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January 4, 2021

VIA ELECTRONIC FILING

Ms. Kimberley A. Campbell, Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4300

RE: Duke Energy Carolinas, LLC's Post-Hearing Brief
Docket No. SP-13695, Sub 1

Dear Ms. Campbell:

Enclosed for filing in the above-referenced docket, please find Duke Energy Carolinas, LLC's Post-Hearing Brief.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

Jack E. Jirak

Enclosure

cc: Parties of Record

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. SP-13695, SUB 1

In the Matter of	)	
	)	
Petition for Relief of Orion Renewable Resources LLC	)	POST-HEARING BRIEF OF DUKE ENERGY CAROLINAS, LLC
	)	
	)	
	)	

NOW COMES Duke Energy Carolinas, LLC ("Duke" or the "Company"), by and through counsel, and submits this Post-Hearing Brief ("Brief") to the North Carolina Utilities Commission ("Commission") in the above-captioned docket.

I. Introduction and Summary Position

Orion Renewable Resources LLC's ("Orion") petition ("Petition") concerns the Independent Administrator's ("IA") evaluation of Orion's subsidiary's proposal in Tranche 1 of the Competitive Procurement of Renewable Energy ("CPRE"). In light of the fact that, by design under Commission Rule R8-71 ("CPRE Rule"), the IA is responsible for the primary evaluation of proposals submitted into CPRE ("Proposals"), Duke had not previously submitted any filings in this docket. However, based on the filings made in this docket and the Commission's questions at the hearing, the Company believes that it is appropriate at this time to submit this post-hearing brief to address the relief requested by Orion.

As discussed during the hearing, Orion was selected as a winning Proposal in Tranche 2 and has executed its Tranche 2 power purchase agreement ("PPA"). Therefore, if Orion were to be awarded a Tranche 1 PPA with Orion's higher Tranche 1 PPA price,

customers will pay more for the energy from Orion's generating facility than would be the case if the Commission were to deny Orion's petition.[1]

Duke agrees with the position set forth in the IA's previous filings in this docket—namely, that the Avoided Cost Cap (as hereinafter defined) established under N.C. Gen. Stat. § 62-110.8(b)(2) is intended to be a ceiling on the price of winning Proposals, but did not impose an obligation on the IA to select any Proposal that was priced below the Avoided Cost Cap (after taking into account any applicable transmission and distribution ("T&D") costs) up to the targeted procurement amount. Orion reads into the governing legal framework a prescriptive obligation (that is, an obligation to select all Proposals below the Avoided Cost Cap) that is not contained in the applicable legal framework and is not consistent with discretion provided to the IA under the CPRE Rule. The IA appropriately exercised its discretion in Tranche 1 and thereby saved customers a projected amount of $3.5 million.[2] To undo the results of Tranche 1 (which will be an immensely complex task as further described below) will simply saddle customers with higher costs.

Furthermore, even if the Commission were to adopt Orion's view that the IA did not have the discretion to reject Proposals that were determined by the CPRE Program Methodology (as hereinafter defined) to have a negative economic impact on customers, that does not necessarily mean that Orion's Tranche 1 Proposal should be awarded a Tranche 1 PPA at its Tranche 1 bid price. There were numerous better-priced Proposals that were eliminated in Tranche 1 based on the Net Benefit Analysis (as hereinafter

[1] Tr. 32-33.
[2] Prior to application of T&D costs. Application of T&D costs will increase the cost impact to customers. *See* Attachment to Late-Filed Exhibit.

defined), including both the two projects that were not formally assessed in Step 2[3] and the 15 projects that were assessed in Step 2.[4] Therefore, a finding that the IA did not have discretion to eliminate Proposals based on the Net Benefit Analysis will set off a cascading series of questions and likely challenges that will take months to resolve, requiring the resolution of a series of complex conceptual questions concerning the retroactively-assessed hypothetical outcome of Tranche 1.[5] Such relief will also introduce further uncertainty into the potential need for Tranche 3 and has the potential to push Duke further into an over-procured scenario relative to the statutorily-established CPRE procurement target.[6]

For all of these reasons, the Commission should deny Orion's requested relief.

II. Argument

a. Under N.C. Gen. Stat. § 62-110.8 ("CPRE Statute") and the Commission's CPRE Rule, the IA had the discretion to eliminate Proposals through application of the IA's CPRE Program Methodology.

As background, N.C. Gen. Stat. § 62-110.8(b)(2) identifies a ***cap or ceiling*** on the price at which Duke procures renewable generation resources through the CPRE process ("…procurement obligation shall be ***capped*** by the public utility's current forecast of its avoided cost").[7] Such cap is set at the current forecast of avoided costs calculated over the term of the PPA in a manner "consistent with the Commission-approved avoided cost."[8]

[3] *See* DEC Late-Filed Exhibit Introduction; *see also* Tr. 88.
[4] *See* DEC Late-Filed Exhibit, Item 6.
[5] *See* DEC Late-Filed Exhibit.
[6] N.C. Gen. Stat. § 62-110.8(b)(1).
[7] N.C. Gen. Stat. § 62-110.8(b)(2). Emphasis added.
[8] *Id*.

Commission Rule R8-71(b)(2) defines "Avoided cost rate" as the long-term, levelized avoided energy and capacity costs utilizing the methodology most recently approved by the Commission ("Avoided Cost Cap"). In accordance with N.C. Gen. Stat. § 62-110.8(b)(2), the CPRE Tranche 1 RFP did, in fact, identify the Avoided Cost Cap—the maximum bid price based on the then current Commission approved avoided cost methodology.[9] Because all Proposals were required to submit a decrement to the Avoided Cost Cap,[10] bids priced above the Avoided Cost Cap were simply not accepted.

However, while N.C. Gen. Stat. § 62-110.8(b)(2) establishes a maximum bid price on Proposals selected through CPRE, it does not mandate that the IA and Duke must select each and every Proposal that has a bid price below the Avoided Cost Cap (subject only to the targeted procurement amount). Such a simplistic, mechanical interpretation of the applicable law is not supported by the text and cannot be reconciled with the broad evaluation role assigned to the IA under the CPRE Rule.

Under the CPRE Rule, the IA is given wide latitude to evaluate Proposals based on its "CPRE Program Methodology," which is defined as the "methodology used to evaluate all proposals received in a given CPRE RFP Solicitation."[11] In the same vein, Commission Rule R8-71(f)(1)(iii) references the "economic and noneconomic factors to be considered by the Independent Administrator in its evaluation of proposals." The CPRE Program

[9] For the sake of clarity, the Avoided Cost Cap applicable to Tranche 1 is set forth in Section IV of the Tranche 1 RFP (see table entitled "Avoided Cost Threshold for Tranche 1"). During the hearing, there was some discussion regarding the "published" avoided cost values. The Avoided Cost Cap set forth in Section IV of the Tranche 1 RFP are the "published" avoided cost rates. See Tr. 42-43; 52-55.

[10] Tranche 1 RFP, Section IV ("To ensure consistency with the approved North Carolina Rate Schedule PP Option B avoided cost pricing structure, proposed pricing must be stated in a decrement that is applied equally all pricing periods. For example, an MP could propose pricing that is $2.00 less than the avoided cost in each pricing period.").

[11] Commission Rule R8-71(b)(4).

Methodology used to evaluate all Proposals, including the "economic and noneconomic factors," was described in detail in the CPRE RFP. Included in the CPRE RFP was a clear and concise description of the IA's net benefit analysis ("Net Benefit Analysis) to be applied to assess each Proposal over the twenty-year PPA term.[12] In the case of the Orion Proposal, the IA determined through application of the Net Benefit Analysis that the Proposal would have a negative economic impact on customers.

The CPRE Program Methodology therefore primarily consisted of (1) the Net Benefit Analysis utilizing the IA's proprietary evaluation tools, and (2) other noneconomic factors (*e.g.*, a demonstration of having adequate site control). Once again, the Net Benefit Analysis was clearly described in the Tranche 1 RFP issued to all market participants and, to the best of the Company's knowledge, no market participant challenged the IA's planned use of Net Benefit Analysis during the Tranche 1 pre-solicitation comment period under Commission Rule R8-71(f).

Orion's position appears to be that the sole economic factor to be assessed is whether a Proposal's bid price is below the Avoided Cost Cap. But if the IA was simply obligated to select each resource that was below the Avoided Cost Cap, the CPRE Statute and the CPRE Rule would have expressly so stated—but they do not. Instead, the CPRE Statute set a ceiling price, and the CPRE Rule directed the IA to develop a CPRE Program

[12] Tranche 1 RFP, at 13 ("Each Proposal will be evaluated on its benefit to the DEC/DEP system over the twenty year analysis period on a $/MWh basis (accumulated net present value)…. In order to assess a Proposal's net benefit, the evaluation must determine both the Proposal's cost and the Proposal's benefit to the DEC/DEP system. The cost of the Proposal is determined by taking the MP submitted $/MWh rate and applying the rate to the Facility's projected output (8760 hours x 20 years). The benefit to the DEC/DEP system is determined using two metrics: (1) the Proposal's output contributes toward the ability to defer future DEC/DEP generating unit capacity and (2) the Proposal's energy output replaces energy that would have been supplied at DEC/DEP system cost for that particular hour.")

Methodology that assessed economic and non-economic factors in a manner deemed reasonable by the IA.

In its prior filings, Orion has not coherently explained what "economic" factors are permissible to be evaluated or why "economic factors" need to be evaluated at all if the IA was simply required to pick Proposals that were below Avoided Cost Cap. In its Petition, Orion stated that "[n]o proposal should have been disqualified based on economic factors other than compliance with the cap."[13] Once again, this interpretation simply reads "economic factors" to be synonymous with compliance with the Avoided Cost Cap even though there is no basis for this interpretation in the CPRE Rule. Had the Commission intended not to provide any discretion to the IA in its economic evaluation of Proposals, it could have easily made that clear by identifying compliance with Avoided Cost Cap as the sole "economic factor" to be considered rather than imposing a general directive on the IA to develop a CPRE Program Methodology, including the assessment of "economic factors" through application of the Net Benefit Analysis.

And where the IA determined that a Proposal was not in the best interest of customers based on the IA's CPRE Program Methodology, the IA and Duke were not required to select a Proposal simply because the Proposal was below the Avoided Cost Cap. And to be clear, the Net Benefit Analysis used the exact same set of underlying data that was used to generate the Avoided Cost Cap, so there was no discrepancy in terms of the timing of data or other assumptions—the Net Benefit Analysis simply used a more granular or "deconstructed" version of the Avoided Cost Cap.[14]

[13] Petition, at 11, FN 20.
[14] Tr. 54-55, Tr. 76-77.

Orion urges a prescriptive read of N.C. Gen. Stat. § 62-110.8(b)(2)—that Duke was required to select every Proposal that was priced below the Avoided Cost Cap up to the procurement target. Yet, even Orion acknowledges that there is room in N.C. Gen. Stat. § 62-110.8(b)(2) for the IA to reject Proposals priced below the Avoided Cost Cap[15] but never explains why this is permissible under N.C. Gen. Stat. § 62-110.8(b)(2) even though the statute makes no express reference to such right. What Orion does not acknowledge is that the only way to reconcile the IA's clear discretionary right to eliminate non-conforming bids is to correctly read N.C. Gen. Stat. § 62-110.8(b)(2) to be imposing a ***cap or ceiling*** on bid prices but not imposing an obligation on the IA to select every bid that was below the Avoided Cost Cap. Stated differently, Orion's formulaic interpretation would essentially prohibit the IA from rejecting any Proposal due to any factors—"economic or non-economic"—so long as the Proposal was below the Avoided Cost Cap and the procurement target had not been met. This is not a coherent interpretation.

Contrary to Orion's assertion in its Petition, the Net Benefit Analysis was not used to "determine whether a bidder's proposal complied with the avoided cost cap."[16] There is no dispute that Orion bid a price that was a decrement to the Avoided Cost Cap since the bid would not have been accepted otherwise.[17] Rather, the IA's Net Benefit Analysis, as part of the CPRE Program Methodology clearly described in the RFP, was utilized to

[15] Orion Reply, FN 2.
[16] Petition, at 8.
[17] *See* FN 10.

determine that the Orion Proposal was not beneficial to customers and was therefore not selected by the IA as a winning Proposal.[18]

Another way to approach the question in this proceeding is to assess the logic of Orion's position and then evaluate whether such logic is supported by the actual provisions of the CPRE Statute and the CPRE Rule. Orion's argument is essentially as follows:

(1) Orion's proposal was below the Avoided Cost Cap;
(2) Therefore, Orion's Proposal met the "cost-effectiveness" test under N.C. Gen. Stat. 62-110.8(b)(2); and
(3) Therefore, the IA was obligated to select Orion's proposal in Tranche 1 since the targeted procurement amount was not satisfied.

As will be described further in Section II(b) below, there is considerable complexity in assessing whether Orion's Proposal was below the Avoided Cost Cap after application of the T&D costs. However, assuming for the sake of argument that the Orion Proposal remained below the Avoided Cost Cap after application of the T&D cost, then the Orion Proposal would satisfy items (1) and (2)—it would be below the Avoided Cost Cap and therefore "cost-effective" under the terms of N.C. Gen. Stat. 62-110.8(b)(2). But Orion has failed to identify any statutory provision or rule to support item (3)—that, the IA was therefore obligated to select Orion's proposal. Such a simplistic formulation is not contemplated by the applicable law nor is it consistent with the Commission's delegation to the IA of the responsibility to develop a CPRE Program Methodology, including the "economic factors" to be considered. Under Orion's view, all such directives regarding

[18] While it is an issue of nomenclature more than substance, it is worth pointing out that the Orion Proposal was not "disqualified" from Tranche 1 (as is repeatedly alleged by Orion) but instead was simply not selected as a Winning Proposal based on the results of the Net Benefit Analysis.

the CPRE Program Methodology are mere surplusage, as the only "factor" to be considered is whether the proposal is below the Avoided Cost Cap.

Had the General Assembly intended N.C. Gen. Stat. § 62-110.8(b)(2) to be prescriptive, it could have easily drafted the statute to that effect—by expressly imposing an obligation on Duke to select every Proposal found to be "cost-effective" under N.C. Gen. Stat. § 62-110.8(b)(2). But such an express directive is simply not contained in the statute. Similarly, if the Commission had intended that the only "economic factor" to be considered is compliance with the "cost-effectiveness" test of N.C. Gen. Stat. § 62-110.8(b)(2), it could have easily so stated. But, the Commission did not, instead electing to direct the IA to assess "economic factors" as determined to be appropriate by the IA as part of the CPRE Program Methodology, all of which was clearly described in the Tranche 1 RFP.

Orion asserts that the "IA's use of a proprietary 'cost-effectiveness' test to disqualify bids is fundamentally at odds with the measure of cost-effectiveness for CPRE proposals prescribed by the General Assembly and this Commission – a measure which relies on the utility's published avoided cost rates."[19] Once again, this argument reads into N.C. Gen. Stat. § 62-110.8(b)(2) an obligation that is not actually stated in the statute. N.C. Gen. Stat. § 62-110.8(b)(2) sets a ceiling on prices but does not impose on the IA the obligation to select every Proposal that is below the Avoided Cost Cap. The mere fact that a proposal is considered to be "cost-effective" under N.C. Gen. Stat. 62-110.8(b)(2) does not mean that the IA was therefore required to select such Proposal where it was determined

[19] Orion Reply, at 2.

to have a negative impact on customers using the same underlying data as was used to develop the Avoided Cost Cap.[20] In the case of the Orion Proposal, the IA exercised its discretion in evaluating the "economic factors" consistent with the CPRE Program Methodology to conclude that the Proposal would not offer any benefit to customers.

From a customer and public policy perspective, the IA's approach resulted in the most beneficial outcome. That is, Orion's Tranche 1 Proposal, which would not have benefitted customers, was rejected, and the unmet Tranche 1 procurement amount was rolled into Tranche 2, where the IA was able to fully meet the Tranche 2 procurement target with Proposals that satisfied the substantially lower Avoided Cost Cap of Tranche 2. In other words, the selection of Orion's Tranche 2 proposal demonstrates the benefit of the IA's decision in Tranche 1 by obtaining for customers a resource with an identified benefit to customers.

Orion asserts that "[a]llowing bidders to be disqualified by a ranking tool is arbitrary and unfair, and undermines the Commission's goal of requiring utilities to procure all cost-effective resources necessary to meet the utility's procurement targets."[21] This assertion is flawed in two primary respects. First, while Duke was not responsible for performing the Step 1 economic evaluation of Proposals, Duke disagrees that use of the IA's Net Benefit Analysis was arbitrary or unfair. The Net Benefit Analysis was specifically designed to identify those Proposals that had the most economic benefit to customers, and therefore there was nothing "arbitrary" about the tool.[22] The Net Benefit

[20] Tr. 54-55, Tr. 76-77.
[21] Orion Reply at 4; *see also* FN. 18 above. Orion's Proposal was not disqualified but instead was simply not selected as a winning Proposal.
[22] Orion has not identified any flaw in the logic of the Net Benefit Analysis—Orion simply does not like the result.

Analysis is an approach that has been used by the IA in hundreds of RFPs across the country.[23] Nor was the application unfair, as the 20-year Net Benefit Analysis performed by the IA was clearly described in the Tranche 1 RFP[24] and then applied exactly as described in the RFP.[25] Second, Orion asserts that the Commission had a "goal of requiring utilities to procure all cost-effective resources necessary to meet the utility's procurement targets" but fails to cite to a statute or rule that establishes such "goal."

Duke acknowledges that the approach to Proposal selection was changed in Tranche 2 as outlined in the IA's memo. This changed approach—while a departure from the optimal approach utilized in Tranche 1—was a concession intended to avoid further costly disputes and avoid a delay in Tranche 2. It is also worth noting that the IA's memo was not drafted by Duke. While the IA attempted to simplify Duke's position with respect to Tranche 2 for purposes of the summary, the IA Memo did not accurately capture the nuance of Duke's position with respect to the change in approach between Tranche 1 and Tranche 2. As described herein, Duke believes that the IA had the discretion to reject a Proposal in Tranche 1 based on the CPRE Program Methodology, including "economic factors" assessed, in part, through application of the IA's Net Benefit Analysis.

b. A finding that the IA did not have the discretion to eliminate Proposals based on the Net Benefit Analysis does not mean that Orion should be awarded a Tranche 1 PPA but, instead, will result in an immense amount of complexity and likely further challenges and unanticipated questions, along with higher costs for customers.

[23] Tr. 30.
[24] *See* FN 12.
[25] Tr. 75-76.

As explained above, Duke believes that the IA's Tranche 1 evaluation approach was consistent with the CPRE Statute and the Commission's CPRE Rule. Duke further asserts that, to the extent that there is any ambiguity in the applicable law regarding the extent of the IA's discretion, the Commission should place weight on the potential complexity and challenges associated with granting the relief requested by Orion.

Such complexity and challenges are largely described in the Company's Late-Filed Exhibit. As it relates to the relief requested by Orion, the most significant issue is that if the Commission determines that a finding of negative economic benefit through the Net Benefit Analysis was not a sufficient basis on which to not select a Proposal as winner, the IA would need to first assess the 17 other better-priced Tranche 1 Proposals (*i.e.,* that were better-priced than Orion's Proposal) [26] that were also eliminated in Tranche 1 based on a determination of negative customer impact. It is possible that 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.[27]

Other complexities and challenges associated with a retroactive change to Tranche 1 results include the following:

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[26] *See* Late-Filed Exhibit, Item 6. As described therein, the Late-File Exhibit provided certain data with respect to two other Proposals with a negative economic impact that were not formally evaluated in Step 2. In addition, 15 other better-priced Proposals were moved to Step 2 but also determined to have negative economic benefit after application of T&D costs.

[27] *See* Late-Filed Exhibit, Item 6; Tr. 88 ("…there were the two other that had negative net benefits which did not do Step 2 analysis, so we would have to evaluate them. And then the other projects that were failed based on their Net
Energy Benefits being positive, let's see if there are additional Step 2 system upgrade costs making them negative, we would have to look at all of those to see if any of those would've passed under this alternate method.").

- The challenge of retroactively assessing the T&D costs for the one similarly situated Proposal that was not previously assessed.[28]

- The windfall that will accrue to any retroactively awarded Tranche 1 Proposals due to the change in equipment classification occurring between Tranche 1 and Tranche 2.[29]

- The need to answer complex conceptual questions regarding whether Orion (and other Tranche 1 Proposals) should be assessed utilizing the assumptions concerning the "standard Upgrade package" from Tranche 1 or Tranche 2.
    - For example, if the updated standard Upgrade package from Tranche 2 is assumed, Orion would be over the Avoided Cost Cap. In that case, should Orion (and other similarly situated Proposals) be given a chance to re-price their bids?

- As was described in the CPRE Program Plan Update, under certain realistic scenarios, the Company (together with Duke Energy Progress, LLC) is already over-procured for CPRE based on current results of Tranche 1 and Tranche 2 due to higher than projected amounts of Transition MWs. Awarding further PPAs to Tranche 1 bidders has the potential to further place Duke in an over-procured situation relative to the overall statutory procurement target.[30] Further, if Orion's requested relief is granted, it will require a minimum of 6 - 8 months to sort through all of the cascading issues and perform any necessary T&D evaluations, which will, in turn, introduce even more uncertainty regarding the potential need for Tranche 3.

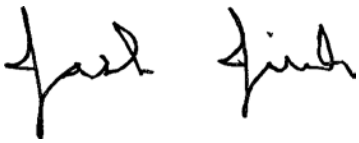
Finally, any retroactive award of Tranche 1 PPA will mean higher costs for customers, since any unmet CPRE amounts would otherwise have been procured under lower Avoided Cost Caps and would include application of the Solar Integration Service Charge (which benefits customers).

[28] *See* Late-Filed Exhibit, Items 1 & 2.
[29] *See* Late-Filed Exhibit, Item 3.
[30] N.C. Gen. Stat. § 62-110.8(b)(1).

III. Conclusion

Wherefore, for all of the reasons set forth herein, the Company respectfully requests that the Commission deny Orion's requested relief.

Respectfully submitted, this the 4th day of January, 2021.



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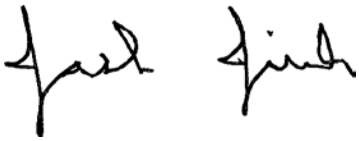
CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Carolinas, LLC's Post-Hearing Brief, in Docket No. SP-13695, Sub 1, has been served by electronic mail, hand delivery or by depositing a copy in the United States mail, postage prepaid to parties of record.

This the 4th day of January, 2021.



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