

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. SP-5157, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
Request by NC WARN and for a Determination)	NC WARN'S REQUEST
That Its Proposed Activities Would Not Cause)	FOR DECLARATORY
It to be Regarded as a Public Utility Pursuant)	RULING
To G.S. 62-3(23))	

NOW COMES the NC Waste Awareness and Reduction Network ("NC WARN"), through the undersigned attorney, with a request for a declaratory ruling and determination that its proposed activities would not cause it to be regarded as a public utility pursuant to G.S. 62-3(23) and other related statutes in the Public Utilities Act.

In support of the request is the following:

OVERVIEW

1. NC WARN has entered into a power purchase agreement ("PPA") with the Faith Community Church in Greensboro to install a 5.2 kW solar photovoltaic ("PV") system on the church's roof. (Attachment A). This project, Solar Freedom, is investigating funding mechanisms to provide affordable solar electricity to non-profits. The installation at the Faith Church is a test case to determine if the up-front costs of solar equipment and installation can be financed through the sale of electricity generated by the PV panels. Because of NC WARN's support, the electricity for on-site usage will be less than half the kilowatt-hour price the non-

profit now pays to its energy supplier, Duke Energy, with additional reduction of the church's electricity bills from its interconnection and net metering with the utility. The application for interconnection with Duke Energy is awaiting final approval, and the formal ribbon cutting ceremony at the Church was held on June 17, 2015. (Photos, Attachment B).

BACKGROUND

2. NC WARN is a not-for-profit corporation under North Carolina law, with more than one thousand individual members and families across the state. Its purpose is to reduce hazards to public health and the environment from global climate change by promoting energy efficiency and renewable energy resources. Its address is NC WARN, Post Office Box 61051, Durham, North Carolina 27715-1051.

3. NC WARN believes low-cost solar electricity should be available to everyone on their own property. Power generation from solar PV is a clean sustainable energy technology, and in the case of the Faith Community Church, solar energy aligns with its mission, "in faith, striving to be good stewards of God's earth and humble servants of God's people." The most significant barriers to the widespread use of PV are up-front financing and concern about Duke Energy's claim that it holds an exclusive monopoly on selling electricity within its service area.

4. NC WARN has a multi-year history in developing up-front funding mechanisms for solar systems. In 2012, it initiated a solar donation program that

supplied free solar panels and/or solar hot water heaters to three nonprofit organizations in the Triangle, the Urban Ministries Shelter for the Homeless in Durham, the Helen Wright Center for Women in Raleigh and the Freedom House Recovery Center in Chapel Hill. At the same time, NC WARN installed a 2.88 kW PV system at its office in Durham. (Docket No. SP-1837, Sub 0). To fund the projects, NC WARN raised the funds for the equipment and installation from its members, and after investigating a number of solar installation companies operating in NC, contracted with Yes! Solar Solutions. The program supplied high-quality panels and equipment, with extensive warranties and projected thirty-year life. There was considerable interest in the program, but it was limited by the amount of funds NC WARN could raise.

5. Subsequently, NC WARN initiated Solarize NC programs in Durham, Chatham County, the Triad and Western Wake County, primarily for residential owners.¹ The funding mechanism consisted of individual installation contracts with costs reduced by purchasing equipment in bulk, with families using Federal and state tax credits if they are able. The programs use experienced and certified contractors who are able to keep and expand crews employed in the area. As part of the Solarize programs, NC WARN organizers hold community meetings and actively recruit potential customers through neighbor-to-neighbor outreach. Part of the costs -- 10 cents per watt installed for systems larger than 3 kW --

¹ Similar solarize programs have been established in several other communities in North Carolina. The May report shows a total of 326 contracts across the 16 programs for an installed 1651.8 kW. The number is expected to double by the end of the year. See <http://solarize-nc.org/>

goes into a community development fund that will allow solar panels to be installed on low-income homes, beginning in Durham.

6. In the fall of 2014, after promoting the Solarize program and the benefits of solar power to the residents of Greensboro, NC WARN began discussions with representatives of the Faith Community Church to determine if NC WARN could install PV on the church's rooftop. NC WARN was restricted by the amount of funds needed for the up-front costs of equipment and installation. 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.

7. As shown in the attached PPA, NC WARN is responsible for the up-front equipment and installation costs, and through its contractor, system maintenance. NC WARN retains ownership of the PV panels and will bill the Church monthly for electricity generated by the system. Because this is a test case, the Church is covered for all liability under the PPA, including the necessity of legal fees for determining if NC WARN is able to finance the installation and operation of the system through the subsidized sale of the electricity from the system. The PPA also clearly states that if it is determined by the NC Utilities Commission, or a court with jurisdiction over the matter, that NC WARN cannot sell the Church the output of the panels, NC WARN is committed to donating the PV system to the Church.

8. An adverse ruling by the Commission would restrict NC WARN's ability to enter into similar funding mechanisms through PPAs with other churches and non-profits, as funds become available.

LEGAL ISSUES

9. 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.

10. The relevant statutes defines a public utility

a. "Public utility" means 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, piped gas, steam or any other like agency 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

G.S. 62-3(23). If the proposed activities undertaken fall within the definition of those of a public utility, the entity is required to comply with statutory requirements in the Public Utilities Act, and regulation by the Commission.

11. NC WARN is aware that the use of its funding mechanism, i.e., the sale of electricity from the owner of a PV system to the owner of the property on which is installed, may be restricted under NC law. NC WARN is bringing the present request before the Commission because it believes the issue is

distinguishable from previous cases, to the point of being of first impression, and provides the Commission the opportunity to review mechanisms for funding solar projects. The issue of third-party sales has been addressed infrequently in North Carolina. In the two dockets discussed below, the Commission fully reviewed legal and policy issues on direct sales versus providing services. NC WARN believes the funding mechanism *sub judice* is permissible under NC law, and should be encouraged.

12. There are two Commission decisions that go directly to whether a non-utility party can sell power directly to someone within the Duke Energy service area. In the *National Spinning* case,² the company wanted to sell excess power to an adjacent manufacturing company and came to the Commission for a declaratory ruling. The Commission denied the request on the grounds the sale of electricity made National Spinning a public utility. Citing an earlier case, *State ex. rel. Utils. Comm'n v. Simpson*, 295 NC 519, 246 SE 2d 753 (1978), the Commission determined the Courts had granted the Commission considerable flexibility in determining the meaning of the phrase “to or for the public,” and concluded the direct sale of power from one industrial facility to another made the initial industry a public utility.

13. In the second case, Progress Solar Solutions³ made a similar request for determination of public utility status. The company proposed to install PV

² Request for a Declaratory Ruling by National Spinning Company, Inc. and Wayne S. Leary, d/b/a Leary's Consultative Services, NCUC Docket SP-100, Sub 7 (1996).

³ Request by Progress Solar Investments, LLC, and Progress Solar Solutions, LLC, for A Determination that Their Proposed Activities Would Not Cause Them to be Regards as Public Utilities under G.S. 62-3(23), NCUC Docket SP-100, Sub 24 (2009).

panels, lights and batteries on poles at a public parking lot. The Commission also followed the *Simpson* analysis, and given that “North Carolina has exclusive utility franchise, a conclusion that owning and operating solar lighting systems for the purpose of selling light to a third party constitutes a public utility activity would effectively prohibit the activity.” Contrary to its conclusion in *National Spinning*, the Commission determined that providing solar lighting at a parking lot did not make the solar company a utility as the end product was lighting as opposed to electricity.

14. The test in *Simpson*, as stated in the parking lot lighting case, Docket No. SP-100, Sub 24, is to balance a number of the “regulatory circumstances of each case,” rather than “depend on some abstract, formalistic definition” of what is or is not included in the G.S. 62-3(23) definition of what selling to the public means. Again, as stated in that docket, the circumstances the Commission reviews 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.

The Commission goes on to state

In the final analysis, the meaning of “public” must be such as what will, in the context of the regulatory circumstances, accomplish the legislature’s purpose and comport with its public policy.

15. 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 non-profit, the Faith Community Church, that it is working with to obtain solar

electricity. More closely aligned with the parking lot lighting case rather than *National Spinning*, NC WARN is providing funding, a service, rather than just selling electricity to a church. The proceeds from the monthly sales of electricity will go to offset much of the initial costs of the equipment and installation, funded upfront by NC WARN, and continuing maintenance of the system. Duke Energy does not have similar programs within its service area, so there is no competition with it in the financing market place. Most financial institutions readily offer home equity loans, and some offer loan funds for renewable energy projects. Nationally there a number of corporations offering “no money down” for solar projects, recovering equipment and installation costs through the sale of electricity.

16. In broad policy terms, Duke Energy has a monopoly in North Carolina, an exclusive service franchise, even though monopolies are prohibited by the NC Constitution in Article I, Section 34, “perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.” The distinctive characteristics of a monopoly are (1) control of so large a portion of the market of a certain commodity that (2) competition is stifled, (3) freedom of commerce is restricted and (4) the monopolist controls prices. *American Motors Sales Corp. v. Peters*, 311 N.C. 311, 317 S.E.2d 351 (1984). Duke Energy is clearly a monopoly under the first three characteristics of this definition, but it is allowed to operate as a monopoly only because it is regulated by the Commission as a public utility.

17. In exchange for providing Duke Energy with an exclusive utility franchise, the Commission has the authority to “compel [its] operation in accordance with policy of the state as declared in statute.” *State ex rel. Utils.*

Comm'n v. Public Staff - NC Utils. Comm'n, 123 NC App. 623, 473 S.E.2d 661 (1996). The current state policy, as recognized in *National Spinning*, is to encourage and develop renewable resources. The REPS provisions in 2007 Session Law 2007-397 (also known as Senate Bill 3), renewed this mandate by adding to the Public Utility Act's declaration of policy,

To promote the development of renewable energy and energy efficiency through the implementation of a Renewable Energy and Energy Efficiency Portfolio Standard (REPS) that will do all of the following:

- a. Diversify the resources used to reliably meet the energy needs of consumers in the State.
- b. Provide greater energy security through the use of indigenous energy resources available within the State.
- c. Encourage private investment in renewable energy and energy efficiency.
- d. Provide improved air quality and other benefits to energy consumers and citizens of the State.

G.S. 62-2(10). To the extent NC WARN is able to raise funds from its members, the Solar Freedom program is an investment in renewable energy, and should be encouraged.

18. In 2015, solar PV systems are a tremendous resource that can provide reliable electricity when we need it. The cost of installed PV system prices in the United States have dropped steadily, by 12% from last year, and by 45% since 2010. North Carolina currently has 1,011 MW of installed solar capacity, the fourth largest in the United States. In North Carolina, there are approximately 177 solar companies that employ 5,600 people, with an investment of \$652 million in

2014.⁴ This level of economic activity should be encouraged as a matter of state policy.

19. As shown in the Solarize programs, there is considerable demand for solar systems, although as noted above, the funding mechanisms for the upfront costs are a significant barrier, especially for churches and other non-profit organizations. Without Duke Energy's financial involvement, donations to non-profits, or private capital, are the two means for overcoming this barrier. As an "industry," NC WARN's member-supported approach is altruistic.

20. 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. Moreover, Duke Energy does not have any programs, nor has it proposed any programs, that provide these types of funding mechanisms for roof-top solar systems.

21. North Carolina is one of only four states that does not have a clear policy statement encouraging third-party funding of renewable energy, either through legislation or court order. The proposed legislation in North Carolina, the

⁴ www.seia.org/state-solar-policy/north-carolina

Energy Freedom Act,⁵ would make third-party financing agreements accessible to all North Carolinians.⁶ Although NC WARN supports this type of broad approach, the determination requested in this docket does not depend on the passage of the bill. The Commission can follow the balancing of considerations in *Simpson* and determine that NC WARN is not a utility in providing a reasonable funding mechanism to a sister non-profit organization.

22. Although determined under Iowa law, the analysis by the Iowa Supreme Court in the Eagle Point Solar case, *SZ Enterprises, LLC v. Iowa Utils. Bd.*, 850 NW 2d 441 (Iowa 2014), is worth reviewing. Like the Commission's requirement under *Simpson*, the Iowa court made "a pragmatic assessment of what is actually happening in the transaction." *Id.* at 466. In that case, like the one before the Commission, the actual issue was not the supplying of electricity but the method of financing, and financing of renewable energy methods was not something the Iowa public utilities were required to do, or chose to do. In finding third-party financing mechanisms permissible, the Iowa court determined that it was contrary to public policy that "providing financing for solar activities should draw an entity into the fly trap of public regulation." *Id.* at 467.

23. Lastly, NC WARN is prepared to provide an annual report filed in this docket, or by some other method, describing the results of the Faith Community Church project, and any similar projects NC WARN enters into with other non-profit entities.

⁵ The Energy Freedom Act, H 245, www.ncleg.net/Sessions/2015/Bills/House/PDF/H245v1.pdf

⁶ www.bizjournals.com/charlotte/blog/energy/2015/03/bill-allowing-renewablepower-sales-direct-to-n-c.html

THEREFORE, NC WARN prays that the Commission grants its request for a determination it is not a utility, and further allow it to respond to comments, if any, by any intervening party.

Respectfully submitted, this is the 17th day of June 2015.

FOR NC WARN

/s/ John D. Runkle

John D. Runkle
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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 the avoided cost docket, E-100, Sub 140, or their attorneys of record by deposit in the U.S. Mail, postage prepaid, or by email transmission.

This is the 17th day of June 2015.

/s/ John D. Runkle

Attorney at Law

SOLAR FREEDOM PROJECT:
POWER PURCHASE AGREEMENT

This purchase power agreement (“PPA”) between NC WARN and Faith Community Church (“FCC”) is for the installation and maintenance of a solar electric system (the “system”) on the FCC property. The system consists of solar photovoltaic panels with total capacity of five kilowatts (kW), will be configured in a manner to allow for adding more capacity at a later time, with a remote monitoring system and all related equipment.

The system installation and maintenance will be provided by NC WARN at no cost to FCC and, in exchange, FCC will purchase electricity produced by the system at a rate as determined in this agreement. Any electricity generated by the system, for example, during times of low on-site usage, will be put onto the power grid and credited against the kilowatt hours (kWh) sold to FCC by Duke Energy. This happens under the state’s net metering program.

Both parties acknowledge this PPA is part of NC WARN’s Solar Freedom project, in which NC WARN is developing funding methods allowing non-profit organizations to benefit from solar electricity. ATTACHMENT A provides a summary of the project.

By signing this PPA, FCC represents it is a not for profit corporation under current IRS rules.

The system will be installed by Yes! Solar Solutions (“YSS”), an excellent company NC WARN has worked with extensively over the past two years. The system is under a limited warranty by YSS. Warranty information and technical specifications will be submitted following a site visit and at least 15 days before installation begins. The limited warranty is transferable to a new owner, including the transfer of ownership from NC

WARN to FCC. A copy of NC WARN's agreement with Yes! Solar Solutions, including transfer of warranty if ownership of system is transferred to FCC, will be submitted when all installation details are finalized.

The system comes with web accessible metering that allows all parties to determine the amount of electricity generated by the system.

The PPA term is for three years from the date of completed installation, with the option of extending the agreement from year-to-year if both parties agree.

If FCC moves, it may transfer this agreement to the purchaser of its building.

If FCC is not satisfied with the system at the end of the agreement term, NC WARN will remove the system and ensure that the roof and other structures are in good working order.

At the end of the agreement term, if both parties agree, or at any time upon mutual agreement between the parties, FCC may assume ownership of the system from NC WARN at no cost.

Installation Location: Faith Community Church
417 Arlington Street
Greensboro, NC 27406

Owner of system: NC WARN
PO Box 61051
Durham, NC 27715

Installer: Yes! Solar Solutions
202 N. Dixon Avenue
Cary, NC 27513

In addition to the representations above, the PPA consists of the following terms and conditions.

- (1) Payments for electricity generated by the system.
 - (a) There are no installation costs to FCC.
 - (b) If this PPA, or one subsequently modified or entered into by NC WARN or FCC, is not permitted by the NC Utilities Commission, legislative mandate or a court action, NC WARN will refund any payments made by FCC under this PPA. NC WARN will bear all legal fees, including attorney fees, associated with determining that the sale of electricity from the system is permissible, and indemnify FCC for all costs associated with this project.
 - (c) FCC will purchase all of the power the system produces. While the PPA is in effect, the purchase price is [\$0.05] per kWh.
 - (d) The monthly payments will be the product of the price per kWh multiplied by the actual kWh output for the calendar month as determined by the web monitoring program. Invoices for monthly payments will be mailed or emailed no later than ten (10) days after the end of a calendar month. FCC may pay the invoice by check or by automatic debit from its bank account. Payments made after 30 days will accrue interest at 6 percent (6%) annually.
 - (e) NC WARN will work with the installer so that FCC is able to take advantage of Duke Energy's net metering program, by which any excess power produced by the system is put

onto the power grid and credited against power bought from Duke Energy. Net metering is automatic and requires no action by FCC.

(f) If (i) the system is shut down for more than seven (7) full twenty-four (24) hour days cumulatively during any month because of actions undertaken by FCC; (ii) FCC takes some action that significantly reduces the output of the system, or; (iii) the metering system is not reporting production to NC WARN (e.g. FCC has disconnected the monitoring system or the internet connection goes down on the reporting day), then NC WARN will reasonably estimate the amount of power that would have been delivered, based on the average production over the preceding 12 months.

(2) Mutual obligations under the PPA

(a) FCC agrees to:

(i) have the system serviced pursuant only to the Limited Warranty and reasonably cooperate with YSS and NC WARN if repairs are required;

(ii) keep trees, bushes and hedges trimmed so that the system receives as much sunlight as it did when it was installed;

(iii) not modify its building in a way that shades the system;

(iv) be responsible for any conditions that affect the operation of the system;

(v) not remove any markings or identification tags on the system;

(vi) allow NC WARN and the installer, after either of them gives reasonable notice, to inspect the system for proper operation as they reasonably determine necessary;

(vii) not permit or allow to exist any condition or circumstance that would cause the system not to operate as intended at the Property;

(viii) notify NC WARN if it thinks the system is damaged or appears unsafe or if any part of the system is stolen.

(b) NC WARN agrees to:

(i) schedule the installation of the system at a mutually convenient date and time;

(ii) employ YSS to construct the system according to written plans approved by FCC;

(iii) provide web-enabled monitoring to accurately measure the amount of power the system delivers;

(vi) ensure the property is not disrupted and is cleaned up thoroughly after installation of the system;

(vii) insure the system against all damage or loss unless (A) that damage or loss is caused by FCC's negligence; or (B) FCC intentionally damages the system. Because of the limited nature of this pilot project, NC WARN may self-insure for damage or loss.

(viii) repair the system pursuant to the limited warranty and reasonably cooperate with FCC when scheduling repairs;

(c) Both parties agree to fully communicate any problems as soon as possible and commit to resolving matters in an amicable manner. It is the intent of the parties to hold each other harmless for all costs, damages and liabilities, except to the extent the PPA assigns costs.

(d) FCC acknowledges the system will remain the property of NC WARN and that this PPA does not constitute a contract to sell or lease any part of the PV system's equipment to FCC. Unless otherwise noted, any tax credits, incentives, and any other non-power attributes of the system are the property of and for the benefit of NC WARN, usable at its sole discretion.

(e) This PPA contains the parties' entire agreement regarding the sale and purchase of power generated by the system. Any change to this PPA must be in writing and signed by

both parties. If any portion of this PPA is determined to be unenforceable, the remaining provisions shall be enforced in accordance with their terms or shall be interpreted or re-written so as to make them enforceable.

I have read this Power Purchase Agreement and the Exhibits in their entirety and I acknowledge that I have received a complete copy of this Power Purchase Agreement.

SIGNATURES

FOR Faith Community Church:

Signature: *Nelson N. Johnson, Sr.*, *Robert L. Lewis*, *Lucretia Middleton*
Printed Name and Title: Nelson N. Johnson, Sr. Pastor, Co-Pastor
Date: 12/19/14 *Lucretia Middleton*

FOR NC WARN:

Signature: *Jim Warren*
Printed Name and Title: Jim Warren, Executive Director
Date: December 8, 2014

ATTACHMENT A: Snapshot of the Solar Freedom Project

Attachment A

Snapshot of the Solar Freedom Project for Faith Community Church

- NC WARN installs a photovoltaic solar electricity-generating system on the building owned and occupied by Faith Community Church.
- There are no up-front costs of any kind to Faith Community Church.
- NC WARN will sell the power to Faith Community Church for on-site usage at less than half the kilowatt-hour price you now pay to Duke Energy.
- NC WARN retains ownership of the equipment.
- System will have a capacity of 5 kilowatts, with installed value in the range of \$20,000.
- Installation to be performed by certified, experienced installer, Cary-based Yes! Solar Solutions, a company with a strong, three-year relationship with NC WARN.
- Installation to be managed by NC WARN, with minimal bother to the church.
- High-quality solar panels and equipment, with extensive warranty and expected 30-year life.
- All inspections and registration paperwork handled by installer and/or NC WARN.
- System to include a feature that allows limited power during a grid outage.
- System to be configured in a manner to allow additional capacity in the future.
- Excess power generated by the system will be put onto the power grid and credited against power bought from Duke Energy.



Installation of 5 kW solar photovoltaic system in progress on the rooftop of Faith Community Church, 417 Arlington Street, Greensboro, NC 27406



5 kW solar photovoltaic installed on the rooftop of Faith Community Church, 417 Arlington Street, Greensboro, NC 27406



5 kW solar photovoltaic installed on the rooftop of Faith Community Church, 417 Arlington Street, Greensboro, NC 27406