

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)	NC WARN'S
Awareness and Reduction Network for a)	REPLY COMMENTS
Declaratory Ruling Regarding Solar)	AND REQUEST FOR
Facility Financing Arrangements and)	ORAL ARGUMENT
Status as a Public Utility)	

Pursuant to the Commission's Order Requesting Comments, dated September 30, 2015, now comes NC WARN, by and through the undersigned counsel, with reply comments addressing the comments of the other parties. Included in its reply comments, NC WARN requests the opportunity for oral argument before the Commission.

As part of these reply comments, NC WARN incorporates its petition for a declaratory ruling that it is not a public utility pursuant to G.S. 62-3(23), filed June 17, 2015, and its comments filed on October 30, 2015.

COMMENTS.

The power purchase agreement ("PPA") between NC WARN and the Faith Community Church (the "Church"), is admittedly a test case to determine if the upfront costs of solar equipment and installation of the solar photovoltaic ("PV") system can be financed through the sale of electricity generated by the system. Under the PPA, the financing of the solar facility is the key component,

and without NC WARN's assistance, the Church would not be able to fund the PV panels on its roof. Using the measured kW-hours produced by the system as the basis for repayment is a matter of ease and efficiency using the system's computerized monitoring program.

As detailed in the original petition and in its comments, NC WARN believes it is not a public utility based on the four-pronged test for Commission review in *State ex. rel. Utils. Comm'n v. Simpson*, 295 NC 519, 246 SE 2d 753 (1978). The circumstances to be reviewed are: (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. Petitions for declaratory rulings previously before the Commission on similar matters focused on the factual basis of whether the sales are made to the public. NC WARN, in its petition, set out the facts of the matter, and detailed the contractual relationship between NC WARN and the Church.

At the outset, NC WARN finds the combined comments of Duke Energy Carolinas and Duke Energy Progress (together "Duke Energy"), with their suppositions about NC WARN's motives, baseless accusations of impropriety and alleged "blatant disregard" for the law, to be unhelpful to the fair resolution of this matter. To the contrary, NC WARN firmly believes its actions are lawful under North Carolina law, and aboveboard and transparent.

Supporting comments. NC WARN adopts herein the comments of the Energy Freedom Coalition of America, consisting of SolarCity Corporation, Silevo Solar and Zep Solar. The Energy Freedom Coalition brings the experience of its members in funding PV systems for residential and commercial customers in other states, and would have the Commission determine that under North Carolina law, any entity can finance solar projects on the customer's side of the meter. In this context "third-party sales" would be broadly defined to allow the sales from a solar facility on the customer's side of the meter to be measured directly by the kW-hours generated by the system.

The second supporting comments adopted herein are those of Interfaith NC Power & Light ("IPL"), a project of the NC Council of Churches, submitted on its behalf by the Southern Environmental Law Center. The IPL comments focused on the religious community's support for renewable energy as part of their stewardship mission, and lack of ability in some instances to fund solar facilities. The IPL comments addressed the four-pronged test in *Simpson* and came to the same conclusion NC WARN did; NC WARN is not acting as a public utility. The IPL comments carefully address, among other cases, the recent decision by the Iowa Supreme Court in the Eagle Point Solar case, *SZ Enterprises, LLC v. Iowa Utils. Bd.*, 850 NW 2d 441 (Iowa 2014). This case is worth reviewing because, similar to the Commission's requirement under *Simpson*, the Iowa court made "a pragmatic assessment of what is actually happening in the transaction." *Id.* at 466. Contrary to Duke Energy's cursory dismissal of the Iowa case, the analysis followed by the Iowa case is similar to

the analysis of the characteristics in *Simpson*, and should be given weight and consideration.

A statement was filed in this docket by the Christian Coalition of NC supporting the IPL assertion that "allowing an installer to place solar panels on a congregation's roof and enter into a PPA would allow greater access to affordable, clean energy." The Christian Coalition also echoed the Energy Freedom Coalition position that the option for third-party sales should be open to all, and not only to churches and other nonprofit organizations.

Additional supporting statements were filed by the solar industry and individuals generally attesting to the benefits of solar energy and the need for financing options to manage up-front costs of solar systems and installation.

Opposing comments. Opposing comments were submitted by the Public Staff, Duke Energy, and Dominion NC Power ("Dominion").

The Public Staff focused somewhat on the legal analysis of *Simpson*, but relied most heavily on the Commission's ruling in National Spinning's petition for a declaratory ruling, Docket SP-100, Sub 7 (1996), as holding that no sales of electricity from one person to another was permissible under North Carolina law. The Public Staff failed to distinguish between sales on the customer's side of the meter (whether part of a financing agreement or not) and a company like National Spinning selling excess power it generated at its own facility to an adjacent manufacturing company. As noted in NC WARN's petition and comments, and supported by the Energy Freedom Coalition and IPL, this

distinction should play an essential part of the Commission's consideration of the *Simpson* circumstances, and lies at the heart of the present petition for declaratory ruling.

The substantive comments of Dominion and Duke Energy center on the lack of explicit statutory authority for a broadly defined "third-party sales," i.e., no person can sell power under any circumstances in North Carolina except the regulated monopolies. As noted by NC WARN and the supporting parties, the need for the *Simpson* review should determine whether the owner of the facility, in this case NC WARN, as owner of the PV system, can sell power to a customer where the power is being produced on the customer's side of the meter. A financing arrangement between two parties, such as NC WARN and the Church, is not open to all members of the public and impacts only those two parties.

NC WARN herein reiterates part of its position in its Petition. The arguments of Dominion and Duke Energy that the exclusive franchise of the monopoly utility should always be favored are particularly flawed in this case because NC WARN is seeking to offer a service that the companies choose not to offer its customers and therefore NC WARN is not in any way competing with the incumbent utility. Disallowing financing arrangements such as this all together would uphold the interests of the utilities over the best interests of customers because it effectively denies customers the opportunity to pursue financing options that could help them install solar even if the monopoly utility chooses not to offer such a service.

Relying on the House Bill 245¹ definition would limit allowable third-party sales to facilities “owned and operated by a third party and located on the customer’s property where such electricity will be consumed,” rather than from any generating facility at any location. This distinction is the key to the *Simpson* analysis; not all third-party sales should be disallowed, especially in instances like that *sub judice* in which the electricity sales are secondary to the financing arrangements.

Lastly, both Dominion and Duke Energy attempt to show NC WARN deliberately and intentionally violated North Carolina law and deserves to be punished. While Dominion at least attempted to confine itself to a timeline of events, Duke Energy relied on *ad hominin* attacks and baseless suppositions about NC WARN’s motives.

To more accurately describe the timeline, the installer filed its initial Report of Proposed Construction of an Electric Generating Facility on behalf of NC WARN and the Church in Docket SP-5157, Sub 0, on February 13, 2015, for the 5.2 kW PV system on the Church roof. The system was completed and inspected June 17, 2015, the day of the dedication of the system.² NC WARN filed a petition for declaratory ruling as soon as it was confident the system was properly

¹ HB 245 was introduced in the 2016 NC General Assembly. NC WARN readily admits the bill did not pass but also believes the bill’s attempt to define what is permissible and what is not has merit. A clear delineation that a PPA similar to one between NC WARN and the Church is allowable would eliminate the need for the Commission to consider all of the *Simpson* circumstances for each similar project.

² As noted in the correspondence between Mr. Somers, counsel for Duke Energy, and Mr. Runkle, counsel for NC WARN, attached to Duke Energy’s comments, Duke Energy connected the system soon after the June 17, 2015, dedication.

installed and inspected, and could go forward as planned. As another matter of speculation, how long would the project have been delayed by Duke Energy if a petition for declaratory ruling had been filed at an earlier juncture?

Duke Energy also in several instances misrepresents statements made by NC WARN in its Request for Declaratory Ruling, as well as the organization's intentions regarding what parties this financing arrangement was made available to. NC WARN questions how Duke Energy came to these inaccurate conclusions. In its comments at page 6, Duke Energy states, "Similarly, NC WARN has held itself out as willing to serve all who apply up to the 5.2 kW capacity of its facilities..." In fact, NC WARN did not offer this financing arrangement to all who apply, but specifically extended an offer to serve only the Church in this case. Duke Energy's comments at page 6 also state, "NC WARN further states that it intends to expand its public utility service..." However, NC WARN has maintained as a critical fact supporting its original request, that it is not offering a public utility service.

The Commission should reject out-of-hand the utilities' demand for \$1000/day penalties. It puts a taint on this proceeding and has shifted some of the important policy debate away from what is permissible third-party sales into the propriety of sanctions.³ NC WARN has openly and persistently criticized Duke Energy's business plan, and firmly believes such criticism has been based on

³ NC WARN finds the public statements by Mr. Wheelless, Duke Energy's spokesman, to be especially inflammatory. From a *Charlotte Observer* article, "Duke Energy urges regulators to fine advocates in solar case," on November 2, 2015, "Wheelless said WARN has lost a number of challenges of Duke that the company viewed as baseless and that 'there should be consequences for doing that.'" Retaliation for criticism should never be grounds for a penalty. www.charlotteobserver.com/news/local/article42209517.html#storylink=cpy

facts and analysis. This does not somehow open the door to punishment through retaliatory penalties.

In NC WARN's review of previous dockets, it is apparent the Commission has not penalized any person who has come to it for a declaratory ruling. A well-reasoned argument that an entity is not a public utility and that an agreement constitutes a permissible third-party sale, made publicly and through Commission channels, should not bring penalties. Duke Energy's threat of massive penalties has a chilling effect on anyone else who would like to bring a petition for declaratory ruling to the Commission, or who believes its actions are lawful under North Carolina law.

REQUEST FOR ORAL ARGUMENT.

NC WARN's petition provides the Commission with adequate facts to make a declaratory ruling, although there are a number of complicated and nuanced legal arguments presented by the parties and other interested persons. NC WARN believes the Commission would benefit from these arguments being placed squarely before it in oral argument.

THEREFORE, NC WARN urges the Commission to issue a declaratory ruling that NC WARN, and similar entities, do not become public utilities when they finance a solar system and sell power on the customer's side of the meter, even if the sales are on a kWh basis. NC WARN further prays that the Commission hold oral argument to allow the parties the opportunity to explain their positions.

Respectfully submitted, this is the 20th day of November 2015.

FOR NC WARN

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served courtesy copies of the foregoing upon each of the parties of record in this docket, and other potentially interested parties, by deposit in the U.S. Mail, postage prepaid, or by email transmission.

This is the 20th day of November 2015.

/s/ John D. Runkle

Attorney at Law