

DOCKET NO. E-100, SUB 150

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Rulemaking Proceeding to Implement) INITIAL COMMENTS OF THE
G.S. 62-110.8) PUBLIC STAFF

NOW COMES THE PUBLIC STAFF - North Carolina Utilities Commission (Public Staff), by and through its Executive Director, Christopher J. Ayers, and, pursuant to the Commission's Order issued in this docket on July 28, 2017, submits these comments.

I. Background

House Bill 589 (Session Law 2017-192 or the "Act") became law on July 27, 2017. Part II of the Act directs the Commission to adopt rules to implement the requirements of newly enacted G.S. 62-110.8. Section 2.(c) of the Act requires Duke Energy Carolinas, LLC (DEC), and Duke Energy Progress, LLC (DEP), to file for Commission approval on or before November 27, 2017, 120 days from the effective date of the legislation, a program for the competitive procurement of energy and capacity from renewable energy facilities.

The Commission directed the parties to specifically address the following topics, consistent with G.S. 62-110.8(h):

1. Oversight of the competitive procurement program.
2. To provide for a waiver of regulatory conditions or code of conduct requirements, if any, that would unreasonably restrict a public utility or its affiliates from participating in the competitive procurement

process, unless the Commission finds that such a waiver would not hold the public utility's customers harmless.

3. Establishment of a procedure for expedited review and approval of certificates of public convenience and necessity (CPCN), or the transfer thereof, for renewable energy facilities owned by the public utility and procured pursuant to this section. The Commission shall issue an order not later than 30 days after a petition for a certificate is filed by the public utility.
4. Establishment of a methodology to allow an electric public utility to recover its costs pursuant to G.S. 62-110.8(g).
5. Establishment of a procedure for the Commission to modify or delay implementation of the provisions of this section in whole or in part if the Commission determines that it is in the public interest to do so.

II. Discussion

Rather than presenting proposed rules in these initial comments, the Public Staff provides the following general comments regarding the rulemaking process and the oversight of the competitive procurement program. Each of the topics are discussed further below.

A. Oversight of the competitive procurement program.

New G.S. 62-110.8(d) provides that:

The competitive procurement of renewable energy capacity ... shall be independently administered by a third-party entity to be approved by the Commission. The third-party entity shall develop and publish the methodology used to evaluate responses received pursuant to a competitive procurement solicitation and to ensure that all responses are treated equitably.

As noted by Public Staff witness John R. Hinton in his March 28, 2017, testimony in Docket No. E-100, Sub 148, the Public Staff supports the use of market-based approaches to determine the most cost-effective options for utilities to meet their customer's needs, as well as avoided cost rates, provided that the competitive bidding process is appropriately structured and an independent evaluator is utilized. Mr. Hinton's testimony cited the Public Staff's recommendations in Docket No. E-100, Sub 122, encouraging the Commission to use competitive bidding to a greater degree and incorporate the best practices identified in the NARUC publication entitled "Competitive Procurement of Retail Electricity Supply: Recent Trends in State Policies and Utility Practices."¹ These best practices included the following:

- The procurement process should be transparent, fair, and objective.
- The procurement should be designed to encourage robust competitive offerings and creative proposals from market participants.
- The procurement should select winning offers based on appropriate evaluation of all relevant price and non-price factors.
- The procurement should be conducted in an efficient and timely manner.

¹ Competitive Procurement of Retail Electricity Supply: Recent Trends in State Policies and Utility Practices, prepared by the Analysis Group for National Association of Regulatory Utility Commissioners (NARUC), July 2008. Online at: <http://pubs.naruc.org/pub/4AE5DC97-2354-D714-5151-A46473B286E7>.

- When using a competitive procurement process, regulators should align their own procedures and actions to support the development of a competitive response.

These best practices are equally applicable in the current context. While the competitive bidding option has been available in North Carolina since the late 1980s, it has not been utilized on a regular basis for purchased power from Qualifying Facilities (QFs).² In recent years, all three investor-owned electric utilities have utilized requests for proposals (RFPs) for various purposes, including complying with the Renewable Energy and Energy Efficiency Portfolio Standard (REPS), meeting voluntary renewable energy procurement goals of certain large industrial customers, and complying with other mandates. Those RFPs were helpful in providing cost-effective pricing options, but they did not involve Commission approval or the oversight of an independent evaluator. In this proceeding, the General Assembly left significant discretion to DEC and DEP regarding the location, timing, and other criteria related to the competitive procurement. In addition, the General Assembly also authorized DEC and DEP to participate in the competitive procurement, both directly through the submission of

² The Commission concluded in Docket No. E-100, Sub 57 (1989), that non-hydroelectric QFs desiring to sell generating capacity of more than 5 MW to Dominion North Carolina Power (DNCP) should participate in DNCP's then current competitive solicitation. It continued this practice for DNCP until the mid-1990s. The process was formalized by the Commission in its June 23, 1995 *Order Establishing Avoided Cost Rates*, in Docket No. E-100, Sub 74. In that Order, the Commission concluded generically that a utility could refuse to negotiate individually with non-hydroelectric QFs not eligible for the standard contracts when the utility is planning to pursue competitive bidding for its next block of capacity, and approved the use of such a competitive bidding process for one solicitation by DNCP and one by DEC. It granted a similar motion by DEP by Order dated April 25, 1996 in the Sub 74 proceeding, for the same relief for DEP's competitive solicitation for capacity needed in 1999.

bids to self-build and operate, subject to a 30% limitation in G.S. 62-110.8(b)(4), and through the acquisition of renewable energy facilities from third parties. Since the General Assembly authorized DEC, DEP, and their affiliates to submit bids in this process, full independent oversight is needed to ensure the integrity of the process and to assure market participants that a fair evaluation will be afforded to all.

In addition to evaluating the NARUC guidance indicated above, the Public Staff also recommends that the Commission consider renewable energy competitive procurement processes implemented in other southeastern states. In particular, the Advanced Solar Initiative and the Renewable Energy Development Initiative (REDI) implemented by Georgia Power may provide a good starting template for designing a competitive procurement process where the independent evaluator maintains a website to ensure transparency.³ Further, the Public Staff recommends that the Commission periodically review the contract with the independent evaluator selected by the Commission to oversee the competitive procurement.

³ The Georgia Public Service Commission has adopted rules for RFP procedures and other requirements. See Ga. Comp. R. & Regs. 515-3-4-.04 (2011), available at <http://rules.sos.state.ga.us/gac/515-3-4>.

B. Waiver of regulatory conditions or code of conduct requirements

The Public Staff is not aware of any rulemaking requirements associated with waivers from the Regulatory Conditions or Code of Conduct⁴ that are needed at this time. Section 2.3 of the Regulatory Conditions already provides an opportunity for the utilities and their affiliates to seek a waiver from the Regulatory Conditions “in a particular case or circumstance for good cause shown by filing a such [sic] request with the Commission.” Furthermore, Section II of the Code of Conduct provides that the utilities “may seek a waiver of any aspect of this Code of Conduct by filing a request with the Commission showing that circumstances in a particular case justify such a waiver.”

As discussed previously, G.S. 62-110.8 authorizes DEC and DEP to participate in the competitive procurement, both directly through the submission of bids to self-build and operate, subject to a 30% limitation in G.S. 62-110.8(b)(4), and through the consideration of renewable energy facilities acquired from third parties and subsequently owned and operated by the utilities. Since the General Assembly authorized DEC, DEP, and their affiliates to submit bids in this process, Code of Conduct issues will likely arise. In addition, G.S. 62-110.8(c) authorizes DEC and DEP to:

[D]etermine the location and allocated amount of the competitive procurement within their respective balancing authority areas, whether located inside or outside the geographic boundaries of the State, taking into

⁴ References to the Regulatory Conditions and Code of Conduct refer to the most recent version approved by the Commission in its September 29, 2016 *Order Approving Merger Subject to Regulatory Conditions and Code of Conduct* in Docket Nos. E-2, Sub 1095, E-7, Sub 1100, and G-9, Sub 682.

consideration (i) the State's desire to foster diversification of siting of renewable energy resources throughout the State; (ii) the efficiency and reliability impacts of siting of additional renewable energy facilities in each public utility's service territory; and (iii) the potential for increased delivered cost to a public utility's customers as a result of siting additional renewable energy facilities in a public utility's service territory, including additional costs of ancillary services that may be imposed due to the operational or locational characteristics of a specific renewable energy resource technology, such as nondispatchability, unreliability of availability, and creation or exacerbation of system congestion that may increase redispatch costs.⁵

Some of the information used in making these determinations may be based on Confidential Systems Operation Information (CSOI), as that term is defined in DEC and DEP's Code of Conduct.

Further, subsection (e) of G.S. 62-110.8 provides that:

An electric public utility may participate in any competitive procurement process, but shall only participate within its own assigned service territory. If the public utility uses nonpublicly available information concerning its own distribution or transmission system in preparing a proposal to a competitive procurement, the public utility shall make such information available to third parties that have notified the public utility of their intention to submit a proposal to the same request for proposals.

In this provision, the General Assembly acknowledged the critical nature of this information and sought to ensure that the information is made available to all third parties that notify the utility of their plans to participate in the competitive solicitation. Section III.A.3. of the Code of Conduct generally already requires the equitable disclosure of this CSOI: to the extent the information is disclosed by DEC

⁵ G.S. 62-110.8(c).

or DEP to an affiliate or nonpublic utility operation, it must also be disclosed to all competing non-affiliates.

Further, the Public Staff acknowledges that the potential transactions between DEC, DEP, their affiliates, and nonpublic utility operations must comply with the appropriate requirements in the Regulatory Conditions applicable to each utility. In particular, the utilities and their affiliates must comply with Section III (Protection from Preemption) and Section V (Treatment of Affiliate Costs and Ratemaking). The Public Staff expects them to fully comply with these requirements, and to the extent potential waivers are needed, to seek such relief from the Commission in a timely fashion.

C. Expedited CPCN review and approval process

In at least two other contexts, the General Assembly has directed the Commission to consider a CPCN for electric generating facilities on an expedited basis. First, in S.L. 2009-390, the General Assembly enacted G.S. 62-110.1(h), which authorized the expedited review of a CPCN application for natural gas generating facilities at retiring coal-fired generating facilities that met certain requirements. This provision required the Commission to render its decision within 45 days of the date the application is filed, and included specific exemptions to the public notice requirements in G.S. 62-82 and the public hearing requirements in G.S. 62-110.1(e). DEP utilized this provision in Docket No. E-2, Sub 960, for the Wayne County Natural Gas Combined Cycle (CC) facility.

In addition, the General Assembly enacted the Mountain Energy Act (Session Law 2015-110), which included a 45-day decision process for a natural gas generating facility that met certain requirements. The Act also included specific exemptions from G.S. 62-110.1(e) and G.S. 62-82(a), but did require a single public hearing and public notice of the hearing. DEP utilized this provision in Docket No. E-2, Sub 1089, for the approval of the Asheville CC facility.

These cases may provide some useful context for the Commission. Rather than enacting new rules for these proceedings, the Commission instead issued an expedited order requesting the Public Staff to investigate the application and present its findings to the Commission at Staff Conference. In the context of CPCN applications or transfers resulting from the RFP, the Commission could take a similar approach and ask the Public Staff to present its findings within the timeframe provided. However, it is critical that the application be complete and include all necessary information to allow the Public Staff to evaluate it. Further, since G.S. 62-110.8 does not provide an exemption from the public notice and public hearing requirements in G.S. 62-110.1(e) and G.S. 62-82(a), the Commission will likely still need to issue an order promptly scheduling the public hearing to meet the 30 day timeframe to issue an order on an application for a new CPCN, as required by G.S. 62-110.8(g)(3).

With regard to the consideration of any related transmission line located on the site of the new generation facility, G.S. 62-101(d)(1) authorizes the Commission to waive the notice and hearing requirements of G.S. 62-102 and

G.S. 62-104 when it finds that the owners of the land to be crossed by the proposed transmission line do not object to the waiver and either: (1) the transmission line is less than one mile long or (2) the transmission line is for certain purposes, such as to connect an existing transmission line to a substation, to another public utility, or to a public utility customer when any of these is in proximity to the existing transmission line. This waiver provision has been utilized by the utilities multiple times in recent years for the approval of transmission tap lines to interconnect renewable energy facilities seeking to interconnect with a utility's transmission system. To the extent this existing waiver can be utilized to allow for the expedited approval of any transmission lines associated with the CPCN, this would be the most straightforward approach to allow the project to proceed in an expedited fashion.

D. Cost recovery pursuant to G.S. 62-110.8(g).

Subsection (g) authorizes DEC and DEP to recover:

[T]he costs of all purchases of energy, capacity, and environmental and renewable attributes from third-party renewable energy facilities and to recover the authorized revenue of any utility-owned assets that are procured pursuant to this section through an annual rider approved by the Commission and reviewed annually.

Rather than incorporating these costs in existing cost recovery riders for fuel and fuel-related costs in G.S. 62-133.2 or the REPS cost recovery rider in G.S. 62-133.8(h), the General Assembly directed the Commission to establish a new annual rider mechanism for these costs. The fuel and fuel-related cost and REPS cost recovery riders codified in Commission Rules R8-55 and R8-67(e),

respectively, provide a good starting framework for defining the cost recovery mechanism for the competitive procurement. Rather than providing a separate rule for Commission consideration at this time, the Public Staff anticipates other parties will provide a proposed rule for this cost recovery mechanism. The Public Staff notes, however, that any cost-recovery proceeding must ensure that the costs are allocated to the appropriate riders or base rates, as applicable, and that the costs associated with any utility- or affiliate-owned or operated project are appropriately allocated to that project in order to prevent any double counting or to eliminate the potential inclusion of any costs in the rider that are more appropriately allocated to the utility in its base rates.

E. Off-ramp provision

Similar to the provision in G.S. 62-133.8(i)(2) of the REPS law, new G.S. 62-110.8(h)(5) directs the Commission to establish a procedure for the Commission to modify or delay implementation of the requirements if it is determined to be in the public interest to do so. The Commission in the REPS context codified this requirement in Commission Rule R8-67(c)(5), which allows parties to petition the Commission to modify the requirements in whole or in part, so long as the electric power supplier can demonstrate that it has made a reasonable effort to meet the requirements. The Commission has utilized this provision multiple times with regard to animal waste set-asides, delaying timeframes and modifying amounts as needed to continue to promote compliance with requirements while recognizing challenges experienced in implementation.

The requirement in Commission Rule R8-67(c)(5) provides a good template for the Commission's rules regarding the off-ramp.

III. Conclusions and Recommendations

The Public Staff's initial comments are meant to provide some preliminary suggestions regarding the implementation of Session Law 2017-192, and will continue to be refined through the schedule of comments and proposed rulemaking established by the Commission in its July 28, 2017, Order.

WHEREFORE, the Public Staff respectfully requests that the Commission take the foregoing Public Staff comments and recommendations into consideration in its deliberations in this proceeding.

Respectfully submitted this the 16th day of August, 2017.

PUBLIC STAFF
Christopher J. Ayers
Executive Director

David T. Drooz
Chief Counsel

Electronically submitted
/s/ Tim R. Dodge
Staff Attorney

Electronically submitted
/s/ Layla Cummings
Staff Attorney

4326 Mail Service Center
Raleigh, North Carolina 27699-4300
Telephone: (919) 733-6110
tim.dodge@psncuc.nc.gov
layla.cummings@psncuc.nc.gov

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the foregoing upon each of the parties of record in this proceeding or their attorneys of record by emailing them an electronic copy or by causing a paper copy of the same to be hand-delivered or deposited in the United States Mail, postage prepaid, properly addressed to each.

This the 16th day of August, 2017.

Electronically submitted
/s/ Tim R. Dodge