Is an Entity Supplying and Operating Solar Panels for an Unrelated Facility a Public Utility?: North Carolina Appellate Court Opinion

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The Court of Appeals of North Carolina ("Court") addressed in a September 19th opinion whether an entity supplying and operating a system of solar panels to a North Carolina facility is a "public utility" under North Carolina law. See *State of North Carolina Ex Rel. Utilities Commission, et al. v. North Carolina Waste Awareness and Reduction Network*, 2017 WL 4126385.

The arrangement included charges for electricity based on the amount of electricity the system generates.

North Carolina Waste Awareness and Reduction Network ("NC WARN") entered into a Power Purchase Agreement ("PPA") with a Greensboro, North Carolina church ("Church"). The PPA provided that NC WARN would install and maintain a system of solar panels on the Church's property. Elements of the PPA included:

- Solar panels remain NC WARN's property
- PPA was not a contract to sell or lease
- NC WARN compensated based on the amount of electricity produced by the system at a rate of $.05 per kWh

NC WARN subsequently filed a request with the North Carolina Utilities Commission ("Commission") asking for declaratory ruling that the agreement would not cause it to constitute a "public utility" pursuant to the North Carolina Public Utilities Act ("Act").

The Commission concluded that the PPA constituted a public utility under the Act. As a result, the Commission ordered that NC WARN:

- Refund charges to the Church
- Pay a $200 penalty every day it provided electric service to the Church through the solar panel system

NC WARN appealed the Commission's decision.

The term "public utility" is defined by the Act as any entity which owns and operates equipment and facilities that provides electricity to or for the public for compensation.

The Court noted that NC WARN owns and operates electricity producing solar panels for compensation. As a result, the key issue is whether NC WARN is:

. . . producing electricity “for the public,” therefore, making it a “public utility.”

A focus of the Court was a North Carolina Supreme Court opinion styled State ex rel. Utils. Comm’n v. Simpson, 295 N.C. 519, 246 S.E.2d 753, 755, initially citing the following quote:

The public does not mean everybody all the time.

Also cited from the Simpson case were factors to be considered in determining whether service is being provided to the public. This issue was stated to be dependent upon:

. . . the regulatory circumstances of the case . . . [including] (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.

This judicial interpretation was stated to be flexible “so as to adjust according to the variable nature of technology” … .

In analyzing these factors the Court noted that NC WARN desired to provide similar projects to other non-profits. This area of the state was already served by Duke Energy which had been granted a monopoly. The opinion opined that preclusion of retail electric competition is needed to prevent duplication of investment, economic waste, inefficient service, and high rates.

The Court characterized NC WARN’s activities as direct competition with Duke as both are sellers of kilowatt hours of electricity to Duke’s customers. It also discounted NC WARN’s assertion that it only intended to serve certain non-profits stating:

Although NC WARN at the present date is only providing its services to a small number of organizations in the Greensboro area, if it were allowed to generate and sell electricity to cherry-picked non-profit organizations throughout the area or state, that activity stands to upset the balance of the marketplace (Noting the precedent it would set and encourage other groups to sell to other classes.)

The Court also assesses legislative intent and notes North Carolina’s policy to promote the inherent advantage of regulated public utilities. The subsequent legislative pronouncement promoting the development of solar energy was deemed not to supersede the state’s monopoly model.

NC WARN is held to be a public utility.

One Justice filed a lengthy dissent arguing NC WARN was not acting as a public utility.

A copy of the opinion can be found here.