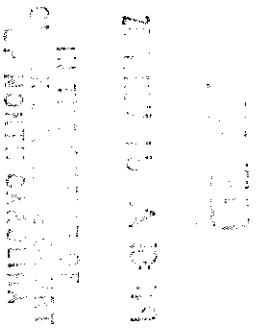
No. 350A17

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION; DUKE ENERGY CAROLINAS, LLC; DUKE ENERGY PROGRESS, LLC; VIRGINIA ELECTRIC AND POWER COMPANY, d/b/a Dominion North Carolina Power,	)	From the North Carolina Utilities Commission No. SP-100, Sub 31 No. COA 16-811
Appellees,	)	
v.	)	
N.C. WASTE AWARENESS AND REDUCTION NETWORK,	)	
Appellant.	)	



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APPELLANT NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK'S NEW BRIEF

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APPELLANT NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK'S NEW BRIEF

****

ISSUES PRESENTED

I. **DOES NC WARN'S FINANCING THE PURCHASE AND INSTALLATION OF A SOLAR SYSTEM ON A CHURCH'S ROOF, FOR THE USE OF ONLY THE CHURCH, MEAN THAT NC WARN IS SELLING ELECTRICITY?**

II. **BY INSTALLING A SINGLE SOLAR SYSTEM ON A CHURCH'S ROOF FOR THE SOLE USE OF SAID CHURCH, IS NC WARN PROVIDING ELECTRICITY TO THE PUBLIC?**

STATEMENT OF THE CASE

On 17 June 2015, the North Carolina Waste Awareness and Reduction Network ("NC WARN") filed a Request for Declaratory Ruling with the North Carolina Utilities Commission ("Commission"). (R p 5). In its Request for Declaratory Ruling, NC WARN explained that it had funded the purchase and installation of a solar photovoltaic ("PV") system on the roof of the Faith Community Church. (R p 5). As a means of ensuring repayment for funding the up-front cost, NC WARN and the Faith Community Church entered into a Power Purchase Agreement ("PPA") pursuant to which the Faith Community Church makes monthly payments calculated by the electricity generated by the PV system. (R pp 17-23). The monthly payments repay NC WARN for the up-front cost of the equipment and installation, and also pay for continuing maintenance of the system. (R p 12). No person or entity other than the Faith Community Church is serviced by this PV system. (R p 17).

In its Request for Declaratory Ruling, NC WARN asked the Commission to rule that the PPA—essentially a financing arrangement affecting only two private parties—was not a sale of electricity to or for the public. (R p 9). This is an important issue because, if the PPA is considered a sale of electricity to or for the public, then NC WARN would be considered a "public utility" and its PPA with the Faith Community Church would violate Duke's exclusive franchise in the

Greensboro area. (R p 326) (*citing* N.C. Gen. Stat. § 62-110.2); *see also* (R p 327) n.9.

On 30 September 2015, the Commission entered an Order Requesting Comments. (R p 33). The Order Requesting Comments added as parties to the docket Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively referred to as "Duke"), as well as Virginia Electric and Power Company d/b/a Dominion North Carolina Power ("Dominion"). (R p 35). The intervention of the Public Staff – North Carolina Utilities Commission ("Public Staff") was automatic pursuant to N.C. Gen. Stat. § 62-15. (R p 2). The Commission allowed numerous other parties to intervene in the docket. (R p 2).

The parties to the docket submitted their initial comments to the Commission on 30 October 2015, including but not limited to the following parties: NC WARN (R p 57), North Carolina Interfaith Power and Light (R p 84), Duke (R p 115), the Public Staff (R p 134), and Dominion (R p 141). On 20 November 2015, reply comments were submitted by North Carolina Interfaith Power and Light (R p 241), Dominion (R p 258), and NC WARN (R p 269).

The Commission's Order Issuing Declaratory Ruling ("Order") was entered on 15 April 2016. (R p 308). The Order denied NC WARN's Request for Declaratory Ruling, determining that NC WARN was engaged in a third-party sale of electricity to the public. (R p 338). Also, the Order fined NC WARN for its

role in the PPA, but suspended the fines upon NC WARN complying with certain conditions. (R p 339). On 5 May 2016, NC WARN filed a Verified Notice of Compliance with the Order Issuing Declaratory Ruling. (R p 340). NC WARN filed a Notice of Appeal and Exceptions to the North Carolina Court of Appeals on 16 May 2016. (R p 349).

On 19 September 2017, the Court of Appeals issued its Judgement in this case. The Judgment affirmed the Commission's Order Issuing Declaratory Ruling. However, Judge Dillon filed a Dissent from the Judgment. The Dissent argued that NC WARN is not a "public utility" because NC WARN is not producing electricity "for the public" "because the system of solar panels in this case is designed to produce electricity on the property of a single customer for that customer's sole use." (Dissenting Op p 1).

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Pursuant to N.C. Gen. Stat. § 7A-30(2) and N.C. R. App. P. 14, NC WARN filed a Notice of Appeal Based on Dissent in Court of Appeals on 18 October 2017.

STATEMENT OF THE FACTS

The Faith Community Church is a not-for-profit Church located in Greensboro, North Carolina. (R pp 17-18). Part of the Faith Community Church's mission statement is: "in faith, striving to be good stewards of God's earth and

humble servants of God's people." (R p 6). In furtherance of this mission statement, the Faith Community Church wants to use renewable energy, namely solar energy, to power its facilities.

But there is a problem confronting the Faith Community Church's effort to realize this mission statement: the high up-front expense of purchasing and installing solar systems. Indeed, without funding assistance, it was impossible for the Faith Community Church to purchase solar panels for its roof. (R p 270).

This problem is not unique to the Faith Community Church. A party to the Commission docket was North Carolina Interfaith Power & Light ("NCIPL"). "NCIPL is a project of the North Carolina Council of Churches, a nonprofit organized to facilitate its members in the North Carolina faith community to impact the state on issues such as economic justice and development, human well-being, equality, compassion, and peace." (R p 43). NCIPL considers it a "moral responsibility, as stewards of Creation, to expand access to clean, renewable solar power." (R p 43). But unfortunately, NCIPL reports that, "[f]or many faith congregations interested in installing solar panels, the up-front costs present a significant barrier." (R p 85).

Essentially, Churches and other not-for-profits throughout the State desire renewable, solar energy but lack the funding for up-front purchase and installation.

NC WARN is a not-for-profit North Carolina corporation whose "purpose is to reduce hazards to public health and the environment from global climate change by promoting energy efficiency and renewable energy resources." (R p 6). A central tenet of NC WARN's is that "low-cost solar electricity should be available to everyone on their own property." (R p 6). Similar to NCIPL, NC WARN has found that one of "[t]he most significant barriers to the widespread use of PV are up-front financing." (R p 6).

Therefore, for years NC WARN has promoted up-front funding mechanisms for solar systems. (R p 6). These funding programs are not open to the general public, "but only to self-selected non-profit organizations." (R p 14). For example, in 2012, NC WARN "initiated a solar donation program that supplied free solar panels and/or solar hot water heaters to three nonprofit organizations." (R pp 6-7). To fund this project and others, NC WARN has traditionally relied on fundraising efforts within its membership. (R p 7). Unfortunately, the scope of these solar-power programs has been limited by NC WARN's ability to raise funds from its members and by the high cost of purchasing and installing solar systems. (R pp 7-8).

In the fall of 2014, NC WARN and the Faith Community Church began discussions to determine if NC WARN could finance the up-front purchase and installation of a 5.2 kW solar photovoltaic ("PV") system on the Church's roof. (R

p 8). A familiar problem plagued the discussions—the up-front cost was too great for both the Church and NC WARN without some repayment arrangement. (R p 8); (R pp 269-70).

To resolve that issue, NC WARN and the Faith Community Church agreed to a financing arrangement pursuant to which NC WARN would fund the purchase and installation of the system, and the Church would repay NC WARN through monthly payments calculated by the electricity generated by the project. (R p 8). The monthly payments repay NC WARN for the up-front cost of the equipment and installation, and also pay for continuing maintenance of the system. (R p 12). Only through this financing arrangement was it possible to install the PV to the Faith Community Church's roof. (R pp 269-70) ("without NC WARN's assistance, the Church would not be able to fund the PV panels on its roof"); *see also* (R p 8) ("NC WARN was restricted by the amount of funds needed for the up-front costs of equipment and installation"; "[t]o resolve this issue," NC WARN and the Church entered into the PPA).

To consummate this financing, NC WARN and the Faith Community Church entered into a Power Purchase Agreement ("PPA") on 19 December 2014. (R pp 17-22). The PPA explicitly stated, "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." (R p 17). According to the PPA, NC WARN is solely responsible for the up-front costs of purchasing and installing the PV. (R p 17). Also, NC WARN retains ownership of the PV, and is responsible for maintenance of the PV. (R pp 17, 21). In exchange, the Faith Community Church purchases electricity produced by the system at a rate of $0.05 per kWh. (R p 19). This rate is about one-half the kilowatt-hour price charged to the Church by Duke. (R p 23). This method for calculating payments under the PPA was selected because it allowed the Church to hedge against an underperforming system; in other words, if the system underperforms and the Church is forced to pay power bills to Duke, then the payments to NC WARN will be commensurably reduced. The term of the PPA is three (3) years, with options to renew. (R p 18).

While the PPA was always designed as a financing arrangement, it should be noted that, functionally, the arrangement is nearly identical to a lease: for instance, NC WARN owns and maintains the system, and the Faith Community Church pays for the system's use over a set term of years and with options to renew. (R pp 17-19, 21). Judge Dillon, in his Dissent, recognized the similarities between the PPA and a lease. (Dissenting Op pp 6-7).

Of the utmost importance is the following fact about the PPA: the power generated by the PV is for the Faith Community Church's use only. (R p 17). NC WARN is not selling power generated by the PV to any offsite person or entity. (R

p 17). If the PV generates excess power over the needs of the Faith Community Church, then the excess power is put into Duke's power grid and credited against the kilowatt hours (kWh) sold to the Faith Community Church by Duke. (R p 17). Put another way, NC WARN is not selling power generated by this PV to the public.

The general rule in North Carolina is that a residential customer may purchase and install a solar PV system on his or her own home. If the system has a rated capacity less than two (2) megawatts, the owner need only file a Report of Proposed Construction with the Commission and an application for interconnection with the relevant utility. N.C. Gen. Stat. § 62-110.1(g); NCUC Rule R8-65. No other public utilities regulation is required. However, the Commission has issued conflicting decisions on whether the financing of a solar PV system may be accomplished by a PPA agreement. *See* (R pp 26-30) (NC Sustainable Energy Association's comments summarizing conflicting decisions by the Commission).

Thus, when discussing the potential PPA, NC WARN and the Faith Community Church understood that some type of declaratory action would be necessary, and NC WARN assumed all the risk. The PPA states,

> If this PPA . . . is not permitted by the NC Utilities Commission, legislative mandate or a court action, NC WARN will refund any payments made by FCC [i.e., the Faith Community Church] 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.

(R p 19). Further, if the Commission or a court of competent jurisdiction determines that the PPA is unlawful, NC WARN will donate the PV system to the Faith Community Church. (R p 8). Essentially, the PPA was designed to hold the Church harmless in the event that the PPA is deemed unlawful.

On 17 June 2015, NC WARN filed the present Request for Declaratory Ruling. (R p 5). In its Request for Declaratory Ruling, NC WARN acknowledged that this is a "test case" designed to determine whether "the up-front costs of solar equipment and installation can be financed through the sale of electricity generated by the PV panels" installed on the Faith Community Church's roof. (R p 5).

STANDARD OF REVIEW

The General Statutes provide that this Court "may reverse or modify the decision [of the Commission] if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are[] . . . [i]n excess of statutory authority or jurisdiction of the Commission, or . . . [a]ffected by other errors of law, or [u]nsupported by competent, material and substantial evidence in view of the entire record . . . ." N.C. Gen. Stat. § 62-94(b).

A principal issue in any appeal from the Commission is whether its findings of fact are supported by "competent, material and substantial evidence in view of

the entire record." *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 348 N.C. 452, 460, 500 S.E.2d 693, 699 (1998). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 460, 500 S.E.2d at 700.

To facilitate appellate review, "[a]ll final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceeding and shall include [] [f]indings and conclusions and the reasons or bases therefor upon all the material issues." N.C. Gen. Stat. § 62-79(a). "Failure to include all necessary findings of fact is an error of law . . . ." *Id.* "Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken . . . in logical sequence; each link in the chain of reasoning must appear in the order itself." *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987).

Additionally, "[t]he Court may reverse the Commission's decision if the appellants' rights have been prejudiced because the decision was affected by an error of law." *State ex rel. Utils. Comm'n v. Envir. Defense Fund*, 214 N.C. App. 364, 366, 716 S.E.2d 370, 372 (2011) (*citing* N.C. Gen. Stat. § 62-94(b)(4)). "Questions of law are reviewed *de novo*." *Id.*; *see also* N.C. Gen. Stat. § 62-94(b)

("the court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions").

STATEMENT OF THE LAW

Before analyzing the circumstances of this specific case, it will be helpful to briefly look at what the General Statutes and case law say about who is, and is not, subject to utilities regulation.

Article 3 of Chapter 62 of the General Statutes is entitled, "Powers and Duties of Utilities Commission." According to that Article, "The Commission shall have and exercise such general power and authority to supervise and control the *public utilities* of the State as may be necessary to carry out the laws providing for their regulation . . . ." N.C. Gen. Stat. § 62-30 (emphasis added). Hence, to be subject to utilities regulation, an entity must be a "public utility." *Id.*; *see also State ex rel. Utils. Comm'n v. Simpson*, 295 N.C. 519, 521, 246 S.E.2d 753, 755 (1978).

"Public utility" is defined in the Public Utilities Act, N.C. Gen. Stat. §§ 62-1 *et seq.*, in relevant part, as follows:

> "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.

N.C. Gen. Stat. § 62-3(23)(a)(1) (emphasis added). Thus, for NC WARN to be a "public utility"—and therefore subject to utilities regulation—it must: (1) produce, generate, transmit, deliver or furnish electricity (2) "to or for the public for compensation." *Id.*

The Public Utilities Act does not define the word "public," but several appellate cases have addressed the subject. In an early case, this Court stated, "One offers service to the 'public' within the meaning of this statute when he holds himself out as willing to serve all who apply up to the capacity of his facilities." *State ex rel. Utils. Comm'n v. Carolina Tele. & Telegraph Co.*, 267 N.C. 257, 268, 148 S.E.2d 100, 109 (1966).

This definition was cited approvingly, and expanded upon, in the leading case on the meaning of "public utility": *State ex rel. Utils. Comm'n v. Simpson*, 295 N.C. 519, 522-24, 246 S.E.2d 753, 755-57 (1978). In *Simpson*, this Court rejected all "formulistic definition[s]" of "public utility" in favor of an "ad hoc," multi-factored analysis: "[W]hether any given enterprise is a public utility within the meaning of a regulatory scheme does not depend on some abstract, formulistic definition of 'public' to be thereafter universally applied. What is the 'public' in

any given case depends rather on the regulatory circumstances of that case." *Id.* at 524, 246 S.E.2d at 756.

In making this fact-specific inquiry, the *Simpson* Court directed the Commission to consider several factors, including the following:

> Some of these circumstances are (1) nature of the industry sought to be regulated; (2) type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) effect of non-regulation or exemption from regulation of one or more persons engaged in the industry.

Id. According to the Court of Appeals, "[n]o single factor is controlling in determining whether an entity is a public utility." *Bellsouth Carolinas PCS, L.P. v. Henderson Cnty.*, 174 N.C. App. 574, 578, 621 S.E.2d 270, 273 (2005). However, it is necessary that "*each [factor] must be weighed*, including lack of competition in the local marketplace, the good or service provided, and the existence of regulation by government authority." *Id.* (emphasis added).

There are two general, but highly important, principles that guide the entire analysis into whether an entity is a "public utility." First, according to this Court in *Simpson*, 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 comports with its public policy." *Simpson*, 295 N.C. at 524, 246 S.E.2d at 756-57. The General Assembly has declared that two goals of the Public Utilities Act are to "promote harmony between public utilities, their users and the

environment" and to "[e]ncourage private investment in renewable energy." N.C. Gen. Stat. § 62-2(a)(5), (10)(c).

Second, in analyzing whether an entity is a public utility, the Commission must examine the *function* of the service provided and not merely the *form* of the service. The Court of Appeals has concluded, "It is important to note that the emphasis in such a determination should be placed on the *function of the service provided rather than a literal interpretation of the definition* of a public utility." *Bellsouth Carolinas PCS, L.P.*, 174 N.C. App. at 578, 621 S.E.2d at 273 (emphasis added); *see also State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co.*, 326 N.C. 522, 527-28, 391 S.E.2d 487, 490 (1990) (holding that the function of a public utility is controlling, not how the term is defined).

The consequence of this analysis—whether NC WARN is a public utility—is outcome determinative for this case. Among other places, Duke has an exclusive monopoly right to sell electricity in Greensboro, where the Faith Community Church is located. (R p 327) n.9 ("As Duke has the exclusive franchise in Greensboro and is providing electric service, unless NC WARN is free of regulation under Chapter 62, the Commission has no such option [i.e., has no option to issue a certificate of public convenience and necessity] here."). Indeed, all service areas in North Carolina have been assigned exclusively to electric suppliers, including Duke and Dominion. (R p 326) (*citing* N.C. Gen. Stat. § 62-

110.2). If NC WARN is indeed a public utility—which it is not—then the PPA with the Faith Community Church would be unlawful, and it would not be possible for the Commission to permit the PPA because of Duke's exclusive franchise. *Id.*

ARGUMENT

Part of the Faith Community Church's mission—and the mission of many other not-for-profits throughout the State—is the preservation of the environment. NC WARN's mission, similarly, is to protect the earth from the climate change crisis. Therefore, these two entities share a desire for the Faith Community Church to be powered by solar energy. Yet neither entity can pay out-of-pocket for the purchase and installation of a solar PV system without some repayment arrangement. Accordingly, they entered into a PPA that financed the purchase and installation of a PV system on the Church's roof. Only the Church, and no other person or entity, is serviced by the power generated by the PV system. NC WARN fronted the expense of the system, and is repaid for the up-front cost and continuing maintenance of the system through the Church's monthly payments calculated by the power generated by the PV system. Only through this arrangement were the funds available to install the PV system.

In short, the PPA was designed to function as a financing agreement. In Judge Dillon's Dissent, he likened the PPA to a lease arrangement. Functionally,

there is no difference: whether financing arrangement or lease, the PPA does not function as a sale of electricity.

The function of the PPA—as opposed to a strict, formulistic inquiry into whether payments are calculated based on power generated by the system—is highly important to this case. In *State ex rel. Utils. Comm'n v. Simpson*, 295 N.C. 519, 524, 246 S.E.2d 753, 756-57 (1978), this Court held that deliberations over whether an entity is a "public utility" and therefore subject to utilities regulation should not be ridged or formulistic but instead must involve an ad hoc, multi-factored analysis of the regulatory circumstances of the case.

In violation of *Simpson*, the Commission's Order elevated form over substance. The Commission began and ended its inquiry with the fact that NC WARN is receiving monthly payments from the Faith Community Church calculated by the power generated by the solar PV system. The Commission did not analyze whether the PPA functions primarily as a financing vehicle (or lease) as opposed to a sale of power. Further, the Commission did not address—did not analyze in any way—the factors mandated by *Simpson* for inquiries into whether power is being sold to the public. Instead, the Commission, in violation of *Simpson*, applied a formulistic definition of "public utility" to decide this case.

The bulk of the Commission's errors can be corralled into two groups. First, the Commission committed an error of law in ignoring *Simpson*'s requirement of a

fact-specific, multi-factored analysis. Second, the Commission failed to make essential findings of fact by failing to consider how the factors mandated by *Simpson* apply to the present case.

For these reasons, among others, including the reasons identified in Judge Dillon's Dissent, the Commission should be reversed.

I. When examining the *function* of the PPA, as required by *Simpson*, it is clear that NC WARN is supplying financing for the up-front cost and maintenance of the PV system and is therefore not "producing, generating, transmitting, delivering or furnishing electricity . . . for compensation."

This Court, in *Simpson*, eschewed "formulistic definition[s]" of "public utility" in favor of a multi-factored, "ad hoc" examination of the "regulatory circumstances" of every case. *State ex rel. Utils. Comm'n v. Simpson*, 295 N.C. 519, 524, 246 S.E.2d 753, 756-57 (1978). Similarly, the Court of Appeals has required that the Commission place "emphasis" on the "*function* of the service provided rather than a literal interpretation of the definition of a public utility." *Bellsouth Carolinas PCS, L.P. v. Henderson Cnty.*, 174 N.C. App. 574, 578, 621 S.E.2d 270, 273 (2005) (emphasis added); *see also State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co.*, 326 N.C. 522, 527-28, 391 S.E.2d 487, 490 (1990) (same). Contrary to these mandates, the Commission's analysis was formulistic and ridged. Hence, the Commission committed an error of law that should be reversed.

A. The Commission used a formulistic analysis to wrongly conclude that NC WARN is "producing, generating, transmitting, delivering or furnishing electricity . . . for compensation."

The Commission's erroneous use of a formulistic analysis is best illustrated by its examination of whether NC WARN is "producing, generating, transmitting, delivering or furnishing electricity . . . for compensation" as required by N.C. Gen. Stat. § 62-3(23)(a)(1).

The Commission's discussion of whether NC WARN is "producing, generating, transmitting, delivering or furnishing electricity" is contained within a section entitled, "NC WARN Identifies A Program For Third Party Sales To Or For The Public." (R p 324). This is a breezy two-paragraph section containing little or no analysis. (R p 324). In this section, the Commission listed the terms of the PPA between NC WARN and the Faith Community Church. (R p 324). Merely because payments by the Church are calculated based on power generated by the PV system, the Commission wrongly declared that "[n]o party disputes that NC WARN is furnishing electricity under its program for compensation." (R p 324). Therefore, according to the Commission, the only "dispositive issue raised by this request is whether . . . the sales under NC WARN's program are sales 'to or for the public.'" (R p 324).

The Commission's Order is the very archetype of formulistic analysis. The Commission merely described the PPA and ended the analysis there. The

Commission did not grapple with the *function* of the PPA. The Commission did not analyze why the PPA was necessary. (R p 324). The Commission did not seek to identify the principal role that the PPA served. (R p 324). The Commission was satisfied with the mere fact that payments are calculated based on power generated by the system. (R p 324).

Judge Dillon's Dissent rightly recognized that the Appellees to this lawsuit are elevating form above substance. Judge Dillon noted that, "at oral argument, counsel for the [Commission's Public Staff] stated that if NC WARN's arrangement with the Church were structured as a lease agreement, rather than as a contract where NC WARN was compensated based on the Church's usage, the [Public Staff] would not be challenging the arrangement in court." (Dissenting Op pp 6-7). In response, Judge Dillon correctly noted that the PPA functioned just like a lease, and that structuring lease payments based on power generated is "a logical method by which private parties should be free to contract to account for wear and tear on the system itself." (Dissenting Op p 7). Judge Dillon is correct that the analysis must go beyond a mere recitation of the fact that payments are calculated based on power generated.

Hence, the Commission committed an error of law by applying the wrong legal standard.

B. A proper analysis into the function of the PPA demonstrates that NC WARN is not "producing, generating, transmitting, delivering or furnishing electricity . . . for compensation."

What the Commission should have done was examine the role, the *function*, of the PPA between NC WARN and the Faith Community Church. Under such an analysis, it is clear that NC WARN is not "producing, generating, transmitting, delivering or furnishing electricity" as required by N.C. Gen. Stat. § 62-3(23)(a)(1). Instead, the PPA was designed to function as a financing agreement for the installation of a solar PV system.

As noted above, without NC WARN's funding assistance the Faith Community Church could not purchase solar panels for its roof. (R p 269-70). But NC WARN was in a similar bind: it had purchased solar systems for other select not-for-profit entities, but was limited by its members' donations and could not pay for the up-front expenses of the Church's system without a repayment arrangement. (R pp 6-8). To resolve this issue, NC WARN and the Faith Community Church agreed to a financing arrangement under which NC WARN would fund the purchase and installation of the system, and the Church would repay NC WARN on a monthly basis for these up-front expenses, plus maintenance expenses. (R pp 8, 12).

Only through this financing arrangement was it possible to install the PV system to the Faith Community Church's roof. (R pp 269-70) ("without NC

WARN's assistance, the Church would not be able to fund the PV panels on its roof"); *see also* (R p 8) ("NC WARN was restricted by the amount of funds needed for the up-front costs of equipment and installation"; "[t]o resolve this issue," NC WARN and the Church entered into the PPA). Indeed, the PPA that consummated this arrangement explicitly stated, "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." (R p 17).

Without any analysis, the Commission rejected that the PPA is a financing agreement merely because payments are calculated by electricity consumed and not by a traditional promissory note. (R p 329). This approach to calculating payments was adopted because it was the only manner in which the Faith Community Church could afford to finance the PV system. As with most houses of worship, money is tight for the Faith Community Church. (R pp 85, 270). The Church cannot afford set promissory note payments in addition to electricity payments in the event that the PV system underperforms and fails to meet the Church's power needs. Therefore, calculating repayments based on the electricity generated by the PV system allowed the Church to hedge against the risk of an underperforming system resulting in power bills from Duke in addition to debt service obligations to NC WARN. So, once again, the PPA is not designed to sell

electricity but to finance the upfront expense of a PV system. In his Dissent, Judge Dillon recognized that "[s]uch billing is a logical method by which private parties should be free to contract." (Dissenting Op p 7).

These facts demonstrate that the entire point behind the PPA—i.e., the function of the PPA—was to fund the up-front expense of installing a solar PV system on the Faith Community Church's roof. Thus, the function of the PPA is not the sale of power by NC WARN to the Church. The Commission committed an error of law by failing to perform this flexible analysis into the function of the PPA as opposed to its form.

C. PPAs are recognized as financing arrangements by other States.

This same theory—that PPAs serve as financing and not the sale of electricity—has been adopted in other states, namely Iowa. In *SZ Enters. LLC d/b/a Eagle Point Solar v. Iowa Utilities Bd.*, 850 N.W.2d 441 (Iowa 2014), the Iowa Supreme Court was confronted with a PPA pursuant to which Eagle Point Solar purchased a solar system for an electric customer and was repaid on a per-kilowatt hour basis. Similar to the *Simpson* case, the Iowa Supreme Court rejected formulistic definitions in favor of "a practical, multifactored" analysis into the meaning of "public utility." *Id.* at 455. After examining the function of the PPA, not merely the fact that electricity was sold, the Iowa Supreme Court concluded that the PPA was essentially a means of finance and did not render Eagle Point

Solar a public utility. *Id.* at 443-44, 470. Obviously the *Eagle Point* case is not binding precedent, but it is persuasive precedent.

In summary, the Commission was fixated on monthly payments being calculated based upon the power generated by the PV system. But the Commission failed to examine the function of the PPA—which is an arrangement for financing (or, as mentioned by Judge Dillon, a lease agreement). In failing to perform these essential deliberations, the Commission committed reversible error. *Bellsouth Carolinas PCS, L.P. v. Henderson Cnty.*, 174 N.C. App. 574, 578, 621 S.E.2d 270, 273 (2005) (holding that the "emphasis" is on the "function of the service provided rather than a literal interpretation of the definition of a public utility"); *see also State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co.*, 326 N.C. 522, 527-28, 391 S.E.2d 487, 490 (1990) (same).

II. The Commission erroneously concluded that NC WARN's private PPA with the Faith Community Church constitutes a sale of electricity "to or for the public," including because the Commission failed to make the findings of fact and conclusions of law required by *Simpson*.

NC WARN has a private contract—the PPA—with the Faith Community Church. Power generated by the solar PV system services only the Church and no other offsite person or entity. (R p 17). The Commission misinterpreted this private arrangement as a sale of electricity to or for the "public." During the course of its analysis, the Commission failed to analyze several factors required by

the *Simpson* case. Thus, the Commission committed an error of law and failed to make necessary findings of fact.

A. The Commission failed to consider the factors required by *Simpson*.

This Court, in *State ex rel. Utils. Comm'n v. Simpson*, mandated that the Commission perform a context-specific, "ad hoc" analysis into whether one is furnishing electricity "to or for the public." 295 N.C. 519, 524, 246 S.E.2d 753, 756-57 (1978). Indeed, the *Simpson* Court provided a non-exclusive list of factors that must be examined during any inquiry into whether electricity is being furnished "to or for the public":

> Some of these circumstances are (1) nature of the industry sought to be regulated; (2) type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) effect of non-regulation or exemption from regulation of one or more persons engaged in the industry.

Id. at 524, 246 S.E.2d at 756.

According to the Court of Appeals, these *Simpson* factors must be examined in *every* case: "No single factor is controlling in determining whether an entity is a public utility, *although each must be weighed*, including lack of competition in the local marketplace, the good or service provided, and the existence of regulation by government authority." *Bellsouth Carolinas PCS, L.P. v. Henderson Cnty.*, 174 N.C. App. 574, 578, 621 S.E.2d 270, 273 (2005) (emphasis added). Thus, it would be error to fail to discuss these *Simpson* factors.

In its Order, the Commission quoted the *Simpson* factors in its statement-of-the-law section entitled, "Chapter 62 And North Carolina Appellate Court Decisions Prohibit Unregulated Electric Sales To Or For The Public." (R pp 325-26). However, the Commission never analyzed how the *Simpson* factors relate to the PPA between NC WARN and the Faith Community Church. (R pp 326-29). *Indeed, the Commission never even mentioned the* Simpson *factors at any point in the Order other than within the statement-of-law section.* In determining that NC WARN is furnishing electricity to or for the public, the Commission merely quoted the relevant statute—N.C. Gen. Stat. § 62-3(23)(a)(1)—and declared that it "is a clear legislative declaration that the provision of electric service for compensation to a third party, *e.g.*, NC WARN's service to the Church, is service to the public." (R p 327). A consideration of the "regulatory circumstances" of the case, as required by *Simpson*, 295 N.C. at 524, 246 S.E.2d at 756, was not undertaken by the Commission.

"Failure to include all necessary findings of fact is an error of law . . . ." N.C. Gen. Stat. § 62-79(a). "All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceeding and shall include [] [f]indings and conclusions and the reasons or bases therefore upon all the material issues." *Id.* Because the *Simpson* factors are material issues, *Bellsouth Carolinas*, 174 N.C.

App. at 578, 621 S.E.2d at 273 ("each must be weighed"), the Commission's failure to analyze the *Simpson* factors constitutes reversible error.

B. The PPA is a private agreement under which only the Faith Community Church benefits, and therefore NC WARN is not furnishing electricity to or for the "public."

As noted above, the *Simpson* Court required that several factors be considered in any analysis of whether an entity is furnishing electricity to the "public." *Simpson*, 295 N.C. at 522, 524, 246 S.E.2d at 755-57. Had the Commission performed this analysis, it would have revealed that NC WARN is not furnishing electricity to the "public." Instead, the PPA is a private agreement that benefits no person or entity other than the Faith Community Church. What follows is a discussion of the *Simpson* factors, which demonstrates that NC WARN is not furnishing electricity to the "public."

The *Simpson* Court approvingly cited prior case law concluding that "[o]ne offers service to the 'public' within the meaning of this statute when he holds himself out as willing to serve all who apply up to the capacity of his facilities." *Id.* at 522, 246 S.E.2d at 755 (*quoting State ex rel. Utils. Comm'n v. Carolina Tele. & Telegraph Co.*, 267 N.C. 257, 268, 148 S.E.2d 100, 109 (1966)).

NC WARN most assuredly is not holding itself "out as willing to serve all who apply." *Id.* Power generated by the solar PV system services only the Church. (R p 17). If the PV generates excess power over the needs of the Faith

Community Church, then the excess power is put into Duke's power grid and credited against the kilowatt hours (kWh) sold to the Faith Community Church by Duke. (R p 17). Thus, the PPA is a private contract between two parties only—NC WARN and the Faith Community Church—and is not open to any other member of the public. (R p 273).

Moreover, NC WARN is not attempting to provide a solar financing service to the general public. Instead, NC WARN is engaged in an altruistic program of financing solar-generated power "to self-selected non-profit organizations." (R p 14). NC WARN's Request for Declaratory Ruling expressly conceded that "it does not intend to offer its Solar Freedom program to all of Duke Energy's customers." (R p 14).

The *Simpson* Court also required that the Commission examine "the kind of competition that naturally inheres in that market." *Simpson*, 295 N.C. at 524, 246 S.E.2d at 756. On this point, it is crucial to understand that NC WARN and Duke are not in competition at all: in the Greensboro service area, Duke does not presently have a program similar to that offered by NC WARN in the PPA. (R p 12). Thus, there is no competition between Duke and NC WARN in this market, which undermines the idea that NC WARN is providing a service to the "public."

In considering whether one is offering a service to the "public," the *Simpson* Court also considered it important to analyze the "effect of non-regulation or

exemption from regulation of one or more persons engaged in the industry." *Simpson*, 295 N.C. at 524, 246 S.E.2d at 756. The PPA is functionally no different from other non-regulated purchases of solar systems. In North Carolina, residential customers may purchase and install a solar PV system without utilities regulation. If the system has a rated capacity less than two (2) megawatts, the owner need only file a Report of Proposed Construction with the Commission and an applicable for interconnection with the relevant utility. N.C. Gen. Stat. § 62-110.1(g); NCUC Rule R8-65. Further, it is common for such customers to finance the purchase and installation of the system without utilities regulation. *See, e.g.*, (R pp 86-87); (R pp 328-29).

The PPA between NC WARN and the Faith Community Church functions the exact same way—the system services only the Church, and the up-front costs of the system were fronted by a third-party (NC WARN). "Whether such a PV system is paid for out of pocket, financed with a loan from a bank, or paid for with a PPA to a third-party, it need not trigger public utility regulation." (R p 92). Thus, if the PPA is upheld by this Court, it will not be an example of exempting NC WARN from utilities regulation. Instead, such a ruling would constitute leveling the playing field between NC WARN and financial institutions that regularly give loans (without utilities regulation) for solar systems. (R p 12).

Accordingly, an analysis of the *Simpson* factors reveals that NC WARN is not furnishing electricity to or for the "public." Instead, NC WARN has a private arrangement with a Church under which no offsite person or entity benefits. Further, the service provided by NC WARN is not in competition with Duke, and the service is functionally identical to other non-regulated financing arrangements for solar power. The Commission committed error by not considering these factors; and had the Commission considered these factors, it would have reached the opposite conclusion.

C. In violation of *Simpson*, the Commission's Order failed to take account of the Public Utilities Act's stated policy in favor of renewable energy.

In *Simpson*, this Court established the following overriding goal for the analysis of whether an entity is a "public utility": "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 comports with its public policy." *Simpson*, 295 N.C. at 524, 246 S.E.2d at 756-57 (internal quotation marks omitted). Yet the Commission completely ignored this goal. At no point in the Order did the Commission examine whether its decision furthered the General Assembly's purpose or public policy.

Had the Commission conducted this analysis, it would have revealed that the PPA furthers the purposes of the Public Utilities Act. The Act contains a section

entitled, "Declaration of policy." N.C. Gen. Stat. § 62-2. In that section the General Assembly stated that,

> It is hereby declared to be the policy of the State of North Carolina . . . .
>
> (5) To encourage and promote harmony between public utilities, their users and *the environment*;
>
> . . . .
>
> (10) 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.

N.C. Gen. Stat. § 62-2(a)(5), (10) (emphasis added).

The solar PV system in the present case furthers all of these goals—for instance, it helps the environment by utilizing renewable energy. *See id.* § 62-2(a)(5). Further, the PPA "[e]ncourage[s] private investment in renewable energy and energy efficiency." *Id.* § 62-2(a)(10)(c). As detailed above, it is a widespread problem that not-for-profits, including Churches, cannot afford the up-front expense of purchasing and installing solar systems. (R p 43). Indeed, without the PPA, it was impossible for the Faith Community Church to install a solar PV system. (R pp 269-70) ("without NC WARN's assistance, the Church would not

be able to fund the PV panels on its roof"); *see also* (R p 8) ("NC WARN was restricted by the amount of funds needed for the up-front costs of equipment and installation"; "[t]o resolve this issue," NC WARN and the Church entered into the PPA).

Approving this PPA therefore furthers the General Assembly's stated goal of "[e]ncourag[ing] private investment in renewable energy and energy efficiency." *Id.* § 62-2(a)(10)(c). Without even considering the issue, the Commission's Order undermines this public policy. This is grounds to reverse the Commission. *See Simpson*, 295 N.C. at 524, 246 S.E.2d at 756-57 ("The meaning of 'public' must in the final analysis be such as will . . . accomplish the legislature's purpose and comports with its public policy." (internal quotation marks omitted)).

D. Since *Simpson*, no North Carolina appellate court has found that a single person or entity constitutes the "public."

The Commission found that, by financing the installation of a solar PV system on the Faith Community Church's roof, NC WARN is providing electricity to a "public" of one. However, the word "public" cannot possibly be flexible enough to apply to an arrangement under which one and only one entity is serviced by a PV system.

Indeed, this is a new and drastic departure from *Simpson* and its progeny. As stated in Judge Dillon's Dissent, "[i]n the years since *Simpson* was decided, our appellate courts have applied *Simpson* to determine whether a certain enterprise

constituted a 'public utility,' . . . [h]owever, unlike the present case, each of those cases involved a system which provided some utility service to *multiple* consumers accessing the system." (Dissenting Op p 4) (emphasis in original).

A review of *Simpson*'s progeny affirms that there is no case in which an entity was deemed a "public utility" without servicing multiple customers. *See Simpson*, 295 N.C. at 520, 246 S.E.2d at 754 (two-way radio service operated in conjunction with telephone answering service, using tower that serves multiple subscribers); *Bellsouth Carolinas PCS, L.P. v. Henderson Cnty. Zoning Bd. Of Adjustment*, 174 N.C. App. 574, 621 S.E.2d 270 (2005) (cellular telephone company operating cellular telephone tower serving multiple customers); *Utilities Comm'n v. Mackie*, 79 N.C. App. 19, 338 S.E.2d 888 (1986), *aff'd as modified*, 318 N.C. 686, 351 S.E.2d 289 (1987) (sewer and water service with approximately twenty-five (25) customers served from a single tank); *Utilities Comm'n v. Buck Island, Inc.*, 162 N.C. App. 568, 592 S.E.2d 244 (2004) (facilities used to produce water and treat sewage in housing development); *Shepard v. Bonita Vista Properties, L.P.*, 191 N.C. App. 614, 664 S.E.2d 388 (2008), (campground charging the occupants of each campsite for use of electricity from a single system at above-market price).

Hence, if the Commission and Court of Appeals are affirmed, then this will be the first and only case to hold that a single person or entity is by itself the "public."

CONCLUSION

For the foregoing reasons, NC WARN respectfully requests that this Court reverse the Judgment of the Court of Appeals, reverse the Commission's Order Issuing Declaratory Ruling, and grant NC WARN's Request for Declaratory Ruling.

Respectfully submitted, this the 16 day of November, 2017.

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CERTIFICATE OF COMPLIANCE

Counsel for Appellant NC WARN certifies that pursuant to Rule 28(j)(B) of the N.C. Rules of Appellate Procedure, the foregoing Brief, which is prepared using a proportional font, is fewer than 8,750 words (excluding cover, indexes, tables of authorities, certificate of service, this certificate of compliance, and appendices) as reported by the word-processing software, including footnotes and citations.

This the 16 day of November, 2017.

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