NO. COA 16-811

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, Defendant-Appellee, v. NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK, Plaintiff-Appellant.	)	From North Carolina Utilities Commission Docket No. SP-100, SUB 31

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BRIEF OF *AMICI CURIAE*

NORTH CAROLINA INTERFAITH POWER AND LIGHT, NORTH CAROLINA COUNCIL OF CHURCHES, GREENFAITH, THE CHRISTIAN COALITION OF AMERICA, YOUNG EVANGELICALS FOR CLIMATE ACTION, AND CREATION CARE ALLIANCE OF WESTERN NORTH CAROLINA

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SUMMARY OF ARGUMENT

The North Carolina Utilities Commission wrongly found that a solar installer becomes a "public utility" when that installer finances a solar-power system with a power purchase agreement ("PPA"). The Commission elevated form over substance by addressing the literal form of the PPA instead of the substance of the contractual arrangement. The customer's choice of how to finance an otherwise permissible solar installation should not trigger regulation of the installer as a public utility. Contrary to the State's public policy, the Commission's Order undermines the deployment of clean, renewable energy and infringes on consumers' freedom to contract.

The Commission's misreading of the North Carolina Public Utilities Act and controlling precedent constitutes an error of law that prejudices not only the Plaintiff-Appellant, but also *Amici* Faith Groups, who represent diverse religious communities seeking practical ways for their congregations to install solar as part of their commitment to caring for creation.

ARGUMENT

I. THIRD-PARTY FINANCING OF A SOLAR-POWER SYSTEM DOES NOT CONSTITUTE ELECTRICITY SALES "TO THE PUBLIC."

A. A Power Purchase Agreement Is a Contract to Finance Solar-Power Equipment, Not a Sale of Electricity "to the Public."

A third-party owner of a solar-power system affixed to a customer's property for that customer's use is not subject to regulation as a "public utility" under the Public Utilities Act. In such an arrangement, the installer does not sell electricity "to the public," but instead finances solar equipment under individualized, bargained-for contract terms, under which the customer makes periodic payments to the installer based on the output of the solar panels. N.C. Gen. Stat. § 62-3(23)(a)(1).

The Commission's conclusion that the customer must own its solar-power system for the self-generation exception to apply is not supported by the Act. R pp 327-28. Customers who "construct or operate" [1] solar-power equipment to generate electricity for their own on-site use fall outside the definition of "public

[1] "Construct or operate" includes contracting for the installation of the solar-power system for that customer's use. The "construct or operate" exception is not a requirement that customers themselves manufacture, install, or manually perform maintenance on the solar panels. Such a requirement would nullify the exception, even for customer-owned generation. *See Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 440, 238 S.E.2d 597, 603 (1977)(rejecting statutory interpretation causing absurd result).

utility" under the "self-generation exception," which does not require the customer to own the equipment. N.C. Gen. Stat. § 62-3(23)(a)(1).

In contrast, elsewhere the Act *does* explicitly require ownership to exempt a service-provider from regulation: a "water or sewer system *owned* by a homeowners' association that provides…service" only to its members is not a "public utility." N.C. Gen. Stat. § 62-3(23)(d) (emphasis added). When a statute includes a word in one section and omits it in others, courts presume that the General Assembly did so intentionally. *See N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (citing *Rodriguez v. United States*, 480 U.S. 522, 525 (1987)).

Moreover, the Commission disregarded the flexible approach adopted by the North Carolina Supreme Court for deciding whether sales are to the "public." *State ex rel. Util. Comm'n v. Simpson*, 295 N.C. 519, 524, 246 S.E.2d 753, 756 (1978). *Simpson* instructs the Commission to examine 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 supplied). Contrary to *Simpson*, the Commission considered only the form of the PPA, ignoring the substance of the financing arrangement.

The *Simpson* court endorsed the "practical," multi-factored approach that Iowa courts use to determine whether sales are to the "public." *Simpson*, 295 N.C. at 524, 246 S.E.2d at 757 (citing *Iowa State Commerce Comm'n v. N. Natural Gas Co.*, 161 N.W.2d 111 (Iowa 1968)). The Iowa Supreme Court itself cited *Simpson* in its opinion allowing PPAs under nearly identical circumstances. *SZ Enterprises, LLC d/b/a Eagle Point v. Iowa Util. Bd.*, 850 N.W.2d 441, 455 (Iowa 2014).

Amici urge this Court to be guided by *Eagle Point*. In that case, the Iowa Supreme Court ruled that using a PPA to pay for a "behind-the-meter" installation of a solar-power system—i.e., one in which the power the system generates primarily goes to meeting a portion of that customer's energy needs—is not a sale of electricity to the public, and that third-party owners of such systems cannot be regulated as public utilities. Because *Eagle Point* is a recent decision involving similarly-situated parties, the same financing, a nearly identical statute, and a similar regulatory-circumstances test for what constitutes a "public utility," it can assist this Court in applying *Simpson* here.

B. Power Purchase Agreements Are the Only Viable Method for Many Faith Communities to Finance Solar Installations.

The service provided under the PPA in this case is financing for an on-site solar-power system for a church's own use, not retail sales of electricity to the

general public.[2] PPAs are bargained-for, specifically defined transactions between installers and customers who want—or, as with *Amici* Faith Groups, are morally compelled—to construct solar on their property, for their own use. PPAs to install behind-the-meter solar-power systems on a customer's property are not a vehicle for selling electricity to the general public, and do not resemble the regulated market for electric service provided by monopoly utilities such as Duke Energy.

The contract at issue here is part of a "Solar Freedom Project," intended to develop "funding methods allowing non-profit organizations to benefit from solar electricity." R p 17. The PPA between Plaintiff-Appellant and Faith Community Church contained the provisions common to this kind of financing. *Eagle Point,* 850 N.W.2d at 453-54. Under a typical PPA, the solar company installs a behind-the-meter solar-power system. The customer finances the installation by paying the third-party owner-installer a fixed rate, over a fixed term, based on the electricity the system generates. Those payments, plus any renewable-energy tax credits or other incentives, allow the third-party owner-installer to recover its costs and earn a return on the investment.

Financing on-site solar-power systems with PPAs solves many of the problems that have slowed the adoption of rooftop solar. First, this financing

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[2] REC Solar, a partner of Duke Energy, offers PPAs as a method of financing solar–power systems in other states for commercial customers; PPA financing is offered as another way to pay for solar installations, listed alongside loans, cash purchases, and leases. http://www.recsolar.com/solar-financing-options/.

method allows houses of worship and other nonprofits to take indirect advantage of tax-credits to make the solar-power system more affordable. Two key financial incentives for installing solar have been the federal and, until last year, state tax credits. Since nonprofits pay no income tax, they cannot directly benefit from tax credits. But when third-party installers retain ownership, they get tax credits that indirectly benefit customers through lower prices.

Financing the installation with a PPA also limits the risk of installing an underperforming system. Because pay is related to the system's performance, third-party owners have an incentive to offer only those solar-power systems that are reliably efficient and perform optimally. PPAs thus have built-in consumer protections.

C. Regulating as Public Utilities Those Solar Installers That Use PPA Financing Artificially Limits Competition.

In *Simpson*, a radio operator sought to avoid regulation as a public utility by serving only one class of customers. This exception would have allowed the operator to compete directly against other radio operators that would remain regulated as public utilities. In concluding that the operator was a public utility, the court examined competition in the market and the effect of non-regulation on other market participants. It found that exempting any one service-provider from regulation because it had a limited class of customers would quickly lead to an

unfair advantage and an unregulated market, defeating the stated public policy of the State.

No evidence in this record suggests that allowing PPA financing for solar-power systems on a customer's property, for that customer's use, would "quickly lead" to an unregulated market for retail electric services.

The *Simpson* court did not categorically rule, as the Commission wrote in its Order, that "services offered to some sub-classification of the general populace" are uniformly offers to the public. R p 325. The *Simpson* decision is much more nuanced. Whether a service is being provided "to the public" cannot be reduced to such abstract and formulistic analysis.

The *Simpson* court discussed *Drexelbrook Associates v. Pennsylvania Public Utility Commission,* 212 A.2d 237 (Pa. 1965), which held that a business to furnish utility services to tenants of an apartment complex—a sub-classification of the general public—was not subject to regulation as a public utility. *Simpson* agreed with the Pennsylvania court that the recipients of the utility service were only the tenants of that complex, "not a class opened to the indefinite public." Such persons are a "clearly constitute[d], defined, privileged and limited group," and the proposed service to them is "private in nature." *Simpson*, 246 S.E.2d at 756. The North Carolina Supreme Court recognized that there are instances in which

services to a sub-class of the general populace may not constitute service "to or for the public."

Such is the case with individualized financing agreements, bargained-for contracts that are used to pay for otherwise permissible behind-the-meter solar-power systems. They are private in nature, and not of sufficient public interest to be deemed "public utilities."

The Commission's failure to consider the underlying service being offered by these financing agreements leads to a bizarre result. According to the Commission, a solar-power system can be installed on a church's property and put into service in the territory of a monopoly utility, such as Duke Energy, if that system is: (1) paid for outright with funds in the faith community's bank account; (2) financed with a loan from a bank or other financial institution; (3) donated by a wealthy benefactor; (4) paid for under a lease arrangement with fixed monthly payments to the installer; or (5) operated by a privately financed, limited-liability company, with ownership transferring to the faith community only after those private investors have received available tax credits and earned a return on their investment.

Though all of these are allowed, the first four do not allow the congregation to benefit from tax credits to make the system more affordable. The fifth option is

a complex arrangement with high transaction costs; in addition, the church cannot receive direct electric-bill benefits from the installation for several years.

But these options illustrate that the Commission is indifferent to how a customer pays for a solar-power system, except in the instance of PPA financing. The Commission even speculated that another option could be available to faith communities who want to install solar-power systems: financing the system with the savings the church realizes on its power bill. R p 328.

Amici are unaware of any such arrangement being offered by any solar installer, which is not surprising. While a solar installer knows how much electricity its solar-power system will likely produce in a year, it has no way of guaranteeing a corresponding amount of savings on the customer's power bill. The installer cannot control how much electricity the customer will use following installation. After installing a solar-power system, a church could expand its facilities, begin offering childcare services during the week, or open a commercial kitchen in order to feed the hungry. Any one of those decisions would increase the church's power bill, even if the solar-power system continued to function as predicted. In other words, it would be difficult, if not impossible, for a solar installer to offer a financing contract in which payments are based on the "savings" the system produces for the customer.

The Commission's willingness to invent and approve such a financing option is nevertheless instructive. It underscores that the Commission is agnostic on the question of how a customer pays for a solar-power system, unless that financing arrangement is called a "power purchase agreement." Such was not the case in *Simpson*. There, the Supreme Court found that the exception sought by the provider of two-way radio services had the potential to swallow the market. Under *Simpson*, a provider of otherwise unregulated services does not become subject to regulation as a public utility because it offers a new method of financing.

The Commission's error is important because PPAs provide one of the only cost-effective, sustainable ways for religious institutions, other nonprofits, and low-income households to install clean, solar power.

D. *Simpson* Dictates a Finding that Financing of Behind-the-Meter Solar Power Is Not "Sales to the Public."

The Commission's superficial and formulistic analysis of PPA financing is evident in its first legal conclusion. It wrongly concluded that the service provided by the installer in this case was the sale of retail electricity in the exclusive franchise of Duke Energy. R pp 324-26. As demonstrated above, that is not the underlying service being provided by the solar installer.

The Commission's mistake arose in part from failing to analyze carefully the circumstances that determine whether any particular transaction involves a "sale to

the public." These circumstances inform the flexible, context-specific analysis required:

> (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.

Simpson, 295 N.C. at 524, 246 S.E.2d at 756.

The Commission recognized that *Simpson* provides the governing law on the central question in this case. R p 325-26. Yet after citing *Simpson* and listing the four circumstances that should guide the decision-making process, the Commission failed to consider those four factors. Instead, it concluded from the outset that the financing arrangement was for the sale of "retail electric" service that infringed on Duke Energy's exclusive franchise. R p 326. The Commission never looked past the literal form of the financing agreement to analyze the substance of the transaction.

The Commission short-circuited the *Simpson* analysis in part because of this categorical error at the first step, which skewed the analysis that followed. The first factor—the nature of the industry—is financing solar installations, not the retail sale of electric service to the public. Behind-the-meter solar installers do not resemble the industry of providing universal electric service to all customers in a public utility's service territory. Such solar-power installers can serve only a

limited number of customers, not the general public. PPAs are merely a way of paying for the installation, operation, and use of such solar-power systems on any given customer's site.

Considering the service provided by regulated public electric utilities helps to illustrate the point. If Duke Energy attempted to fulfill its obligations as a public utility by supplying a customer only with a rooftop solar array—and billing that customer for that solar array's electrical output—the utility would not be in compliance with its obligation to provide continuous electrical service to all within its service area. It would not be fulfilling its obligations as a "public utility." The service provided by third-party solar installers—whether financed by PPAs or otherwise—is instead complementary to the service provided by the electric utility.

The market served by such solar installers—the second *Simpson* factor—does not resemble the market served by a traditional public utility. As noted above, a public utility must serve all customers in its territory at all times. *State ex rel. N.C. Util. Comm'n v. New Hope Rd. Water Co.*, 248 N.C. 27, 30, 102 S.E.2d 377, 379 (1958). Providing that service is a legal obligation, and it must provide such service to all members of the public in its service territory without discrimination. *Id.* Small-scale solar installers are not competing in that regulated market. Unlike traditional public utilities, solar-power systems are not suitable for every location. Limiting factors include rooftop shading, structural integrity,

orientation, and tilt.[3] Even those customers who install solar-power systems, whether financed with a PPA or otherwise, almost always remain a customer of the incumbent, regulated public utility.

As to the third *Simpson* factor—the kind of competition that naturally inheres in that market—allowing PPAs to finance solar would not negatively change the kind of competition in the market for small-scale solar-power systems. Again, such solar installers are not directly competing with the incumbent utility, which does not offer rooftop solar systems or financing arrangements for such systems to its retail customers. Instead, installers who finance with PPAs are providing a service that helps customers offset their energy demand, similar to energy-efficiency and conservation measures. Solar installers compete with each other, or with companies that offer energy-efficiency services.

As to the fourth *Simpson* factor—the effect of non-regulation or exemption from regulation of one or more persons engaged in the industry—allowing PPAs to finance third-party-owned solar-power systems would have little or no effect on those engaged in the relevant industry. Currently, neither installers of solar-power systems that are purchased outright by consumers, nor those consumers who buy or

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[3] National estimates incorporating these limitations show that only 22 to 27 percent of residential rooftop area is suitable for hosting a solar array. *See* National Renewable Energy Laboratory, Supply Curves for Rooftop Solar PV-Generated Electricity for the United States (Nov. 2008), http://www.nrel.gov/docs/fy09osti/44073.pdf.

lease such solar-power systems for their own use, are regulated as public utilities. Those who use solar-power systems to generate electricity for their own use within the territory of a public utility may do so without infringing on that utility's exclusive franchise. Nor does state law limit the availability of self-generation for solar-power systems with nameplate capacity below 1 MW.[4] Unlike the radio operator in *Simpson*, exempting third-party owners of solar-power systems financed with PPAs would not have the effect of leaving the market completely unregulated. It would instead level the playing field between those who can afford to install systems with cash, loans, or leases, and faith institutions that are otherwise denied the ability to finance such systems with PPAs.

II. USING A PPA TO FINANCE BEHIND-THE-METER SOLAR IS OTHERWISE CONSISTENT WITH NORTH CAROLINA LAW AND PUBLIC POLICY.

In addition to ignoring the *Simpson* factors, the Commission failed to follow *Simpson's* directive to consider fully whether the transaction at issue is consistent with the State's public policy. *Simpson*, 295 N.C. at 524, 246 S.E.2d at 756–57. Instead, as with the rest of its analysis, it stopped at the form of the "power purchase agreement" and considered public policy only to the extent that the Public Utilities Act permits an exclusive franchise for monopoly, retail sellers of

[4] *In re Investigation of Net Metering*, N.C.U.C. Docket No. E-100, Sub 83 (March 31, 2009).

regulated electrical service. R pp 327-28. But the public policy of North Carolina also favors increased investments in clean, renewable energy.

Since 2007, state law has explicitly encouraged investment in renewable energy through the Renewable Energy and Energy Efficiency Portfolio Standard, which requires utilities in the state to use more indigenous energy resources and to diversify those resources. It also encourages private investment in renewable energy and has the aim of improving air quality by burning less fossil fuel. N.C. Gen. Stat. § 62-2(a)(10). These measures are in addition to the 35-percent State renewable energy tax credit to encourage deployment of solar that was available for 16 years. N.C. Gen. Stat. § 105-129.16A (2015).

The Commission has previously acknowledged this public policy in favor of clean energy when allowing renewable-energy systems to be financed with PPAs. *See, e.g.*, *In re Request by Progress Solar Investments, LLC, and Progress Solar Solutions, LLC*, N.C.U.C. Docket No. SP-100, Sub 24 (Nov. 25, 2009). The Commission ruled that Progress Solar did not provide solar-powered lighting "to the public," but instead provided it "as a result of bargained for transactions and pursuant to agreed-upon terms and conditions" and in furtherance of the State policies promoting renewable-energy resources. *Id.*

In another 2009 decision, the Commission similarly concluded that a provider of third-party financing for solar thermal panels was not a public utility

when it entered into an arrangement to install and own solar thermal panels and sell British thermal units to an on-site conference center at a rate based on the energy produced. *In re Application of FLS YK Farm, LLC for Registration of a New Renewable Energy Facility*, N.C.U.C. Docket No. RET-4, Sub 0 (Apr. 22, 2009) ("[The arrangement is] consistent with the recently enacted policy of the State to promote the development of renewable energy ….").

The same analysis holds for the solar PPA now before this Court. The Commission's approval of the power purchase agreements in *Progress Solar* and *FLS YK Farm* demonstrates that the Commission has the authority to allow PPAs as a method of financing solar power. R p 324.

III. THE COMMISSION'S ORDER VIOLATES THE CONSTITUTIONAL RIGHT TO CONTRACT.

By regarding solar installers as public utilities just because they finance a solar-power system with a PPA, the Commission overreached its authority. Customers have a constitutional right to contract privately for such systems, unless such financing contracts are expressly prohibited by statute or are contrary to public policy. *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 243, 539 S.E.2d 274, 276 (2000) (citing *Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. 87, 93, 194 S.E.2d 834, 838 (1973)). The Commission's declaration that the Plaintiff-Appellant is a "public utility" is void under the Constitution because it "interferes with private rights of property or contract." *State ex rel. N.C. Util.*

Comm'n v. New Hope Rd. Water Co., 248 N.C. at 30, 102 S.E.2d at 379. Because PPA financing for on-site solar has not been explicitly prohibited by statute, is allowed under the self-generation exception, and is consistent with State public policy, the Commission's decision interferes with *Amici's* constitutional right to contract for clean, renewable solar power.

CONCLUSION

The question before this Court is whether a power purchase agreement to finance a behind-the-meter, solar-power installation for the use, and on the property, of a religious institution or other customer is a sale of electricity services "to the public." The Commission erred when it rejected *Simpson's* flexible analysis, disregarded State policy promoting renewable energy, and elevated the form of PPAs over their substance, to characterize this particular financing arrangement as a sale of electricity to the public. As a result, the Commission overreached its authority and infringed on the rights of *Amici* Faith Groups to contract for the PPA-financed installation of solar equipment.

Respectfully submitted, this the 18th day of October 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2016, I electronically filed the foregoing Brief of *Amici Curiae* North Carolina Interfaith Power and Light, North Carolina Council of Churches, Greenfaith, The Christian Coalition of America, Young Evangelicals for Climate Action, and Creation Care Alliance of Western North Carolina with the Clerk of the Court of the North Carolina Court of Appeals, and served counsel for all parties by electronic mail, addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for *Amici Curiae* North Carolina Interfaith Power and Light, the North Carolina Council of Churches, GreenFaith, the Christian Coalition of America, Young Evangelicals for Climate Action, and Creation Care Alliance of Western North Carolina ("Faith Groups"), certifies that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding cover, index, table of authorities, certificate of service, and this certificate of compliance), as reported by the word-processing software.

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