STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

Docket No. SP-100, Sub 31

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	))))))	**COMMENTS OF ELECTRICITIES**

Pursuant to the Order Requesting Comments issued in this docket on September 30, 2015, ElectriCities of North Carolina, Inc., North Carolina Municipal Power Agency Number 1 and North Carolina Eastern Municipal Power Agency (collectively hereinafter "ElectriCities" or "the Power Agencies") provide these comments concerning the issues arising from NC WARN's Request for Declaratory Ruling.

INTRODUCTION

ElectriCities of North Carolina, Inc., is a joint municipal assistance agency organized pursuant to N.C. Gen. Stat. § 159B-43 by North Carolina Municipal Power Agency Number 1 ("NCMPA1") and North Carolina Eastern Municipal Power Agency ("NCEMPA"). ElectriCities provides aid and assistance to NCMPA1 and NCEMPA in connection with the operation of their electric systems, and also provides management services to them.

NCMPA1 is a joint agency organized pursuant to Chapter 159B by its members, consisting of 19 municipalities[1] located in that portion of western North Carolina served

[1] The members of NCMPAl are the following cities and towns: Albemarle, Bostic, Cherryville, Cornelius, Drexel, Gastonia, Granite Falls, High Point, Huntersville, Landis, Lexington, Lincolnton, Maiden, Monroe, Morganton, Newton, Pineville, Shelby and Statesville.

by legacy Duke Energy Carolinas, LLC f/k/a Duke Power Company ("DEC"). NCEMPA is a joint agency organized pursuant to Chapter 159B by its members, consisting of 32 municipalities[2] located in those portions of eastern North Carolina served by Duke Energy Progress, Inc. f/k/a Progress Energy ("DEP") and Dominion North Carolina Power.

COMMENTS

By its Request for Declaratory Ruling NC WARN seeks Commission approval of the power sale arrangement that NC WARN has entered into with Faith Community Church ("the Church"). North Carolina law does not allow the ruling that NC WARN requests.

NC WARN contends that its present and proposed future sales of electric power as described in the Request should not cause it to be a public utility, arguing as follows:

> NC WARN's primary argument is that it is not a public utility as the Solar Freedom project is not sales 'to or for the public' but to a specific nonprofit, the Faith Community Church, that it is working with to obtain solar electricity. More closely aligned with the parking lot lighting case[3], rather than *National Spinning*[4], NC WARN is providing funding, a service, rather than just selling electricity to a church.

Request at ¶ 15.

NC WARN's tortured exercise in semantics undertaken in an effort to escape the Commission's ruling in *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*, Docket

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[2] The members of NCEMPA are the following cities and towns: Apex, Ayden, Belhaven, Benson, Clayton, Edenton, Elizabeth City, Farmville, Fremont, Greenville, Hamilton, Hertford, Hobgood, Hookerton, Kinston, LaGrange, Laurinburg, Louisburg, Lumberton, New Bern, Pikeville, Red Springs, Robersonville, Rocky Mount, Scotland Neck, Selma, Smithfield, Southport, Tarboro, Wake Forest, Washington and Wilson.

[3] *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 SP-100, Sub 24 (2009).

[4] *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*, Docket SP-100, Sub 7 (1996).

SP-100, Sub 7, is to no avail. In *National Spinning* the Commission denied a request for a declaratory ruling that the use of steam for both National Spinning's industrial processes and for generating electricity for National Spinning, in a facility owned by Leary, would not cause either of the petitioners in that docket to be a public utility. Because the present Request also involves a direct third-party sale of electricity, the Commission should reach the same result here.

NC WARN attempts to characterize the arrangement it has entered into with the Church as one where it provides a funding "service" rather than providing power. If a bank lent money to the Church so that it could install its own solar panels, and thereby generate its own electricity, then that bank's provision of funding might arguably be a "service." In the test case scenario it has constructed with the Church, however, NC WARN is selling electricity to the Church - which the Church can use as it sees fit. NC WARN is not selling lighting – it is selling power – and its depiction of this arrangement as a "funding mechanism" does not change that reality. Request at ¶¶ 4, 6, 11 and 20. NC WARN is billing the Church, and is being paid by the Church, based on the amount of electricity NC WARN provides to the Church ("the Church agreed to allow NC WARN to own the system and pay monthly for the electricity generated. . . .") Request at ¶ 6. This is a power sale arrangement, and it is not permitted under North Carolina law.

NC WARN contends that its proposed activities as described in its Request would not cause it to be a public utility, arguing that its sale of power to the Church is not a sale "to or for the public." That assertion cannot be squared with NC WARN's strategy as described in its Request – where it candidly acknowledges that not only is it selling electricity to the Church, pursuant to a power purchase agreement, but it hopes to generate

sufficient revenue from its sale of power to the Church to allow it to replicate this scenario and thereby provide power to additional (and potentially an unlimited number of) other non-profit enterprises in the future.

> To resolve this issue, the Church agreed to allow NC WARN to own the system and pay monthly for the electricity generated by the project, with a portion of the cost supported by NC WARN. **Such a funding mechanism could potentially generate a revolving revenue stream and allow NC WARN to provide similar projects to other non-profits in the future.**
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> **NC WARN does not hold itself out as providing solar financing to the general public, but only to self-selected non-profit organizations, and it does not intend to monopolize the territory with a public service.** While NC WARN believes that under G.S. 62-3(23), any entity should be allowed to provide funding mechanisms for solar systems, either through ownership and subsidized sales, or through lease with payments based on the output of the systems, **it does not intend to offer its Solar Freedom program to all of Duke Energy's customers.**

Request at ¶¶ 6, 20 (emphasis added).

In a number of dockets, the Commission has ruled that the petitioner(s) will not be a public utility by virtue of the particular facts and circumstances presented in each docket. In doing so, the Commission has examined the factors articulated in *State ex rel. Utility Commission v. Simpson*, 295 N.C. 519, 246 S.E.2d 753 (1978). One such factor commonly recognized by the Commission in making such a finding is the breadth or extent to which service is proposed to be offered. For example, in *In the Matter of Request for a Declaratory Ruling by Westmoreland-LG&E Partners*, Docket Nos. SP-77 and SP-100, Sub 2, the Commission cited *State ex rel. Utilities Commission v. Carolina Telephone & Telegraph Company*, 267 N.C. 257, 268, 148 S.E.2d 100 (l966), in noting as follows:

> The Supreme Court has held that one offers service to the 'public' when he holds himself out as willing to serve up to the capacity of his facilities without regard to the facts that his service is limited to a specified area and his facilities are limited in capacity.

Order On Notice Of Amended Information And On Request For Declaratory Ruling issued October 13, 1993 at p. 4. *See, e.g., In the Matter of Request for Declaratory Ruling by Duke Engineering & Services, Inc.*, Docket No. SP-100, Sub 8, Declaratory Ruling issued May 24, 1996 at p. 4 ("DE&S will not hold itself out to provide landfill gas to the general public."); *In the Matter of Notice of Change in Information and Request for Declaratory Ruling by Panda-Rosemary Corporation, et al.*, Docket Nos. SP-100, Sub 15 and SP-73, Order on Notice of Change in Information and Request for Declaratory Ruling at p. 2, issued October 21, 1997 ("Neither Panda nor Rosemary will hold themselves out to provide water to the general public."), and *In the Matter of Request for Declaratory Ruling of Asheville Landfill Gas*, LLC, Docket No. SP-100, Sub 12, Order On Request For Declaratory Ruling issued April 8, 1997 at pp. 1-2 ("In addition, ALG's sale of landfill gas … should not be considered a sale 'to or for the public' because it is a sale to a single customer, there will be no resale, there is little or no displacement of public utility services, and the project offers substantial public policy benefits.")

NC WARN apparently hopes to build as many solar facilities as it can, using funds generated from power sales, and then sell the power from these additional solar facilities to additional non-profit entities. In other words, if allowed to do so, NC WARN would "hold itself out to the public" and generate and sell power to other entities "up to the capacity of [its] facilities." The "revolving revenue stream" which NC WARN seeks to engineer is quote different, and readily distinguished from, the scenario the Commission has typically confronted in dockets involving sale of steam or landfill gas, wherein the petitioner is a single purpose entity requesting a ruling from the Commission that its sale of steam or landfill gas to a single user will not be a public utility offering service "to or for the public for compensation."

The situation and plans described in NC WARN's Request are not analogous to the facts and circumstances presented in those dockets. The ruling requested by NC WARN would not be consistent with prior Commission rulings interpreting the "to or for the

public" provision in the definition of public utility set forth in N.C. Gen. Stat. § 62-3(23)a.1. ElectriCities thus submits that under the circumstances and plans described in the Request, NC WARN would, in fact, be offering to furnish electric power to or for the public for compensation.

QUESTIONS POSED IN THE COMMISSION'S ORDER

In the Order Requesting Comments regarding NC WARN's Petition, the Chairman requested that commenters address the following discrete questions:

1. 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.

The Commission does not have the express legal authority to allow third-party sales of electric service to retail customers. NC WARN describes the issue presented by its Request as follows:

> The key issue to be resolved, and the reason why this test case has been raised, is whether state law prohibits third-parties, such as NC WARN, from installing solar panels and selling the power to a client, OR does only a public utility, such as Duke Energy, have the ability to do so.

NC WARN Request ¶ 9.

The Commission has, just this year, explicitly concluded that there is no provision for third-party (*i.e.*, non-utility) sales of electricity to retail customers in North Carolina. Specifically, in its Order Approving Pilot Programs, issued in Docket No. E-l00, Sub 90 on January 27, 2015, the Commission noted the following:

> 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).

The Commission's definitive statement on this point goes to the very heart of NC WARN's Request, which effectively asks the Commission to reverse itself now and reach exactly the opposite conclusion in this docket. Suffice it to say, if Chapter 62 prohibits third-party (*i.e.*, non-utility) sales, then it is apparent that the Commission does not have "the express legal authority to allow third-party sales of Commission regulated electric utility service."[5] Having found that Chapter 62 prohibits third-party sales of electricity to retail customers, the Commission cannot grant NC WARN's request under Chapter 62 as currently written.

2. 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?

The Commission does not have such authority. Even if it did, there would be no rational basis for allowing such sales based on some artificial distinction as to the nature of the persons or entities which could engage in such transactions. No meaningful or rational distinction is brought to the analysis of the extent of the Commission's legal authority by the nature of the prospective retail purchaser, *i.e.*, the fact that a non-profit entity such as Blue Cross and Blue Shield of North Carolina, a North Carolina non-profit corporation, wished to purchase power directly from a non-utility seller, would not resolve the question of the Commission's authority.

[5] In addition, the arrangements described in NC WARN's Request conflict with the Electric Act of 1965, also known as the Territorial Assignment Act, N.C. Gen. Stat. §§ 160A-331, *et seq*., as it relates to the Power Agencies' member municipalities.

3. 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?

If the Commission was to conclude that NC WARN is not a *de facto* public utility under the Public Utilities Act, N.C. Gen. Stat. §§ 62-1, *et seq.* ("the Act"), by virtue of its current and proposed future sales of electricity, then the Commission would be without authority to regulate the terms and conditions of its services. The Act grants the Commission "general power and authority to supervise and control the public utilities of the State." N.C. Gen. Stat. § 62-30. *See also* N.C. Gen. Stat. §§ 62-31 and 31. If NC WARN is found to not be a public utility, then the Commission would be without power to regulate the rates, terms or conditions of the electric service it provided to the public. In such a scenario, absent legislative action, there would be no protection for the public that chose to do business with such third-party suppliers.

4. 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?

The Commission should issue its Order denying NC WARN's Request.

CONCLUSION

The Power Agencies respectfully request that the Commission take these comments into consideration, and that it deny NC WARN's Request.

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

BURNS, DAY & PRESNELL, P. A.

By: _____

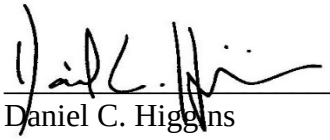
Daniel C. Higgins
Post Office Box 10867
Raleigh, NC 27605
Tel: (919) 782-1441
E-mail: dhiggins@bdppa.com
Attorney for ElectriCities of North Carolina, Inc., NCEMPA and NCMPA1

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been served on all counsel of record in this docket, either by electronic mailing or by depositing same in the U.S. Mail, first class postage prepaid.

This the 30th day of October, 2015.

BURNS, DAY & PRESNELL, P.A.

By: 

Daniel C. Higgins
Post Office Box 10867
Raleigh, NC 27605
Tel: (919) 782-1441