Solar Energy: North Carolina Appellate Court Addresses Whether Solar Panel Owner/Operator is a Public Utility

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The Court of Appeals of North Carolina ("Court") addressed in a September 18th opinion whether an entity that owns and operates a solar panel system producing electricity qualifies as a public utility. See *In the Matter of: Request for a Declaratory Ruling By Col. Francis X. De Luca USMCR (Ret),* 2018 WL 4440580.

Col. Francis X. De Luca USMCR (Ret) ("Appellant") appealed from an Order entered by the North Carolina Utilities Commission ("Commission") ruling that Fresh Air Energy II, LLC ("Fresh Air") is not a "public utility" within the meaning of N.C. Gen. Stat. § 62-3(23).

The Appellant had filed a request for a declaratory ruling with the Commission asking that it declare Fresh Air a public utility. He argued Fresh Air met the definition of a public utility as defined in the relevant statute because the company produced electricity to or for the public for compensation. . . by selling it to Duke Energy Carolinas, LLC ("Duke Energy").

Fresh Air argued before the Commission that it was not a public utility:

. . . because it constituted a "Qualifying Facility" ("QF") under the federal Public Utility Regulatory Policies Act of 1978 ("PURPA"), and thus was exempt from certain federal and state laws.

The company further claimed under federal law it could not sell solar energy to the public because the objective of PURPA is to ensure. . . ratepayers remain financially indifferent as to whether the electric utility generates the electricity itself or purchases the electricity from a QF. In addition, Fresh Air asserted it was not a public utility under N.C. Gen Stat. § 62-3(23) because it will not furnish electrical output "to or for the public." Instead, its output would only be sold to Duke Energy, which would then sell the electricity to its customers.

On appeal, Appellant argued that all of Fresh Air's electricity production entered the public grid. As a result, it contended that Fresh Air fell squarely under the definition of a public utility pursuant to the North Carolina statute. He further argued that federal law does not preempt state law. Consequently, Fresh Air was argued to not be removed from the Commission's oversight. As such, Appellant contended the state was not barred from regulating Fresh Air as a public utility.

Parties opposed to this position argued that Fresh Air is not a public utility because it does not sell electricity to or for the public. Further noted was its status as a QF.

The Court in reviewing the issue, noted:

Undisputed here is that Fresh Air owns and operates a solar panel system – i.e., equipment – that produces electricity. Duke Energy compensates Fresh Air for the electricity produced. The question,

however, is whether in producing energy that is sold to Duke Energy, Fresh Air is producing electricity "to or for the public," thus making it a "public utility."

In addressing the issue, the Court undertakes a detailed analysis of the phrase "public utility."

While Fresh Air is deemed to have a customer (i.e., Duke Energy), the Court states:

We do not read the definition of public utility to include a facility that not only sells the totality of its output to a single regulated utility, but who also has no apparent plan or desire to expand its offering to other entities.

It further considers what it describes as "the factor of competition in the marketplace."

North Carolina law is noted to establish regional monopolies on the sale of electricity, which precludes retail electric competition and helps prevent marketplace "duplication of investment, economic waste, inefficient service, and high rates." Fresh Air's activities are deemed by the Court to support, rather than conflict with, Duke Energy's activities. The Court further concludes in upholding the Commission's decision that Fresh Air is not a public utility:

While we are sympathetic to Plaintiff's argument that the words "for the public" should be interpreted as to their plain and ordinary meaning, we cannot go so far here as to say that selling to a singular, regulated client who then sells the power to the public is the equivalent of Fresh Air producing energy for the public. Duke Energy, a regulated utility, is in control of the power it purchases from Fresh Air. Although Duke Energy currently sells the power to its public customers, it could use the power in its own operations. That Duke Energy engages in the subsequent sale of the power it purchases, whether relied on or not by Fresh Air, does not automatically bring Fresh air under the statutory definition of a public utility.

A copy of the opinion can be found here.