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North Carolina Electric  
Membership Corporation

FILED

OCT 30 2015

Clerk's Office  
N.C. Utilities Commission

October 30, 2015

*VIA HAND DELIVERY*

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

*Re: Docket No. SP-100, Sub 31*

Dear Ms. Mount:

Accompanying this letter are the original and thirty (30) copies of North Carolina Electric Membership Corporation's Comments to be filed in the above-referenced docket. Upon filing, please return a date stamped copy in the enclosed envelope.

Should you have any questions, please do not hesitate to contact me at 919.875.3121.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard M. Feathers".

Richard M. Feathers

Vice President and Associate General Counsel

RMF/bl

cc: Parties of Record

**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	<b>NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION'S COMMENTS</b>
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**NOW COMES** North Carolina Electric Membership Corporation (“NCEMC”) pursuant to Commission Order Requesting Comments issued on September 30, 2015, in which NCEMC was made a party to this docket without the necessity to file a petition to intervene, and pursuant to N.C. Gen. Stat. § 62-72, and Rule R1-19 of the Rules and Regulations of the North Carolina Utilities Commission.

NCEMC incorporates by reference the background and summary leading the Commission to request comments in this Docket. The Commission’s requests for comments and NCEMC’s responses are as follows:

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.*

NCEMC has found no provision in Chapter 62 of the North Carolina General Statutes expressly authorizing the Commission to allow third-party sales of Commission regulated electric utility service. This is widely accepted as the current state of North Carolina’s policy on third-party power purchase agreements. See “3<sup>rd</sup> Party Solar PV Power Purchase Agreement,” DSIRE, July 2015, available online at <http://ncsolarcen->

[prod.s3.amazonaws.com/wp-content/uploads/2015/08/3rd-Party-PPA\\_072015.pdf](http://prod.s3.amazonaws.com/wp-content/uploads/2015/08/3rd-Party-PPA_072015.pdf) (last accessed October 13, 2015) (citing N.C. Gen. Stat. 62-3(a)(23) for the basis that third-party sales of electricity are “apparently disallowed by state or otherwise restricted by legal barriers”). This follows from the long-standing precedents from North Carolina’s appellate courts: the Commission, “being an administrative agency created by statute, and has no regulatory authority except such as is conferred on it by Ch. 62 of the General Statutes.” *State ex rel. Utilities Commission v. National Merchandising Corp.*, 288 NC 715, 722 (1975) (citing *State ex rel. Utilities Commission v. Atlantic Coast Line R. Co.*, 268 N.C. 242, 245 (1966)). Thus, on the face of Chapter 62 the Commission lacks express authority to allow third-party sales, and by judicial precedent lacks inherent power to enact such a policy change.

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?*

Again, NCEMC has concluded that the Commission does not have such authority.

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?*

The Commission has the authority and duty to regulate the **facilities** used in third-party seller arrangements in a number of ways, *see e.g.* N.C. Gen. Stat. § 62-100.1 (prohibiting a public utility or other person to construct a facility for the generation of electricity without first obtaining a certificate of public convenience and necessity), § 62-101 (providing that “an entity” may obtain a certificate to construct a new transmission

line solely for the purpose of providing interconnection of an electric generation facility), and 16 U.S.C. 2601 *et. seq.* (delegating to the Commission various authority to regulate “qualifying facilities” under the Public Utility Regulatory Policies Act), but it does not seem to have authority to regulate the rates and other terms of third-party sellers of electricity as such, given that the actual practice of third-party sales is unauthorized. The General Assembly vested authority to the Commission to “regulate public utilities generally, their rates, services and operations...” N.C. Gen. Stat. § 62-2(b). NCEMC does not understand this authority to permit the Commission to enable or sanction third-party sales, nor to prescribe rates or terms of service under which a third-party seller might offer service.

*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 a declaratory ruling providing that NC WARN is in violation of the requirements of Chapter 62 of the General Statutes and impose such remedies or penalties as it deems appropriate and within its discretion.

NC WARN’s petition invites the Commission to create by declaratory ruling an exemption to the statute defining the term “public utility.” *See* N.C. Gen. Stat. § 62-3(23)(a). This invitation runs contrary to the North Carolina Constitution’s fundamental declaration that “[t]he legislative power of the State shall be vested in the General Assembly.” Art. II, § 1, NC Const. Long ago, the General Assembly determined that the business of public utilities is “affected with the public interest and that the availability of

an adequate and reliable supply of electric power...to the people, economy and government of North Carolina is a matter of public policy.” N.C. Gen. Stat. § 62-2(a). The General Assembly therefore granted the Commission “such general power and authority to supervise and control the public utilities of the State as may be necessary...” N.C. Gen. Stat. § 62-30. However, the Commission, “being an administrative agency created by statute, and has no regulatory authority except such as is conferred on it by Ch. 62 of the General Statutes.” *State ex rel. Utilities Commission v. National Merchandising Corp.*, 288 NC 715, 722 (1975) (citing *State ex rel. Utilities Commission v. Atlantic Coast Line R. Co.*, 268 N.C. 242, 245 (1966)). In exercise of its legislative power, the General Assembly has enacted detailed exemptions from the definition of “public utility” which do not include third-party sales of electricity. *See* N.C. Gen. Stat. § 62-3(23)(d), (g), (h), (i), and (k).

Indeed, the General Assembly was presented with an opportunity to enact a further exemption from that definition during the legislative session that adjourned on September 30, 2015. *See* H.B. 245, First ed., 2015 Gen. Assem., Reg. Sess. (N.C. 2015). House Bill 245 would have provided an exemption from regulation as a “public utility” for third-party sales of electricity from on-site renewable energy facilities. *Id.* at §§ 2 and 3. The General Assembly’s House of Representatives failed to hold even one committee hearing or vote on the legislation. *See Id.* (last action on Aug. 12, 2015 re-referring to the Com. on Rules, Calendar, and Operations of the House, if favorable, Finance). If it were to grant NC WARN’s petition, the Commission would effectively usurp the legislature’s authority to set policy, exercising authority the legislature has only recently declined to wield.

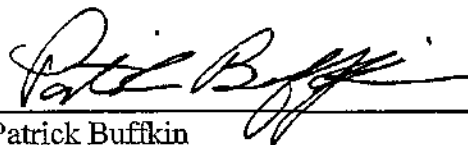
This does not mean the Commission is without authority to enforce the prohibition against such third-party sales. This activity is “affected with the public interest” and “a matter of public policy.” N.C. Gen. Stat. § 62-2(a). The reasoning supporting this conclusion is clear: the General Assembly made a long considered decision to grant exclusive franchise territory to the electric utilities of the state and to require and allow utilities to base their long-term planning upon that franchise. *See generally* Art. 6, Ch. 62, N.C. Gen. Stat. The potential loss of load experienced by utilities when customers enter into third-party sales arrangements alters the economics and engineering of the electric system thereby undermining the validity of the long-term planning that the General Assembly has mandated for utilities. Viewed in this light, third-party sales arrangements promote the unraveling of the carefully balanced rights and duties associated with an exclusive utility franchise.

NCEMC urges the Commission to decline NC WARN’s invitation to legislate by declaratory ruling. Instead the Commission’s ruling should provide that NC WARN is in violation of the requirements of Chapter 62 of the General Statutes, and issue such remedy and penalties, within its grant of enforcement and judicial responsibility under N.C. Gen. Stat. §§ 62-23 and 62-30, as the Commission may deem appropriate.

Respectfully submitted this the 30<sup>th</sup> day of October, 2015.

**NORTH CAROLINA ELECTRIC  
MEMBERSHIP CORPORATION**

By:



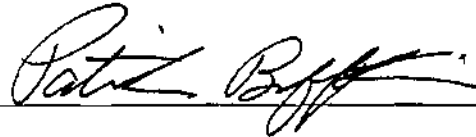
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[rick.feathers@ncemcs.com](mailto:rick.feathers@ncemcs.com)

**CERTIFICATE OF SERVICE**

It is hereby certified that the foregoing document has been served upon all parties of record by electronic mail, or depositing the same in the United States mail, postage prepaid.

This the 30<sup>th</sup> day of October, 2015.

  
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