utility service, and to foster the continued service of public utilities on a well-planned and coordinated basis. N.C.G.S. § 62-2(a)(1)-(3). It is also well-established that the public policy basis for requiring a certificate of public convenience and necessity to engage in public utility activities is the General Assembly's policy that, nothing else appearing, the public is better served by a regulated monopoly than by competing suppliers of the service. *See State ex rel. Utilities Com. v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 271, 148 S.E.2d 100, 111 (1966) ("*Telegraph Co.*"). For the electric industry, this policy is additionally expressed in the Territorial Assignment Act of 1965, which grants DNCP, Duke, and Duke Energy Progress, LLC ("Progress") exclusive franchise rights to serve retail electric customers within their assigned service areas. *See* N.C.G.S. § 62-110.2.

[6] The Company notes that the Declaratory Ruling Request identifies the PPA rate of $0.05 per kWh as a subsidized rate. *Declaratory Ruling Request*, at 4. The NC WARN PPA rate should not be viewed as the "market cost" of third party rooftop solar PV in North Carolina.

Any modification to the State's established energy policy and regulatory model would be for the legislature to determine, as the Commission's authority to regulate public utilities is limited to the regulatory authority conferred by the General Assembly. *See State ex rel. Utils. Com'n. v. National Merchandising Corp*., 288 N.C. 715, 722, 220 S.E.2d 304, 308 (1975). As the Commission's *Order Requesting Comments* notes, Senate Bill 513 in the recent 2015 legislative session at one point included a proposed Renewable Energy Economic Development Study Committee that would, in part, focus on third party sales of electricity. However, Senate Bill 513 was ultimately passed into law without that provision.[7] Why the Renewable Energy Study Committee provisions were not included in the final legislation adopted by the General Assembly is uncertain. However, the import of this legislative inaction on third-party sales is clear – the Commission should continue to apply the State's Public Utilities Act and further its policy that the public's interest in adequate, reliable and economic utility service to citizens of the State should be supplied by regulated public utilities. Ultimately, it will be for the General Assembly to determine whether further evaluation of the regulatory and policy issues associated with third party sales of electricity by non-public utilities would benefit North Carolina.

II. DNCP's Responses to Commission Questions

a. <u>Question 1</u>: Does the Commission have the express legal authority to allow third-party sales of Commission-regulated electric utility services? If so, please provide a citation to all such legal authority.

No. The Commission does not have legal authority to allow third-party sales of Commission-regulated electric utility service, as proposed by NC WARN. Because NC

[7] Other bills in the 2015 and prior legislative sessions to allow third-party, non-utility sales of electricity to retail customers have also not been adopted by the General Assembly.

WARN's retail sale of electricity to FCC constitutes public utility activity, the Commission cannot authorize NC WARN to bypass Duke's exclusive franchise and sell electricity to FCC.

Whether an activity constitutes public utility activity subject to regulation by the Commission "is determined . . . according to whether [a business] is, in fact, operating a business defined by the Legislature as a public utility." *State ex rel. Utilities Com. v. Mackie*, 79 N.C. App. 19, 32, 338 S.E.2d 888, 897 (N.C. Ct. App. 1986). The Commission has no authority to expand or limit the scope of activities that the General Assembly has legislated shall be regulated as activities of public utilities. *See Telegraph Co.*, 267 N.C. at 268, 148 S.E. 2d at 109 ("Neither the Commission nor this Court has authority to add to the types of business defined by the Legislature as public utilities").

The Public Utility Act defines a "public utility" to include, among other things:

> . . . a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:
>
> 1. Producing, generating, transmitting, delivering or furnishing electricity . . . for the production of light, heat or power to or for the public for compensation; provided, however, that the term "public utility" shall not include 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.

N.C.G.S. § 62-3(23)(a)(1). To date, North Carolina's appellate courts have not been presented with a controversy regarding the scope of public utility activity in the electric industry under this definition. However, they have previously interpreted the scope of the public utility definition applicable to other industries under the Public Utilities Act.

In *Telegraph Co.*, the North Carolina Supreme Court concluded that a person offering utility service is a public utility where he "holds himself out as willing to serve

all who apply up to the capacity of his facilities" and it is "immaterial . . . that his service is limited to a specified area and his facilities are limited in capacity." *Telegraph Co.*, 267 N.C. at 268, 148 S.E. 2d at 109.

In *State ex rel. Utilities Com. v. Simpson*, 295 N.C. 519, 246 S.E.2d 753 (1978) ("*Simpson*"), the Court held that a doctor's two-way radio enterprise, which was only offered to other doctors in Cleveland County, constituted public utility activity and was subject to regulation. The issue in *Simpson* was whether service offered to "a medical society of 55 to 60 members" falls within or outside the General Assembly's intended meaning of service "to the public." In evaluating this question, the Court rejected the "abstract, formulistic definition of 'public,'" relied upon in the prior *Telegraph Co.* decision, instead determining that it is more appropriate to consider the specific regulatory circumstances in a given case, including "(1) [the] nature of the industry sought to be regulated; (2) [the] type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) [the] effect of non-regulation or exemption from regulation of one or more persons engaged in the industry." *Id.* at 522, 246 S.E.2d at 755. The Court further held that the "meaning of 'public' 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." *Id.* (internal citations omitted).

In finding that Dr. Simpson's two-way radio service constituted public utility activity provided to the public, the Court emphasized the following in its analysis:

- The fact that Chapter 62 regulates the radio industry at issue shows the General Assembly's intent that participants in this industry be subject to regulation if offering service to the public (*Id.* at 525, 246 S.E.2d at 757);

- Adopting a definition of "public" that allows prospective offerors of services to approach specific classes of customers without falling within the definition of public utility would allow an industry to "escape regulation" in a manner that "could easily shift [the industry] from a regulated to a largely unregulated one" (*Id.*); and
- Allowing certain industry participants to offer unregulated service to specific classes of customers might "leave burdensome, less profitable service on the regulated portion resulting inevitably in higher prices for the service." *Id.*

The foregoing analysis has also been consistently applied in other, more recent cases evaluating whether activities constitute public utility activities subject to regulation. *See State ex rel. Utilities Com. v. Mackie*, 79 N.C. App. 19, 338 S.E.2d 888 (N.C. Ct. App. 1986) (applying *Simpson* analysis to find that water and sewage service to less than 20 customers was service to the public subject to public utility regulation); *State ex rel. Utils. Comm'n v. Buck Island, Inc*., 162 N.C. App. 568, 592 S.E.2d 244 (N.C. Ct. App. 2004) (applying *Simpson* analysis to affirm Commission determination that furnishing water production and sewer treatment, both classic utility functions, to small group of homeowners constituted public utility activity).

While North Carolina's appellate courts have not reviewed the scope of the public utility definition to electric suppliers, the Commission has, on a number of occasions, addressed the scope of its regulatory authority over electric public utilities under N.C.G.S. § 62-3(23)(a)(1). The Commission's foremost Order applying the *Simpson*

analysis to a potential retail sale of electricity is its 1996 declaratory ruling known as the "National Spinning" decision.[8]

National Spinning, a textile manufacturing company, engaged a consultant/electric generation project developer to plan an on-site biomass facility to reduce National Spinning's electricity cost from its incumbent utility supplier, Carolina Power & Light ("CP&L"), now Progress. Ownership of the proposed facility was split between the project developer and National Spinning in order to allow National Spinning to obtain federal tax credits for selling biogas to a third party. National Spinning would own a gasifier to gasify wood waste and would sell the resulting gas to the project developer, who would own a high pressure boiler that would burn the gas to produce steam for sale back to National Spinning for its use in a steam turbine generator and other electric generating facilities. The gasification and electric generating facilities owned by National Spinning would be operated by the project developer. Construction of the planned generating facility would have displaced much of National Spinning's purchases from CP&L, although National Spinning planned to continue purchasing a portion of its requirements from CP&L under applicable rate schedules and to sell any excess power it produced to CP&L under its then-established avoided cost rates. *Id.* at 4-6.

After noting that the Supreme Court in *Simpson* had provided the Commission with flexibility in interpreting the definition of public utility, the Commission first held that the proposed project could not be considered self-generation, since the boiler proposed to be owned by the project developer is "an essential and integral part of the electric generating equipment." *Id.* at 5-6. The Commission also rejected the contention

[8] *In the Matter of Request for a Declaratory Ruling by National Spinning Company, Inc. and Wayne S. Leary, d/b/a Leary's Consultative Services*, Order Denying Petition for Declaratory Ruling, Docket No. SP-100, Sub 7 (April 22, 1996) ("*National Spinning Order*").

that the project developer was acting as the agent of National Spinning for purposes of self-generation as such a construction of the self-generation exception would "eat the rule." *Id.* at 6.

Citing earlier landfill gas declaratory rulings, the Commission also held that it "will not allow a 'steam utility' to sell steam for use in generating electricity" because the purchasing customer "would be able to bypass the certificated electric utility, which has a monopoly franchise for the area." *Id.* Emphasizing "its concern about third-party steam being used to displace a regulated electric utility's load," the Commission stated that its prior rulings:

> recognize a fundamental distinction between producing process steam, which the Commission has not regulated, and providing steam for electric generation, which the Commission has reserved the right to regulate as a public utility function. This distinction is entirely proper under the Simpson analysis, which requires the Commission to consider the regulatory circumstances on a case by case basis. Again, the Commission cannot ignore practical realities, and we would be doing just that if we tried to analyze a steam transaction such as the one proposed herein without regard to how the steam will be used.

Id. at 7. The Commission concluded its analysis that National Spinning's proposal would constitute public utility activity by articulating a number of policy considerations under the North Carolina Supreme Court's *Simpson* analysis:

- The Commission emphasized the importance of National Spinning as a CP&L customer, explaining that "large industries are very desirable customers for the regulated utilities" as they "generally have high load factors, and the regulated electric utilities' generation plant has been planned and built to serve them reliably." *Id.*

- The Commission expressed concern about opening the door to other suppliers and retail customers "inevitably seek[ing] similar arrangements." *Id.*
- The Commission expressed concern that "[n]ew, unregulated electric suppliers could 'cherry pick' the electric utilities' best customers, leaving them with significant stranded investment. The rates that must be charged to the remaining residential, commercial and smaller industrial customers, who are not in a position to install turbine generators and purchase generation steam, would be impacted. The ultimate result could be a windfall for a relatively small number of large industries, at the expense of other customers." *Id.* at 8.
- The Commission also held that allowing the National Spinning project structure "could undermine the territorial assignment statutes and could result in the inequitable shifting of costs to smaller customers," noting "the 'effect of non-regulation or exemption from regulation' is a factor clearly identified in the *Simpson* case, and it is for the Commission to decide the weight to give the various factors in *Simpson*." *Id.*
- Finally the Commission reiterated the Court's concern in *Simpson* that "[u]nregulated radio services might focus on classes which are easier and more profitable to serve . . . leav[ing] burdensome, less profitable service on the regulated portion resulting inevitably in higher prices for the service." *Id.* at 9.

Subsequent to the *National Spinning Order*, no party has proposed to take the action NC WARN has unilaterally undertaken here – a retail sale of electricity to an end use customer that bypasses the franchised electric utility. However, the Commission has on

limited occasions reviewed other proposed transactions, which also have some bearing on NC WARN's request.

In 2009, after enactment of Senate Bill 3, the Commission granted Progress Solar Investments, LLC ("PSI") and its related entity, Progress Solar Solutions, LLC ("PSS"),[9] request for a written determination that their proposed solar lighting services were excluded from the definition of a public utility.[10] The Public Staff was the only other party to participate in the proceeding and recommended the Commission apply the *Simpson* analysis to find that the proposed bargained-for solar lighting transactions did not constitute public utility activity. The Public Staff emphasized that "[u]nlike steam and piped gas, the light produced by the solar lighting systems cannot be used to generate electricity and thus be used indirectly to bypass the electric utilities' exclusive franchises." *Id.* at 2. The Commission similarly applied the *Simpson* analysis and held that PSI's proposed activities did not constitute public utility activity, subject to regulation, explaining:

> The use of solar resources to provide lighting as proposed by PSI is consistent with the recently enacted policy of the State to promote the development of renewable resources. PSI will not be holding itself out to provide solar lighting to the general public, and the lighting will be provided only as a result of bargained for transactions and pursuant to agreed-upon terms and conditions. ***Unlike steam and piped gas, the light produced by the solar lighting systems cannot be used to generate electricity and thus be used indirectly to bypass the electric utilities' exclusive franchises***.

Id. at 4. (Emphasis added). However, the *Solar Lighting Order* was also clear that "[b]ecause North Carolina has exclusive utility franchises, a conclusion that owning and

[9] PSI and PSS were not affiliates of the regulated utility, Duke Energy Progress.

[10] *In the Matter of Request by Progress Solar Investments, LLC, and Progress Solar Solutions, LLC, for a Determination That Their Proposed Activities Would Not Cause Them to be Regarded as Public Utilities under G.S. 62-3 (23)*, Docket No. SP-100, Sub 24, *Order on Request for Determination of Public Utility Status* (Nov. 25, 2009) ("Solar Lighting Order").

operating solar lighting systems for the purpose of selling light to a third party constitutes a public utility activity would effectively prohibit the activity." *Id.*

In 2012, the Commission rejected a declaratory ruling request designed to circumvent the public utility definition (and, in relation, exclusive franchise protections of incumbent utilities) by offering electricity "free of charge." [11] Specifically, a combined heat and power ("CHP") generator requested a declaratory ruling that providing a *de minimis* amount of electricity to its third-party steam customer for free would not subject the CHP generator to regulation as a public utility because the electricity was not being sold "for compensation." *Free Electricity Declaratory Order*, at 2. The Public Staff opposed the request on grounds that such situations would provide third parties "strong incentives to provide hidden or indirect compensation to the party providing the service," and the Commission held that the "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." *Id.* at 3. In rejecting this arrangement, the Commission explained that allowing the proposed arrangement "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." *Id.* at 4.

Most recently, in January 2015, the Commission held in an Order approving two NC GreenPower solar pilot programs, that "Chapter 62 of the North Carolina General

[11] *In the Matter of Application of W.E. Partners 1, LLC, for Registration of a New Renewable Energy Facility,* Order on Request for Declaratory Ruling and Notice of Intent to Revoke Registration of New Renewable Energy Facility, Docket No. SP-729, Sub 1 (Sep.17, 2012). ("Free Electricity Declaratory Order").

Statutes prohibits third-party sales of electricity by non-utility solar installers to retail customers."[12]

Applying the foregoing precedents to NC WARN's Declaratory Ruling Request, NC WARN is clearly selling retail electricity to the public for compensation without Commission certification or approval. Throughout the Declaratory Ruling Request, NC WARN repeatedly states that its proposed "financing arrangement" is a sale of electricity to FCC, where NC WARN owns the solar system. *Declaratory Ruling Request*, at 1-2. Thus, as an initial matter, the self-generation exception in N.C.G.S. § 62-3(23)(a)(1) does not apply.

It is also uncontroverted that NC WARN is receiving compensation for the sales of electricity under the arrangement. NC WARN's September 18, 2015 filing confirms that NC WARN has invoiced FCC for 1423 kilowatt hours generated by the solar system and consumed by FCC.

NC WARN's purported "primary argument" that it is not operating as a public utility because its sales to FCC are not sales to or for the public. *Declaratory Ruling Request*, at 7. North Carolina law, as interpreted by our appellate Courts and prior Commission rulings, clearly dictates the opposite.

First, applying the *Simpson* analysis, electric sales and service to utility customers is the most highly regulated of all public utility services in North Carolina. Scattered throughout the Declaratory Ruling Request is NC WARN's begrudging recognition that Duke has an "exclusive utility franchise" to serve its assigned customers within its "monopoly" service territory. While NC WARN suggests that "it does not intend to

[12] *In the Matter of NC GreenPower*, Order Approving Pilot Programs, at 3 Docket No. E-100, Sub 90 (Jan. 27, 2015).

monopolize [Duke's] territory with a public service," NC WARN states that "there is considerable demand for solar systems" and goes on to explain the organization's plans to offer its solar PPA financing proposal "to self-selected non-profit organizations." *Id.* at 10. NC WARN's existing sale to FCC as well as future sales to other Duke customers would be a sale to the public. It would also represent a first step – likely quickly followed by others – in eroding the existing least-cost, fully-integrated electric utility model that has served North Carolina with adequate, efficient and reliable utility service for almost a century. Put another way, NC WARN's proposal represents a clear departure from the General Assembly's current regulatory model and would be inconsistent with State policy promoting the inherent advantages of regulated public utilities.

NC WARN's retail sale of electricity also cannot be reconciled with prior Commission Orders. The Declaratory Ruling Request suggests, albeit without any coherent support, that NC WARN's sale of solar power to FCC is more closely aligned with the *Solar Lighting Order* than the *National Spinning Order*. *Id.* at 8. To the contrary, the Commission's approval of PSI's solar lighting proposal relied, in part, upon PSI's assertion that "no generation or sale of electricity will occur," which allowed the Commission to conclude that the solar lighting systems "cannot be used to generate electricity" and thus cannot "indirectly . . . bypass the electric utilities' exclusive franchises." *Solar Lighting Order*, at 4. Because NC WARN's proposal directly bypasses Duke, the *Solar Lighting Order* is clearly distinguishable from the Declaratory Ruling Request. DNCP also finds no logical or reasonable basis to distinguish NC WARN's proposal from the Commission's legal and policy analysis in the *National*

Spinning Order. The power sale at issue in that case was similarly a sale to a single customer that, if approved, would have opened the door to other suppliers and retail customers inevitably seeking similar arrangements. The same concerns in the *National Spinning Order* about shifting costs between customers and the potential for stranded utility investment would also be applicable if third-party sales were allowed in North Carolina. Finally, nothing in Senate Bill 3 modifies the legal analysis or fundamental policy considerations identified in the *National Spinning Order*. Indeed, the Commission's Orders since Senate Bill 3's enactment have only reinforced the view that the Public Utilities Act prohibits third-party sales of electricity by non-utility solar installers to retail customers.

Under any just and reasonable reading of the Public Utility Act, the *Simpson* decision, and the Commission's prior Orders, NC WARN's sales of power to FCC and potentially other sales to self-selected non-profits represent sales of electricity to the public for compensation that subjects NC WARN to Commission regulation as public utility activity.

b. <u>Question 2:</u> If the Commission has the authority to allow third-party sales of regulated electric utility service, should the Commission approve such sales by all entities desiring to engage in such sales, or limit third-party sales authority to non-profit organizations?

Assuming *arguendo* the Commission could allow third-party sales of a regulated utility service, like electricity, the Commission would have no authority under the Public Utilities Act to distinguish between non-profit organizations and other entities desiring to engage in such sales. As an administrative agency, the Commission's authority to regulate public utilities is limited to the authority conferred by the General Assembly under the Public Utilities Act. The definition of public utility set forth in N.C.G.S. § 62-

3(23)(a), applies to any "person, whether organized under the laws of this State or under the laws of any other state or country" that operates as a public utility. A "person" is expansively defined in N.C.G.S. § 62-3(21) to include any "corporation, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit, and includes any trustee, receiver, assignee, lessee, or personal representative thereof." Therefore, unless action was taken by the General Assembly to modify the Commission's existing authority, the Public Utilities Act would require the Commission to allow all "persons" to make third-party sales.

c. <u>Question 3:</u> What authority, if any, does the Commission have to regulate the electric rates and other terms of electric service provided by a third-party seller?

Assuming *arguendo* that the Commission determined that third-party sales of electricity did not constitute public utility activity, the Commission would have no authority to regulate such sales (or the rates and operations of third-party sellers). The Commission's authority over non-public utilities is proscribed in the Public Utilities Act and is limited to its certification authority over construction of new electric generating facilities under N.C.G.S. § 62-110.1.

d. <u>Question 4:</u> To the extent that the Commission is without authority to authorize third-party sales or to the extent the Commission's express authorization is required before third-party sales may be initiated, what action should the Commission take in response to NC WARN's sales in this docket?

NC WARN's electric sales to FCC bring it squarely within the Commission's regulatory authority under the Public Utilities Act. Because NC WARN is operating as a public utility, the Commission has expansive authority under the Public Utilities Act to investigate and to regulate its rates and operations: "[A]bsence of [a] CPCN is no impediment to the authority of the Commission to exercise jurisdiction over the rates or

services of the public utility and even to order refunds for the unauthorized collection of public utility revenues."[13] The Commission also has authority to seek an injunction of violations of an electric utility's exclusive franchise. *See Public Serv. Co. v. Shelby*, 252 N.C. 816, 821,115 S.E.2d 12, 16 (1960) ("Injunction is a proper remedy in cases in which a franchise of a corporation or rights thereunder are being invaded"). For example, in 2009, the Commission granted a preliminary injunction against Public Service Company of North Carolina ("PSNC") for PSNC's "public utility construction activities" in Piedmont Natural Gas's assigned service territory.[14] In addition to enjoining invasions of an electric utility's exclusive franchise, the Commission also has the authority to levy fines against public utilities up to $1,000 per day for violations of the Public Utilities Act. *See* N.C.G.S. § 62-310(a).

In evaluating what actions the Commission should take in response to NC WARN's electric sales to FCC, the following facts merit consideration:

- NC WARN contractually bound itself by executing the PPA on December 8, 2014, but elected not to seek Commission guidance on the legality of its proposed sale of electricity to FCC under the PPA until June 17, 2015 – over six months after entering into the PPA;
- NC WARN held a ribbon cutting and press conference on the morning of June 17, 2015, with NC WARN Executive Director Jim Warren announcing that the "Solar

[13] *In the Matter of Application of Time Warner Cable Information Services (North Carolina), LLC, for Designation As An Eligible Telecommunications Carrier*, Order on Jurisdiction, at 9 Docket No. P-100, Sub 133C (Jan. 22, 2014) (*citing State ex rel. Utilities Comm'n v. Mackie*, 79 N.C.App. 19, 32, 338 S.E.2d 888, 897 (1986)).

[14] *In the Matter of Piedmont Natural Gas Company, Inc., Complainant v. Public Service Company of North Carolina, Inc., Respondent*, Preliminary Injunction, Docket No. G-5, Sub 508 (June 15, 2009).

Freedom" project would "impact state policy" because "this State needs energy competition and not monopoly control of rooftops";[15]

- NC WARN elected to energize and begin selling electricity to FCC prior to obtaining Commission guidance on the legality of its proposed sale of electricity, even though NC WARN was "aware that . . . the sale of electricity . . . may be restricted under North Carolina law." *Declaratory Ruling Request* at 5;
- NC WARN's website states that a "game-changing Energy Freedom bill," House Bill 245 (which was not enacted by the General Assembly), "opens up North Carolina electricity markets to third-party sales of electricity;[16]
- NC WARN Executive Director Jim Warren issued a statement on March 25, 2015, that North Carolina remains among the States that "attempt to prohibit such competition" in the sale of electricity and specifically prohibits third-party sales;[17]
- NC WARN Executive Director Jim Warren co-wrote a May 2, 2015, opinion piece in the Winston Salem Journal with FCC pastor Reverend Nelson Johnson advocating for the Energy Freedom Act as "legislation that would open the door to rooftop solar competition" in North Carolina;[18] and
- As the 2015 legislative session wound down, NC WARN Executive Director Jim Warren issued a statement on September 29, 2015, which recognized that the

[15] *See* http://www.ncwarn.org/2015/06/faith-community-church-and-nc-warns-solar-freedom-ribbon-cutting/.
[16] *See* http://www.ncwarn.org/energy-freedom/.
[17] *See* http://www.ncwarn.org/2015/03/poll-shows-huge-bipartisan-support-for-solar-power-competition-in-nc-news-release-from-nc-warn/
[18] *See* http://www.ncwarn.org/2015/05/solar-power-and-competition-are-good-for-all-customers-winston-salem-journal/

House Bill 245 third party financing legislation had not passed during the 2015 legislative session.[19]

NC WARN's actions and public statements before and subsequent to the filing of its Declaratory Ruling Request, the unsupported legal arguments used to support NC WARN's Request, and the fact the NC WARN has proceeded to make retail electric sales to FCC prior to the Commission ruling on NC WARN's Request, all point to the Declaratory Ruling Request being frivolous and a subterfuge in NC WARN's ongoing public campaign against Duke Energy and North Carolina's traditional regulated utility model.[20]

As described in response to Question one above, the Company recommends that the Commission apply the Public Utilities Act and answer NC WARN's Declaratory Ruling Request by finding:

1) NC WARN's retail sale of electricity to FCC constitutes public utility activity under the Public Utilities Act's definition of electric public utility activity set forth in N.C.G.S. § 62-3(23);
2) NC WARN's retail sale of electricity to FCC violates Duke's exclusive franchise to provide retail electric service within its assigned service territory under N.C.G.S. § 62-110.2 and is, therefore, unlawful; and

[19] *See* http://www.ncwarn.org/2015/09/duke-energy-koch-cabal-beats-down-solar-in-nc-news-release-from-nc-warn/.

[20] It is unclear whether the Public Utilities Act provides the Commission authority to impose sanctions or attorney fees for filing a frivolous action (and DNCP is not advocating that the Commission should take such a step here). However, Rule 34 of the North Carolina Rules of Appellate Procedure clearly provides the appellate courts authority to sanction a party or attorney or both for pursuing a frivolous appeal. Should NC WARN appeal from a Commission's Order on the Declaratory Ruling Request, DNCP would view the appeal as clearly not warranted by existing law or a good faith argument for the extension of existing law. Reasonable arguments could also be made that such an appeal was taken to harass Duke Energy and the Commission.

3) If FCC were to own the solar generating facility now installed on its roof, that activity would constitute self-generation, which is exempt from the definition of "public utility" under the Public Utilities Act.

Consistent with the foregoing recommended determinations, the Company further recommends that the Commission respond to NC WARN's sales of electricity to FCC by ordering NC WARN to make a verified filing informing the Commission whether NC WARN has donated the PV system to FCC, as contemplated in the Declaratory Ruling Request and in NC WARN's PPA with FCC. The Commission should also enjoin NC WARN from making additional sales of electricity to FCC and order NC WARN to refund to FCC the unauthorized collection of public utility revenues received in exchange for those sales.

CONCLUSION

DNCP respectfully requests the Commission implement the recommendations presented in the foregoing Comments along with any other relief the Commission determines is necessary or appropriate.

Respectfully submitted, this the 30th day of October, 2015.

DOMINION NORTH CAROLINA POWER

By: s/ *E. Brett Breitschwerdt*
Counsel

Counsel for Virginia Electric and Power Company
d/b/a Dominion North Carolina Power

Lisa S. Booth
Horace P. Payne, Jr.
Dominion Resources Services, Inc.
Legal Department
120 Tredegar Street, RS-2
Richmond, Virginia 23219
(804) 819-2288 (LSB phone)
(804) 819-2682 (HPP phone)
lisa.s.booth@dom.com
horace.p.payne@dom.com

E. Brett Breitschwerdt
McGuireWoods LLP
434 Fayetteville Street, Suite 2600
Raleigh, North Carolina 27601
(919) 755-6563 (Phone)
(919) 755-6579 (Fax)
bbreitschwerdt@mcguirewoods.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Initial Comments of Dominion North Carolina Power*, submitted in Docket No. SP-100, Sub 31, has been delivered via U.S. mail or electronically upon all parties of record in the above-captioned proceeding.

This, the 30th day of October, 2015.

s/ *E. Brett Breitschwerdt*
E. Brett Breitschwerdt
McGuireWoods LLP
434 Fayetteville Street, Suite 2600 (27601)
P.O. Box 27507
Raleigh, North Carolina 27611
Phone: (919) 755-6563
Fax: (919) 755-6699
bbreitschwerdt@mcguirewoods.com

Attorney for Virginia Electric and Power Company, d/b/a Dominion North Carolina Power