

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. SP-13695, SUB 1
BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:

Orion Renewable Resources LLC

)
)
)
)
)
)

**SUPPLEMENTAL POST-HEARING
BRIEF OF ORION RENEWABLE
RESOURCES LLC**

NOW COMES Orion Renewable Resources LLC (“Orion”), by and through the undersigned counsel and pursuant to the *Notice of Due Date for Proposed Orders and/or Briefs* issued on July 15, 2021, and submits this Supplemental Post-Hearing Brief.

In March 2020, Orion petitioned the Commission to challenge the disqualification of its Proposal 129-01 (the “Proposal”) for an 80-megawatt solar project (the “Project”) in Tranche 1 of the Competitive Procurement of Renewable Energy (“CPRE”) Program of Duke Energy Carolinas, LLC (“Duke”). Orion sought relief on the grounds that the Independent Administrator, Accion Group LLC (“Accion” or “IA”), disqualified the Proposal using an Evaluation Tool which was intended and authorized under the Tranche 1 RFP to rank bids but not to disqualify them from consideration. If Orion’s Proposal pricing was below the avoided cost cap established by H.B. 589 and this Commission (“Avoided Cost Cap”) and Duke did not meet its Tranche 1 procurement target, the utility was obliged to offer the Project a Tranche 1 PPA.

This Supplemental Post-Hearing Brief only addresses issues arising out of the Late-Filed Exhibit filed by Duke on November 25, 2020. Duke Energy Carolinas, LLC’s Corrected Late-Filed Exhibit (Nov. 25, 2020) (“LFE”). These issues were discussed in supplemental testimony

filed by the parties and presented at the evidentiary hearing held by the Commission on June 30, 2021 (the “Hearing”).

The LFE purported to “provide[] additional factual information regarding questions posed by the Commission concerning a potential scenario in which Tranche 1 PPAs were retroactively offered to these Proposals”, and to describe “complexities and challenges associated with granting the relief requested by Orion” which Duke asserted the Commission should weigh in assessing the relief that may be afforded Orion if the Commission finds that Accion acted improperly in eliminating Orion’s Proposal from Tranche 1 based on its Net Benefit analysis. Duke Post-Hearing Br. at 12.

The evidence adduced in testimony and at the Hearing clearly shows that these “complexities and challenges” are illusory or can readily be addressed, and that there is no valid reason for the Commission not to grant Orion the relief that it seeks. The appropriate remedy for the improper disqualification of Orion’s Proposal from Tranche 1 is to amend the Project’s Tranche 2 PPA to reflect the pricing of its Tranche 1 Proposal.

I. PROCEDURAL BACKGROUND

On March 9, 2020, Orion filed its Verified Petition for Relief (“Petition”) in Docket No. SP-13695, Sub 1. On April 9, 2020, Accion filed a response in opposition to Orion’s petition, and on May 26, 2020, Orion filed a reply in support of the petition. On May 29, 2020, the Public Staff filed a Motion for Leave to File Comments and Comments, and on June 12, 2020, Accion filed an additional response to Orion’s reply comments.

On October 21, 2020, this Commission issued an *Order Scheduling Hearing* for a remote hearing on November 2, 2020. In the Hearing Order, the Commission also granted the Public

Staff's Motion for Leave to File Comment and found that Orion had been timely in bringing its Petition before the Commission.

An evidentiary hearing was held on November 2, 2020, with Commissioner Clodfelter presiding. At the Hearing, Accion presented the testimony of witnesses Harold T. Judd, Phillip Layfield, Ralph Montsalvatge, David Ball and Garey Rozier; Duke presented the testimony of witness Orvane Piper; and Orion presented the testimony of witness Timothy Lasocki.¹

As ordered by the Commission, Duke filed a Corrected Late-Filed Exhibit on November 25, 2020.

The parties filed post-hearing briefs on January 4, 2021. In its Post-Hearing Brief, Orion cited evidence demonstrating that: (1) Accion disqualified Orion's Proposal from CPRE Tranche 1 not because it was priced above the Avoided Cost Cap, but because Accion determined that the Project's "Net Benefit" was negative; (2) when the cost of Network Upgrades for the Project is factored in, Orion's Proposal was still below the Avoided Cost Cap; and (3) although two other proposals were eliminated from Tranche 1 for the same reason as Orion's Proposal, even if those proposals had been awarded Tranche 1 PPAs, Duke's capacity shortfall in Tranche 1 was such that Orion's Proposal would still have been awarded a Tranche 1 PPA.

Orion filed a Motion to Strike or in the Alternative Reopen Hearing on January 25, 2021, relating to the Late-Filed Exhibit filed by Duke, and on April 14, the Commission issued an Order Denying Motion to Strike and Reopening Record, Allowing Testimony or Comments on Late-Filed Exhibit, and Scheduling Further Hearing. In response to the Commission's Order, Duke and Accion filed testimony relating to the LFE on April 28 and Orion filed the Supplemental Rebuttal Testimony of Timothy Lasocki ("Lasocki Suppl. Testim.") on May 12.

¹ Orion's pleadings, including its Verified Petition for relief and attachments thereto, were admitted into evidence at the hearing.

On May 14, 2021, Orion filed a Motion to Compel Discovery and for Leave to Provide Supplemental Testimony. Accion filed a response on May 28. On June 4, the Commission issued an Order Postponing Hearing, Granting Orion's Motion to Compel, and Permitting Orion to File Limited Supplemental Testimony. In response to the Commission's Order, Orion filed the Second Supplemental Rebuttal Testimony of Timothy Lasocki ("Lasocki 2d Suppl. Testim.") on June 21, 2021.

The Hearing relating to factual issues addressed in the LFE was held on June 30, 2021, with Commissioner Clodfelter presiding. At the Hearing, Accion presented the testimony of witnesses Harold T. Judd, Phillip Layfield, Ralph Montsalvatge, David Ball and Garey Rozier; Duke presented the testimony of witnesses Orvane Piper and Phillip Cathcart; and Orion presented the testimony of witness Timothy Lasocki.

II. ARGUMENT

The LFE raised four issues that, according to Duke, introduce "challenges and complexity" to Orion's request for relief: (1) the possible existence of other projects eliminated from Tranche 1 based on Accion's Net Benefit Analysis which might be entitled to the same relief sought by Orion; (2) the risk of "over-procurement" of CPRE resources by Duke if the Commission were to award PPAs to other proposals (besides Orion's) that were eliminated in Step 1 based on a Net Benefit Analysis; (3) the implications of Duke's reclassification of point of interconnection (POI) switching equipment as Network Upgrades between the Tranche 1 RFP and Tranche 2 RFP; and (4) whether a PPA award for Orion's proposal would be "detrimental to customers."

Duke's core argument, which the LFE was designed to support, is that the Commission should not grant *Orion's* request for relief because granting that relief to *other* proposals similarly situated to Orion's would result in "an immense amount of complexity and likely further

challenges and unanticipated questions” to be resolved by the Commission. Duke Post-Hearing Br. at 11-12 (emphasis added). This argument is both illogical and patently unfair. Orion has diligently pursued its claims, first informally with the assistance of the Public Staff and then through this complaint proceeding. No other party similarly impacted by Accion’s error has sought relief, and it is not Orion’s burden to litigate their claims for them or to resolve any complexity that might (in theory) arise were the Commission to grant relief to such parties.

In any event, the evidence adduced in testimony and at the Hearing demonstrates that the “complications” posited in the LFE are purely theoretical and do not actually exist. As discussed below, the evidence shows that there were at most two other proposals similarly situated to Orion’s. These other proposals were eliminated from Tranche 1 based on a Net Benefit Analysis but may have been below the Avoided Cost Cap after consideration of T&D Upgrade costs. If the Commission were to require Duke to offer Tranche 1 PPAs to those projects (assuming they still exist), it would not create difficult challenges or otherwise disrupt the administration of CPRE.

A. The existence of other proposals eliminated based on Net Benefit does not complicate Orion’s request for relief.

Duke argues, citing the LFE, that “the *most significant issue*” complicating Orion’s request for relief is that if the Commission finds in Orion’s favor, “the IA would need to first assess the 17 other better-priced Tranche 1 Proposals . . . that were also eliminated in Tranche 1 based on a determination of negative customer impact,” to determine whether “one or more of those Proposals would remain under the Avoided Cost Cap and be more cost-effective than Orion’s Proposal such that the Tranche 1 procurement target would be fully satisfied without the need for Orion’s Tranche 1 Proposal.” Duke Post-Hearing Br. at 12 (emphasis added).

The assessment described in Duke’s Post-Hearing Brief has now been done. It shows that of the 17 other Tranche 1 proposals identified in Duke’s Post-Hearing Brief, there are, at most,

two other proposals similarly situated to Orion's in that they were below the Avoided Cost Cap but were improperly eliminated based on Net Benefit. Even if Accion had correctly applied the Avoided Cost Cap as the measure of cost-effectiveness in Tranche 1 and awarded PPAs to Orion and these two other proposals, Duke still would have been shy of its Tranche 1 procurement goal and Orion's Proposal would still have been selected for a PPA.

1. Projects eliminated in Step 1

Two proposals other than Orion's were eliminated in Step 1 of Tranche 1 based on a Net Benefit analysis even though they may have been below the Avoided Cost Cap. The total capacity of those two proposals, however, was only 52.6 megawatts ("MW"). (Transcript of June 30, 2021 Hearing ("Tr.") p. 24:7-9; Petition, Att. D).² So even if those proposals were awarded Tranche 1 PPAs along with Orion's, this would only have added 127 MW to the procurement, leaving Duke still well short of its 600 MW procurement goal for Tranche 1. (Tr. p. 24:7-9 (Lasocki Suppl. Testim.))

Duke claimed in the LFE that if the Commission were to grant PPAs to those two other proposals, it would increase the risk that Duke will ultimately exceed its CPRE procurement goals. LFE at 6.³ However, Duke's witness Mr. Cathcart acknowledged at the Hearing that in recent filings with the Commission,⁴ Duke estimates that it is still 112 MW shy of the total CPRE

² In its April 9, 2019 CPRE Step 2 report filed in Docket Nos. E-2, Sub 1159 and E-7, Sub 1156, Accion reported that three proposals representing 127 MW of capacity were eliminated in Step 1 as being "above avoided cost." Verified Petition, Att. D. Orion's Project size for CPRE purposes was 74.4 MW (Petition, Att. B), meaning that the total capacity of the two other projects ("Bid A" and "Bid B," as described in the LFE) was 52.6 MW.

³ Duke nonetheless concedes that granting Orion's request for relief will have no impact on CPRE procurement targets because Orion's project was already awarded a PPA in Tranche 2. LFE at 6; Tr. p. 124:13-22.

⁴ In the Initial Comments of Duke Energy Progress, LLC and Duke Energy Carolinas, LLC filed on June 15, 2021, in Docket No. E-2, Sub 1159 and E-7, Sub 1156 ("Duke CPRE Comments"),

procurement mandated by H.B. 589. (Tr. p. 138:18-139:5, 145:5-10.) Consequently, although awarding PPAs to those two proposals (with a total capacity of 52.6 MW) would help to make up Duke's CPRE shortfall, doing so would, according to Duke's most recent estimates, not result in over-procurement.

Nor is it difficult to determine if those two proposals – designated “Bid A” and “Bid B” in the Late-Filed Exhibit – were below the Avoided Cost Cap. Duke analyzed the T&D Upgrade costs for Bid B during Tranche 1 and determined that those costs were less than the “Maximum Allowable T&D Upgrade Costs” as calculated by Accion. (Tr. p. 136:20-137:4, 137:12-14; LFE at 1, 8.) This means that Bid B was below the Avoided Cost Cap and entitled to a PPA. (Tr. p. 132:6-13.)⁵

For Bid A, Duke has indicated that the Maximum Allowable T&D Upgrade Cost was \$668,100 but a “thermal study” would have to be conducted to determine whether the cost of any T&D Upgrades triggered by the project would exceed that amount. (LFE at 1, 8; Tr. p. 137:14-20.) Duke did not indicate why a thermal study was not performed for Bid A, nor does it argue that performing such a study would be unduly burdensome.⁶ Given that a thermal study was conducted for every other project advanced to Step 2 (other than those eliminated based on

Duke Energy Carolinas, LLC states that the **minimum** shortfall in procurement after Tranche 2 is 112 MW, but that the shortfall could be as high as 585 MW. Duke CPRE Comments at 4. Although this is minimum shortfall is established in Mr. Cathcart's hearing testimony, Orion requests that the Commission take judicial notice of the Duke CPRE Comments to the extent it deems necessary to support its findings in this matter.

⁵ Duke has also acknowledged that interconnecting Bid B would not have had detrimental effects on later-queued projects because Duke included this project in the “base case” for studying later projects. LFE at 2; Tr. p. 143:6-19.

⁶ Mr. Cathcart also stated on Duke's behalf that performing such studies for the Bid A project would not result in complications for other CPRE projects. Tr. p. 144:19-145:1.

transmission constraints), it can hardly be argued that this analysis could not reasonably be done for Bid A.

2. None of the 15 Projects eliminated in Step 2 based on Net Benefit were below the Avoided Cost Cap.

In the Late-Filed Exhibit, Duke claimed that “15 projects were also eliminated in Tranche 1 based on a determination of negative Net Benefits *after* the application of T&D costs determined in Step 2” but that “extensive further analysis” would be required “to assess each such Proposal to determine whether the applicable T&D costs ... would have exceeded the Maximum Allowable T&D Upgrade Cost.” LFE at 7.

In its Post-Hearing Brief, Duke argued that the possibility “that one or more of those Proposals would remain under the Avoided Cost Cap and be more cost-effective than Orion’s Proposal” is the “*most significant issue*” complicating Orion’s request for relief. Duke Post-Hearing Br. at 12 (emphasis added). But evidence presented at the Hearing shows that none of these 15 Proposals was actually below the Avoided Cost Cap. Six of the 15 proposals cited by Duke were eliminated from consideration in the Tranche 1 RFP because they were located within or near a constrained area of the electric grid, and were dependent on substantial Network Upgrades assigned to earlier queued upgrades. Contrary to Duke’s claims, these six proposals were eliminated from consideration not based on a negative Net Benefit, but because of transmission constraints and “potential uncertainty regarding the ultimate cost responsibility for such Upgrades.” (Tr. p. 24:19-25:4 (Lasocki Suppl. Testim.); Att. A to Lasocki Suppl. Testim.; Att. B to Lasocki 2d Suppl. Testim. at 1-2.) Accion’s witness Mr. Judd conceded at the Hearing that these six projects were not below the Avoided Cost Cap. (Tr. p. 66:18-22.)

With respect to the nine proposals that were eliminated in Step 2 based on a Net Benefit analysis, information produced by Accion in response to the Commission’s Order granting Orion’s

Motion to Compel shows that the cost of T&D Upgrades for each of these proposals exceeded the “Maximum Allowable T&D Upgrade Costs” for such proposal as calculated by Accion. (Tr. p. 33 (Lasocki 2d Suppl. Testim.); Att. B to Lasocki 2d Suppl. Testim. at 3.) As Accion’s witness Mr. Judd acknowledged at the Hearing, this means that each of these nine proposals was above the Avoided Cost Cap. (Tr. p. 84:2-6.) So even if Accion had correctly employed the Avoided Cost Cap, rather than Net Benefit, as the cost-effectiveness standard in Tranche 1, none of the 15 proposals referenced in the LFE would have been selected (Tr. p. 90:7-91:4). The “most significant issue” identified by Duke in the Late-Filed Exhibit has thus been resolved, and poses no impediment to granting Orion’s request for relief.

B. Granting Orion’s request for relief would not result in a “windfall” to Orion.

In its Late-Filed Exhibit, Duke notes that after the conclusion of Tranche 1, it changed the classification of POI Switching Equipment from Interconnection Facilities (the costs of which are borne by CPRE participants) to Upgrades (the costs of which are borne by the utility). LFE at 3. According to Duke, this change in classification has increased the cost of the “standard Upgrade package” by approximately \$1 million to \$1.25 million, although a portion of that increase is offset by a reduced estimate for the cost of relaying equipment.

As a Tranche 2 winner, Orion’s Project is currently being studied for the cost of Upgrades and Duke’s Interconnection Agreement with the Project will classify POI Switching Equipment as Upgrades, consistent with Duke’s revised policy. In the Late-Filed Exhibit, Duke claimed that this change in equipment classification raises two issues: (1) whether Orion would receive a “windfall” if it were awarded a Tranche 1 PPA, since the Interconnection Agreement will use the revised equipment classification; and (2) whether a Tranche 1 bidder’s compliance with the Avoided Cost

cap established for Tranche 1 should be assessed based on the equipment classification in effect at the time of the bid or under the current equipment classification policy. *Id.* at 3-4.

These are not hard questions. With respect to the second, it would be inconsistent with CPRE Rules and the Tranche 1 RFP, not to mention grossly unfair, to assess Upgrade costs for a Tranche 1 project using a different set of interconnection facility cost assumptions than the ones Market Participants were given when formulating their bids. Had Orion known it would not be required to bear the cost of POI Switching Equipment, it would have calculated its Tranche 1 Proposal pricing differently. (*See* Tr. p. 27:1-5.)

Any concern about a windfall to Orion based on this change is easily addressed. Orion's witness Mr. Lasocki testified at the Hearing, and no party disputed, that there are at least three ways to do this without impacting ratepayers or treating Orion's proposal unfairly. (Tr. p. 28:3-14.) First, Orion could be awarded a PPA with Tranche 1 bid pricing reduced by an amount corresponding to the 20-year levelized cost of POI Switching Equipment treated as Upgrades. This would prevent any "windfall" to the Project or any negative impact to ratepayers from the reclassification. Second, the Project's Interconnection Agreement could follow the Tranche 1 policy and classify POI Switching Equipment as Interconnection Facilities rather than Upgrades, so that the Project would bear this cost. Finally, Orion could voluntarily assume the cost of the POI Switching Equipment, regardless of how it is classified under the Interconnection Agreement. Orion would have no objection to bearing those costs if its request for relief were granted, as they were factored into its Tranche 1 Proposal. *Id.* Orion has no inherent preference among these alternatives, although re-pricing its bid (the first alternative listed above) would likely be the most complex approach.

C. Duke's claim that awarding a Tranche 1 PPA to the Project "would be detrimental to customers" is unfounded.

In its Late-Filed Exhibit, Duke claimed that awarding a PPA to Orion based on its Tranche 1 Proposal price "would be detrimental to customers." LFE at 1. This assertion is demonstrably incorrect.

As thoroughly discussed in the filings of Orion and the Public Staff, the General Assembly established the standard by which the "the cost-effectiveness of procured new renewable energy resources" under CPRE must be measured – the utility's Avoided Cost. G.S. § 62-110.8(b)(2). Duke itself agrees that it "is required under the terms of N.C. Gen. Stat. 62-110.8(b)(2) to contract with Proposals that bid at or below the 20 year levelized Avoided Cost (in each pricing period) identified in the RFP, notwithstanding a determination of net benefit under the IA Evaluation Methodology, if doing so is necessary to achieve the procurement targets established for each tranche during the 45 month CPRE procurement period." Petition Att. E (Memorandum published by Accion on February 28, 2020 for CPRE Tranche 2) at 2. To now claim that compliance with this statutory directive is "detrimental to customers" is nonsensical.

Duke's claim appears to be that any contract under which aggregate payments are projected by the IA to exceed Duke's current projected hourly avoided cost rates over the term of the contract is "detrimental to customers," even if the legislature and this Commission have determined that such a contract is cost-effective. Notwithstanding the IA's Net Benefit analysis, however, it is not "beneficial to customers" to disregard both the legal requirements established by the General Assembly and the guidance provided to CPRE bidders regarding the standards that would be used to disqualify Tranche 1 bids as not cost-effective. CPRE participants and Duke's customers have a strong interest in ensuring that the CPRE program is administered fairly and in accordance with the law. To simply ignore the IA's failure to comply with the General Assembly's (and this

Commission's) instructions for administering the CPRE program would encourage further deviations and would add an element of instability and uncertainty to the CPRE program, which may reduce participation and ultimately lead to higher prices for customers in future procurements.

III. CONCLUSION

In its Late-Filed Exhibit, Duke attempted to muddy the waters concerning Orion's straightforward claim for relief by raising a number of vague and speculative concerns relating not only to Orion's claim but to the implications of granting relief to similarly-situated projects – despite the fact that no party other than Orion has requested such relief. It has taken eight months, a motion to strike, two rounds of supplemental testimony, a motion to compel, and an evidentiary hearing to confirm what Orion has long maintained – that there is no basis for Duke's speculation and no valid reason to deny Orion's request for relief.


Orion's Proposal, including the cost of T&D Upgrades triggered by the Project, was below the Avoided Cost Cap set by H.B. 589 and this Commission. Had the IA properly followed the cost-effectiveness standard set by the General Assembly and this Commission – namely, the avoided cost rate published by Duke to Tranche 1 participants – Orion's Project would have been awarded a Tranche 1 PPA. This is true notwithstanding the existence of one or two other proposals that were also improperly eliminated from Tranche 1 based on Accion's Net Benefit analysis.

The appropriate remedy for this violation of the applicable rules and the terms of the Tranche 1 RFP is to amend the Project's CPRE PPA to reflect its Tranche 1 proposal pricing (as may be modified to address Duke's reclassification of POI switching equipment as Network Upgrades). Awarding this relief would support the integrity of the CPRE process, would be

consistent with the General Assembly's goal of ensuring the cost-effective procurement of renewable energy, and would be fair to both Orion and Duke's customers.

Respectfully submitted, this the 30th day of July 2021.

KILPATRICK TOWNSEND & STOCKTON LLP

By: 
Benjamin L. Snowden
Counsel
4208 Six Forks Road, Suite 1400
Raleigh, NC 27609
Telephone: (919) 420-1719
Email: bsnowden@kilpatricktownsend.com

OFFICIAL COPY

Jul 30 2021

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing
**SUPPLEMENTAL POST-HEARING BRIEF OF ORION RENEWABLE RESOURCES
LLC** upon all parties of record by electronic mail and/or first-class United States mail.

This the 30th day of July 2021.



Benjamin L. Snowden