Jack E. Jirak
Associate General Counsel

Mailing Address:
NCRH 20 / P.O. Box 1551
Raleigh, NC 27602

o: 919.546.3257
f: 919.546.2694

jack.jirak@duke-energy.com

April 8, 2020

VIA ELECTRONIC FILING

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

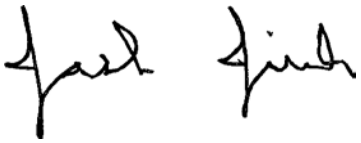
RE: Duke Energy Carolinas, LLC's Response in Opposition to Cool Springs Solar LLC's and Lick Creek Solar LLC's Verified Petition for Declaratory Ruling
Docket No. E-7, Sub 1156

Dear Ms. Campbell:

Enclosed for filing in the above-referenced docket, please find Duke Energy Carolinas, LLC's Response in Opposition to Cool Springs Solar LLC's and Lick Creek Solar LLC's Verified Petition for Declaratory Ruling.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance with this matter.

Sincerely,



Jack E. Jirak

Enclosure

cc: Parties of Record

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-7, SUB 1156

In the Matter of Cool Springs Solar LLC and Lick Creek Solar LLC	)	**DUKE ENERGY CAROLINAS, LLC'S RESPONSE IN OPPOSITION TO COOL SPRINGS SOLAR LLC'S AND LICK CREEK SOLAR LLC'S VERIFIED PETITION FOR DECLARATORY RULING**

NOW COMES Duke Energy Carolinas, LLC ("DEC"), pursuant to North Carolina Utilities Commission ("Commission") Rule R1-5, and hereby submits this Response in Opposition to Cool Springs Solar LLC's ("Cool Springs") and Lick Creek Solar LLC's ("Lick Creek" and together with Cool Springs, "Petitioners") Verified Petition for Declaratory Ruling and Other Relief ("Petition").[1]

BACKGROUND

DEC does not dispute the basic facts as set forth in the Petition. Both of the Petitioners established a legally enforceable obligation ("LEO") utilizing the Commission-approved Notice of Commitment ("NOC") form, which entitled Petitioners to avail themselves of power purchase agreement ("PPA") rates determined in accordance with the avoided cost methodology established in Docket No. E-100, Sub 148. Pursuant to N.C. Gen. Stat. § 62-156(c), as amended by Session Law 2017-192 ("HB 589"), the term of the PPA to which the Petitioners were entitled was five years.

[1] While the Petition was filed in three dockets (Docket No. SP-8748, Sub 1; Docket No. SP-8741, Sub 2; Docket No. E-7 Sub 1156), DEC's Response is only being filed in Docket No. E-7 Sub 1156 (DEC's CPRE docket), which is the only docket in which DEC is a party.

Both Cool Springs and Lick Creek executed their respective PPA and Interconnection Agreement ("IA"). The PPA expressly requires that Cool Springs and Lick Creek, respectively, sell "one hundred percent (100%) of the Capacity, output of Energy (including stored Energy) produced by the Facility" under the terms of the PPA. At no time prior to execution of the respective PPAs did either Petitioner communicate to DEC its belief that, notwithstanding execution of the PPA, the respective projects could participate in Tranche 2 or that they believed that their obligations under the respective PPAs to be contingent on the outcome of the Competitive Procurement of Renewable Energy ("CPRE") Tranche 2 Request for Proposal ("RFP").

The Tranche 2 RFP was made available for comment on the Independent Administrator's ("IA") website on August 15, 2019 in accordance with Commission Rule R8-71(f). Such initial draft contained the following express statement: "[a]lso for the avoidance of doubt, [a Market Participant] may not submit a Proposal for a Facility that has an existing off-take agreement"[2] (for purposes of this Response, such requirement in the Tranche 2 RFP will be referred to as the "RFP Off-Take Restriction"). This unambiguous statement was never amended in any way and was included in the final Tranche 2 RFP posted to the IA's website on October 15, 2019 in accordance with Commission Rule R8-71(f). To be clear, the RFP Off-Take Restriction would not have prevented a Market Participant with an existing off-take agreement from participating in CPRE Tranche 2 so long as such Market Participant terminated the off-take agreement in advance of bid submission.

[2] *See* Tranche 2 RFP, FN 4. The Duke Evaluation Team, with the IA's approval, added the statement to Tranche 2 as part of its overall efforts in collaboration with the IA to improve and clarify the RFP. To be clear, however, the Duke Evaluation Team did not intend to accept bids in Tranche 1 from projects with existing off-take agreements and to the best of the IA's knowledge, no such bids were received in Tranche 1.

COMMENTS

I. The RFP Off-Take Restriction is Supported by the Structure of HB 589, Including the Terms of the CPRE Statute.

By its very structure, HB 589 contemplated three distinct and mutually exclusive paths to an off-take arrangement with DEC or Duke Energy Progress, LLC ("DEP" and together with DEC, "Duke" or the "Companies"). A Qualifying Facility ("QF") can elect to sell output to Duke pursuant to (1) an avoided-cost based PPA (either through a negotiated QF PPA or a standard contract depending on the size of the facility (all such PPAs referred to herein as "Full Avoided Cost PPA"), (2) a competitively-bid PPA obtained through CPRE ("CPRE PPA"), or (3) a Green Source Advantage ("GSA") PPA. Nothing in HB 589 contemplated that QFs should be permitted to enter into a Full Avoided Cost PPA or GSA PPA but then attempt to obtain a CPRE PPA in parallel.

The manner in which the CPRE procurement target is set in N.C. Gen. Stat. § 62-110.8 (the "CPRE Statute") further supports this position. Specifically, N.C. Gen. Stat. § 62-110.8(a) establishes a CPRE procurement target that is adjusted based on the number of QFs that have executed both Full Avoided Cost PPAs and IAs.[3] N.C. Gen. Stat. § 62-110.8(b)(1) mandates that if a QF has executed both a Full Avoided Cost PPA and an IA, then the total CPRE procurement target is adjusted.[4] The Companies' CPRE Program Plan

[3] N.C. Gen. Stat. § 62-110.8(a) ("***Subject to the limitations set forth in subsections (b) and (c) of this section***, the electric public utilities shall issue requests for proposals to procure and shall procure, energy and capacity from renewable energy facilities in the aggregate amount of 2,660 megawatts (MW), and the total amount shall be reasonably allocated over a term of 45 months beginning when the Commission approves the program.")(emphasis added).

[4] N.C. Gen. Stat. § 62-110.8(b)(1) ("If prior to the end of the initial 45-month competitive procurement period the public utilities subject to this section have executed power purchase agreements and interconnection agreements for renewable energy capacity within their balancing authority areas that are not subject to economic dispatch or curtailment and were not procured pursuant to G.S. 62-159.2 having an aggregate capacity in excess of 3,500 megawatts (MW), the Commission shall reduce the competitive procurement aggregate amount by the amount of such exceedance. If the aggregate capacity of such renewable energy

updates filed in the IRP refers to QF projects with both a Full Avoided Cost PPA and an IA as "Transition MW" and summarizes Duke's current projections that the total CPRE procurement amount will be reduced substantially below 2,660 MW due to the amount of Transition MW. Furthermore, it is not clear under the CPRE Statute whether termination of Petitioners' Full Avoided Cost PPAs and IAs would necessitate adjustment of the Transition MW but, if so, such an outcome would result in an overly iterative process.

In establishing this structure, the CPRE Statute thus clearly contemplated that executing a Full Avoided Cost PPA or participating in a CPRE RFP are mutually exclusive. In contrast, Petitioners now urge that, despite the fact that they have each executed a Full Avoided Cost PPA and an IA and are therefore included in the Transition MW and reduced the total CPRE procurement target, they should also be allowed to participate in the Tranche 2 CPRE RFP. Under Petitioners' argument, their projects would both qualify as Transition MW—given that they have both executed Full Avoided Cost PPAs and executed IAs—and then also be permitted to bid into CPRE. In contrast with Petitioners' position, the RFP Off-Take Restriction is fully consistent with the HB 589, including the CPRE Statute.

II. The RFP Off-Take Restriction is Reasonable as a Matter of Policy.

Apart from the statutory framework of HB 589, there are a number of reasonable policy bases to support the RFP Off-Take Restriction. First, in order for the full benefits of the competitive solicitation process to be realized, Market Participants must be motivated, to the greatest extent possible, to bid the lowest PPA prices (assuming all

facilities is less than 3,500 megawatts (MW) at the end of the initial 45-month competitive procurement period, the Commission shall require the electric public utilities to conduct an additional competitive procurement in the amount of such deficit.").

minimum technical requirements have satisfied). While there are many variables that go into project economics, it is important that all projects have the same incentive to bid as aggressively as possible given their individual unique economics. So long as all projects are competing on the same basis, it is reasonable to assume that the competitive process will yield the lowest possible prices for customers.[5] Having a backstop of a firm, alternative PPA arrangement could potentially reduce the incentive to bid aggressively. This is particularly the case with respect to Petitioners in that Petitioners have a PPA with Sub 148 rates that are higher than the current Sub 158 avoided cost rates and therefore may not be incentivized to bid as aggressively as Market Participants that do not have such a contract, which works against the benefits of competitive process.

Second, if projects that are encumbered by a PPA are permitted to bid into CPRE, then such projects will, as a matter of economic common sense, price into their bids the cost of any liquidated damages that would be due under such other PPA in the event that such project is selected as a winner in CPRE. Thus, even though Petitioners assert that they would be willing to pay the liquidated damages due under the Full Avoided Cost PPAs if selected as a winner in Tranche 2, it is reasonable to assume that, all things being equal, their bid price is higher than would have been the case in order to cover the cost of such liquidated damages. In this case, the developer will only pay the liquidated damages when it has an attractive revenue stream that will make it whole, which makes the offer to pay liquidated damages disingenuous.

[5] The IA has confirmed that there are no projects bid into CPRE Tranche 2 that have an existing off-take arrangement other than Petitioners' and their affiliate and is not aware of any similarly situated projects that were bid into CPRE Tranche 1.

Third, it is reasonable to assume that if Petitioners had terminated the PPA and paid the liquidated damages prior to submitting their bids to comply with the RFP Off-Take Restriction, they would also have sought to recover those damages via the CPRE bid price. There is nothing wrong with this approach, as all projects seek to recover their project related costs in their bids. If they are awarded a CPRE PPA, they will recover the costs. If they are not awarded a CPRE PPA, they would need to find another revenue stream, which is similar to the position of all other Market Participants. However, Petitioners want to avoid the risk of having to find a replacement revenue source to cover their liquidated damages if they are not selected in CPRE. That would effectively create a free option to cancel the existing PPA if they can get a more attractive revenue stream via CPRE. That is plainly not in line with the policy purposes of HB 589 and the CPRE Program.

Fourth, while it is true that the CPRE PPA confers certain additional benefits (*i.e.*, broader curtailment rights and RECs) and that the structure of CPRE as established HB 589 leads to prices that are below currently projected avoided costs, it is also true that long-term fixed prices PPAs (such as the 20-year CPRE PPA) still impose risks on customers. In contrast, Petitioners' Full Avoided Cost PPAs will be reset every five years. Therefore, there is a potential that the Full Avoided Cost PPAs could be more advantageous to customers if future avoided costs decline substantially from the current projections. To be clear, Duke continues to believe in the benefits of a competitive bidding process as it relates to long-term PPAs, but it is important to understand that even competitively bid long-term PPAs impose risks on customers. The overpayment risks are somewhat ameliorated when the term of the PPA is only five years, even if the PPA price is set at full avoided cost, as is the case with Petitioners' PPAs. Finally, it should also be noted that based on the

Commission's direction to date, Duke's expectation is that solar integration services charge will be imposed on the Petitioners' Full Avoided Cost PPAs beginning in year six and going forward.

Fifth, if Petitioners' position is accepted, then there would be nothing to prevent projects with GSA PPAs from bidding into CPRE. This would introduce uncertainty into the GSA Program as well given the potential that a GSA project could be allocated GSA capacity and then choose to opt out of a GSA arrangement.

Duke did agree to allow projects with a LEO established pursuant to the Commission-approved NOC to bid into CPRE without losing such LEO in order to not unnecessarily discourage participation. But contrary to Petitioners' assertion, there is a substantial difference between a LEO established through a NOC and an executed PPA. Duke's view, supported by HB 589 and all of the policy reasons articulated herein, is that allowing projects with an executed PPA to bid into CPRE is not appropriate.

III. The RFP Off-Take Restriction is Reasonable from the Perspective of RFP Administration Efficiency.

Allowing projects with pre-existing off-take arrangements to bid into CPRE also introduces greater uncertainty into the overall procurement process, as Duke and the IA have no way of being certain that a Market Participant will in fact terminate such existing PPA and pay any applicable liquidated damages if selected as a winner. The CPRE evaluation process is complex and involves evaluation of a large number of projects over a short period of time. Allowing a project with an existing off-take agreement into the process introduces yet another element of uncertainty into an already complex and contingent evaluation process. Finally, if a Market Participant with an existing off-take

agreement were selected as a winner and then refused to execute CPRE PPA, other projects could be impacted (even if Duke was able to recover the Step 2 Proposal Security amount).

IV. Petitioners Could Have Raised this Issue Substantially Sooner and Thereby Avoided the Need for an Expedited Decision and Uncertainty with Respect to the IA's Evaluation.

It is also worth noting that Petitioners had ample opportunity to pursue this issue in a more timely manner and in a way that would not have introduced uncertainty into the process at this late stage for all Market Participants and resulted in the need for the Commission to make an expedited decision. As described above, the fact that Market Participants with existing off-take agreements were not permitted to bid into CPRE was unambiguously stated in the draft RFP that was posted on August 15, 2019, and this express statement remained unchanged in the final RFP that was posted on the IA website on October 15, 2019, the date of Tranche 2 RFP opening. Given the clarity of the RFP document, Petitioners could have more diligently pursued this issue in late 2019 rather than waiting until 21 days after the Tranche 2 bid window had closed. The IA is currently proceeding with its Tranche 2 evaluation with Petitioners' projects excluded and a modification to the RFP Off-Take Restriction would likely necessitate revaluation and could result in a delay in Tranche 2 completion.

Furthermore, the IA has advised Duke that the existence of pre-existing PPA obligations was not disclosed by the Petitioners when the two Proposals were submitted. That is, the bid form required Market Participants to confirm that the facility did not have an existing off-take agreement and both Petitioners affirmed that there was no off-take agreement. The existing PPAs were discovered by the IA during the due diligence phase of evaluations and confirmed by the Petitioners on March 11, 2020.

V. The Commission Should Ignore Petition's Baseless Allegations Regarding Duke's Intent in Establishing the RFP Off-Take Restriction.

Petitioners make a number of baseless allegations regarding the Companies' intent in imposing the RFP Off-Take Restriction. Petitioners state that "[i]f Petitioners elected to keep their PPAs and not bid into Tranche 2, this would also benefit Duke by increasing the prospects of success of Duke' own Proposals. Given DEC's eligibility as a Market Participant in Tranche 2, it is particularly inappropriate that it should have any voice in the exclusion of other competitors based on how they conduct their business with DEC." This is a misleading allegation for numerous reasons.

First, the basis for the RFP Off-Take Restriction is well supported under the statutory framework of the CPRE Program, as a matter of policy, and has been made clear to all parties from the very beginning of the RFP. Thus, it is unreasonable to suggest or imply that Duke is somehow nefariously orchestrating the RFP to its own benefit.

Second, to the extent that the RFP Off-Take Restriction is viewed as having a benefit to those Market Participants that have projects without an executed PPA, it is a benefit that is conferred on all similarly situated Market Participants and not just Duke. In fact, the IA has confirmed that no other bidders in Tranche 1 or Tranche 2 had an existing off-take arrangement. Furthermore, while the RFP Off-Take Restriction was raised during the stakeholder meetings and through the written question and answer process, the issue was not one that was identified as being vitally important to the majority or even a substantial portion of the Market Participants. Therefore, the RFP Off-Take Restriction is, based on all available evidence, only impacting Petitioners' projects and, if it is conferring any meaningful benefit on other Market Participants, is doing so for all other Market Participants equally.

Third, Petitioners' assertions concerning the alleged intent of Duke in reaching this decision completely ignores the communication restrictions imposed by the CPRE Rule and implemented by Duke under the supervision of the IA. As the Commission is well aware, such communication restrictions have been mandated by the CPRE Rule and implemented through the establishment of teams within Duke, with one team established for purposes of assisting the IA in the CPRE evaluation and other separate teams established for purposes of preparing proposals (two separate teams, one for the regulated side and one for the unregulated side). In accordance with the Commission's CPRE Rule, no communications are permitted between the members of the Evaluation Team and the members of the DEC/DEP Proposal Team and the DER Proposal Team. Therefore, the decisions concerning the contents of the RFP are made by the members of the Duke Evaluation Team (who have no insight into the plans of the DEP/DEC or DER Proposal Teams) in collaboration with the IA.

Finally, Petitioners assert that "[i]t is also inappropriate for DEC to use its influence over CPRE policy decisions to pressure Petitioners to terminate their PPAs as a condition of participating in CPRE." The framing of this assertion is misleading and misses the forest for the trees. What the Petition frames as "DEC's influence over CPRE policy decision" is actually DEC (along with DEP) jointly fulfilling its statutory obligations to implement CPRE in compliance with the statutory framework established by the General Assembly and under the supervision and oversight of the Commission and the IA.[6] In this case, the

[6] *See e.g.,* N.C. Gen. Stat. § 62-110.8 ("Each electric public utility shall file for Commission approval a program for the competitive procurement of energy and capacity from renewable energy facilities with the purpose of adding renewable energy to the State's generation portfolio…the electric public utilities shall issue requests for proposals to procure and shall procure, energy and capacity from renewable energy facilities….(b) Electric public utilities may jointly or individually implement the aggregate competitive procurement requirements set forth in subsection (a) of this section…")

Companies have implemented reasonable eligibility requirements that are consistent with the policy goals of HB 589 and have made such eligibility requirements available for comment and input in accordance with the Commission's CPRE Rule.

VI. A Number of the Other Assertions in the Petition are Misleading or Inaccurate.

It should also be noted that a number of the other assertions in the Petition are misleading or inaccurate. First, Petitioners assert that "the elimination of these Projects…will most likely: (a) increase the average bid price for Tranche 2; (b) increase the clearing price for Tranche 2; and (c) make it more difficult for DEC to achieve its procurement goals for Tranche 2." Such a statement is pure speculation given that only the IA has access to the total number of bids and pricing received in Tranche 2. It just as well could be the case that Petitioners' bid prices are not competitive or that DEC will be able to satisfy the procurement target without Petitioners' projects. It would also be a moot point if Petitioners had followed the requirements of the Tranche 2 RFP and terminated their Full Avoided Cost PPAs before seeking to participate in Tranche 2.

Second, Petitioners make reference to liquidated damage provisions that are included in their executed Full Avoided Cost PPA for each project. Such liquidated damage provisions are a standard term in each of Duke's negotiated QF PPAs. For the avoidance of doubt, any liquidated damages received under such PPAs will not benefit Duke but are instead credited to customers through fuel rates.

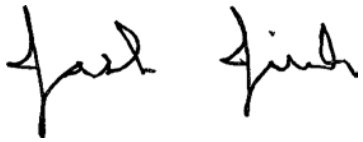
Finally, Petitioners' assertion that "it is possible that this decision was intended to force Petitioners to cancel their existing PPAs or be excluded from CPRE Tranche 2" attempts to insinuate some sort of hidden motive in an express and generally-applicable statement of policy. The RFP Off-Take Restriction unambiguously prohibits projects with

an existing off-take arrangement from participating in a CPRE RFP. While it is absolutely the case that the RFP Off-Take Restriction would "force Petitioners to cancel their PPAs or be excluded from CPRE Tranche 2" for all of the statutory and policy reasons articulated in this response, there is no evidence or factual basis to suggest that the RFP Off-Take Restriction was imposed specifically to target Petitioners. In fact, as is explained in this Response, the RFP Off-Take Restriction actually levels the playing field for all Market Participants.

CONCLUSION

WHEREFORE, for all the foregoing reasons, DEC respectfully requests that the Commission deny Cool Springs Solar LLC's and Lick Creek Solar LLC's Verified Petition for Declaratory Ruling and Other Relief in its entirety.

This the 8th day of April, 2020.



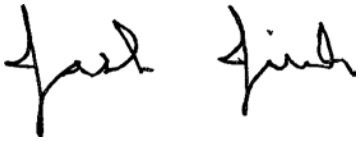
Jack E. Jirak
Associate General Counsel
Duke Energy Corporation
P.O. Box 1551/NCRH 20
Raleigh NC 27602
(919) 546-3257
Jack.Jirak@duke-energy.com

Counsel for Duke Energy Carolina, LLC

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Carolinas, LLC's Response in Opposition to Cool Springs Solar LLC's and Lick Creek Solar LLC's Verified Petition for Declaratory Ruling, in Docket No. E-7, Sub 1156, has been served by electronic mail, hand delivery, or by depositing a copy in the United States mail, postage prepaid, properly addressed to parties of record.

This the 8th day of April, 2020.



Jack E. Jirak
Associate General Counsel
Duke Energy Corporation
P.O. Box 1551/NCRH 20
Raleigh, North Carolina 27602
(919) 546-3257
Jack.jirak@duke-energy.com