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Rooftop Solar Provider Held to be a "Public Utility" in North Carolina

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The North Carolina Waste Awareness and Reduction Network (NC WARN) installed solar panels on the roof of a Greensboro, North Carolina, church. Under a 2014 Power Purchase Agreement (PPA) between NC WARN and the church, NC WARN continued to own and operate the panels and sold the output to the church at a fixed rate per kWh. In an order issued by the North Carolina Utilities Commission (NCUC) on a 2015 request for a declaratory order by NC WARN, the NCUC found that NC WARN was acting as a "public utility" under state law by providing electric service under the PPA and, in doing so, infringed on the monopoly rights of the local utility, Duke Energy. The NCUC ordered NC WARN to terminate the PPA and refund payments made by the church. The NCUC also ordered NC WARN to pay a fine of $200 per day that it continued to provide electricity to the church.

On appeal, the Court upheld the NCUC's finding that NC WARN was operating as a public utility under state law. North Carolina law defines a public utility as an entity "owning or operating . . . equipment or facilities" that provide electricity "to or for the public for compensation."[1] The Court's decision, therefore, hinged on whether NC WARN was providing electric service "to the public." Observing that even a select class of customers can constitute the "public" under North Carolina law, the Court found that NC WARN was acting as a "public utility" when it provided electric service to the church.[2]

The Court noted that "perhaps most important[]" to its analysis was the potential impact on North Carolina's franchised utilities, which have been granted an "exclusive right to provide electricity in return for compensation within [their] designated [service] territory and with that right comes the obligation to serve all customers at rates and service requirements established by the [NCUC]."[3] The Court dismissed NC WARN's arguments that it did not

intend to provide service to the entire public, but only to "non-profit organizations," observing that a "stamp of approval by this Court would open the door for other organizations like NC WARN to offer similar arrangements to other classes of the public, including large commercial establishments, which would jeopardize regulation of the industry itself."[4] While recognizing that the North Carolina General Assembly has established a policy of promoting renewable development, the Court found that such policy is meant "to coexist with North Carolina's well-established ban on third-party sales of electricity . . . until such time as the monopoly model is abandoned by [North Carolina's] legislature."[5]

Although the Court's decision is a setback for entities seeking to provide rooftop solar service in North Carolina, it does not necessarily entirely prohibit third-party solar arrangements. As observed by one judge in his dissenting opinion, the NCUC had previously approved arrangements where a third-party **leased** solar panels to a single customer. Moreover, at oral argument,theNCUC stated that leasing arrangements are acceptable,[6] likely because they fall under an exception for entities producing power "for such person's own use."[7]

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[1] N.C. Gen. Stat. § 62-3(23)(a).

[2] *N. Carolina Waste Awareness and Reduction Network v. N. Carolina Utils. Comm'n*, No. COA16-811, 2017 WL 4126385, at *1-4 (N.C. Ct. App. Sept. 19, 2017).

[3] *Id.* at *3.

[4] *Id.* at *4.

[5] *Id.*

[6] *Id.* at *6 (Dillon, J., dissenting).

[7] N.C. Gen. Stat. § 62-3(23)(a).

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