

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

)
) **MOTION TO STRIKE, OR IN THE**
) **ALTERNATIVE TO REOPEN**
) **HEARING OF ORION RENEWABLE**
) **RESOURCES LLC**
)

NOW COMES Orion Renewable Resources LLC (“Orion”), by and through the undersigned counsel, and submits this Motion to Strike or in the Alternative to Reopen Hearing, pursuant to G.S. § 62-65 and R1-7. This motion relates to portions of the Late-Filed Exhibit filed by Duke on November 24, 2020 (“Late-Filed Exhibit”) and the Post-Hearing of Duke Energy Carolinas, LLC filed on January 4, 2021 (“Duke Post-Hearing Brief”).

At the evidentiary hearing held in this matter on November 2, 2020 (the “Hearing”), the Commission requested that Accion, the Independent Administrator, provide a late-filed exhibit containing specific information regarding two proposals that were eliminated from Step 1 of CPRE Tranche 1 based on a negative Net Benefit calculation. Instead, Duke – which had elected not to participate in this docket prior to the Hearing – submitted a Late-Filed Exhibit raising a host of new factual issues. None of these new factual issues were presented in the parties’ pre-hearing filings or addressed by Duke’s witness at the Hearing, nor were they the subject of Commissioner questions at the Hearing. Moreover, in its Post-Hearing Brief, Duke not only argues that the new factual issues raised in its Late-Filed Exhibit justify denying Orion’s claim for relief, but also raises *additional* new factual issues that Orion has had neither reason nor opportunity to rebut.

In so doing, Duke attempts to muddy the waters concerning Orion’s straightforward claim for relief. The bulk of Duke’s Late-Filed Exhibit and Post-Hearing Brief is not relevant to any issue raised by the parties or the Commission before or during the Hearing, and moreover is not competent evidence, but merely self-serving argument.

Duke – which voices its opposition to Orion’s request for relief for the first time in its Post-Hearing Brief – made a strategic decision to delay presenting any arguments or evidence until *after* the Hearing, when the record was closed and Orion has no opportunity to develop facts to rebut Duke’s speculative objections. It would be procedurally improper and unfair for the Commission to rule on the Petition without giving Orion a fair opportunity to develop its own evidence and to respond to Duke’s newly-asserted factual assertions and arguments. The Commission should strike the bulk of Duke’s Late-Filed Exhibit and strike or disregard the portions of Duke’s Post-Hearing Brief that rely on evidence not properly before the Commission.

If the Commission does not grant Orion’s Motion to Strike, it should reopen the record and permit Orion to conduct discovery and present additional evidence concerning new factual issues raised in the Late-Filed Exhibit and Duke’s Post-Hearing Brief.¹

I. 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 the Petition, and on May 26, 2020, Orion filed a reply. On May 29, 2020, the Public Staff filed a Motion for Leave to

¹ A decision by the Commission granting Orion’s request for relief would of course moot Orion’s motion to strike and its alternative request to re-open the record.

File Comments and Comments, and on June 12, 2020, Accion filed an additional response to Orion's reply.

On October 21, 2020, this Commission issued an *Order Scheduling Hearing* ("Hearing Order"), which scheduled a remote hearing on November 2, 2020, in order "to clarify certain matters of fact that may be material to disposition of the petition" – specifically, whether Orion's Proposal was eliminated from Tranche 1 because it failed the IA's "Net Benefit" analysis, or because, after accounting for system upgrade costs associated with the Proposal, the final price of the Proposal exceeded the avoided cost cap established by N.C. Gen. Stat. § 62-110.8(b)(2). Hearing Order at 1-2. The Commission informed the parties that "The scope of the hearing shall be limited to the facts and circumstances of the evaluation of the Proposal following the time it was submitted by the IA for Step 2 evaluation." *Id.* The Hearing Order stated that the parties should present testimony, and directed DEC to "tender for questions by the parties and by the Commission a representative who is knowledgeable concerning the Step 2 review procedures followed in Tranche 1 and, specifically, with the application of those procedures to review of the Proposal during Step 2."

At the Hearing on November 2, 2020, Presiding Commissioner Clodfelter requested that Accion submit a late-filed exhibit disclosing the identity of two other projects eliminated in Step 1 based on the IA's "Net Benefit" analysis. Transcript of Nov. 2, 2020 Hearing ("Hearing Tr.") at 81:2-10, 82:11-18. Duke's counsel volunteered to collaborate with Accion on the preparation of this exhibit.

When asked by Orion's counsel for guidance on the scope of post-hearing filings, Commissioner Clodfelter replied that "*anything that we've discussed this afternoon* is open for you to discuss and argue if you wish." *Id.* at 161-162. Commissioner Clodfelter also indicated that the

panel would keep the record of the hearing open for the receipt of the late-filed exhibit, and otherwise close the evidentiary record. *Id.* at 161.

Duke filed a confidential version of the Late-Filed Exhibit on November 24, and a public, corrected version on November 25. The Late-Filed Exhibit includes a one-page table providing the limited information requested by the Commission regarding the two other projects disqualified in Step 1 of Tranche 1 based on the IA's Net Benefit analysis, as well as two paragraphs of explanatory material. There is also some recitation of and elaboration on the testimony that Duke's witness Mr. Piper provided at the Hearing.² But the bulk of the Late-Filed Exhibit consists of factual assertions related to issues never before raised in this docket, either in the parties' pre-hearing filings or at the Hearing itself. These new factual issues include: (1) recent changes in Duke's policies relating to the classification of switching equipment as Interconnection Facilities or Upgrades³; (2) Duke's progress towards its overall CPRE procurement targets;⁴ and (3) the question of whether any of the proposals eliminated in Step 2 of Tranche 1 based on a Net Benefit analysis might have been below avoided cost after considering the cost of their Upgrades.⁵ These factual assertions are entirely new to this proceeding and, in addition, lack sufficient detail to enable the Commission to fully consider them.⁶ Duke did not disclose its position on the merits of Orion's underlying claims, or the relief requested by Orion, in the Late-Filed Exhibit.⁷

² Late-Filed Ex. p. 1-2 (Items 1-2).

³ *Id.* at 2-6 (Item 3).

⁴ *Id.* at 6 (Item 5).

⁵ *Id.* at 6-7 (Item 6).

⁶ For example, the Late-Filed Exhibit mentions 15 proposals eliminated in Step 2 but does not provide sufficient information about them for the Commission to conclude that they were actually below avoided cost. The Late-Filed Exhibit also does not disclose whether, after the consideration of Upgrade costs, those 15 proposals had a more negative Net Benefit than Orion's proposal. Other relevant information not disclosed includes the cost of those proposals' respective Upgrades.

⁷ Orion did not object to the Late-Filed Exhibit when it was filed because Duke had never disclosed any position on Orion's claims in this matter, meaning that Orion had no way of ascertaining the significance Duke would attach to the assertions in the Exhibit. Nor did the contents of the Late-Filed Exhibit generally relate to the issues in dispute between Orion and Accion, as set forth in their briefs or at the hearing.

Post-hearing briefs were filed by the parties on January 4, 2020. In its Post-Hearing Brief, Duke argues (for the first time) that Accion had the discretion to eliminate Orion’s proposal based on the results of its Net Benefit analysis. Duke’s brief also asserts, again for the first time, that the February 28, 2020 Memorandum published by Accion and discussed in Orion’s Petition (“Tranche 2 Memorandum”) “did not accurately capture the nuance of Duke’s position with respect to the change in approach between Tranche 1 and Tranche 2.” *Id.* at 11. Finally, Duke’s Post-Hearing Brief argues, based primarily on assertions made in the Late-Filed Exhibit, that Orion’s request for relief should not be granted because awarding Orion a Tranche 1 PPA “will result in an immense amount of complexity and likely further challenges and unanticipated questions, along with higher costs for customers.” *Id.* at 11-13.

II. ARGUMENT

A. The Commission should strike portions of Duke’s Late-Filed Exhibit.

Orion does not dispute that it was appropriate for Duke to respond to the Commissioner’s requests at the Hearing for specific information, or to confirm the accuracy of Mr. Piper’s testimony, in the Late-Filed Exhibit. And the Commission did indicate at the Hearing that Duke would have some “latitude” to include additional material based on Duke’s assurances that it wanted to provide the “most informative” exhibit for the Commission’s consideration. Hearing Tr. at 91-92. However, Duke has far overstepped the bounds of any such latitude by introducing factual considerations never raised in this docket, without providing sufficient detail to allow Orion to respond or the Commission to make an informed decision. Moreover, this material does not constitute competent evidence under the Rules of Evidence, which this Commission is bound to follow insofar as practicable. G.S. § 62-65(a). Accordingly, the Commission should strike Items 3, 4, 5, and 6 (pages 2-7) of the Late-Filed Exhibit.

1. The Late-Filed Exhibit is not competent evidence.

The Commission's orders must be based on competent, material, and substantial evidence. Where practicable, the Commission applies the same rules of evidence used in the superior courts in civil matters. *See* G.S. § 62-65(a). The Commission may exclude incompetent, irrelevant, immaterial and unduly repetitious or cumulative evidence. *Id.* Late-Filed Exhibits, while a permissible part of Commission practice, are no exception to this general rule. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 269, 148 S.E.2d 100, 110 (1966) (“The statutes prescribing the procedure for hearings before the Commission do not forbid it to make a finding ... upon the basis of facts arising between the conclusion of the hearing and the entry of the order when those facts are shown by ‘late’ exhibits, otherwise competent, and when the adverse party has had adequate notice that such exhibits have been filed with the Commission for inclusion in the record.”) (emphasis added).

The new factual assertions in Duke’s Late-Filed Exhibit are not competent evidence of any matter in dispute here. The exhibit itself is not verified and is not supported by the testimony of any Duke witness, and the scope of information included in the Late-Filed Exhibit substantially exceeds the scope of the testimony presented by Duke’s witness at the Hearing. Instead, the Late-Filed Exhibit is simply an anonymous statement made by the company in support of positions it now articulates in its Post-Hearing Brief. In short, it is unauthenticated hearsay that does not comply with the Rules of Evidence, and is inadmissible. *See* N.C.R. Evid. 801(c), 901.

2. Orion has not had the opportunity to develop evidence related to the factual issues raised in the Late-Filed Exhibit.

Even if the new factual assertions in the Late-Filed Exhibit were admissible, it would be manifestly unfair for the Commission to rely on them in resolving Orion’s claims because Orion has had no opportunity to investigate or respond to them. These assertions were not raised in the

parties' pre-hearing filings and are outside the scope of the Hearing as described by the Commission in the Hearing Order and the scope of the testimony presented by Duke's witness at the Hearing.⁸ Many of Duke's new factual assertions were not discussed at the Hearing at all, such as Duke's changes in equipment classifications.

Because these factual issues are raised for the first time in a post-hearing filing, Orion has had neither reason nor opportunity to develop evidence regarding them, either through discovery or by cross-examining Duke's witness. The vague and speculative nature of some of the claims made in the Late-Filed Exhibit and repeated in Duke's Post-Hearing Brief (in particular, that it is "possible" that there are other proposals eliminated in Step 2 of Tranche 1 based on NEB analysis that would nonetheless be under avoided cost, *see* Duke Post-Hearing Br. at 6)⁹ would make it particularly inappropriate to rely on them without affording Orion an opportunity for discovery and cross-examination. This is further reason to strike these portions of DEC's Late-Filed Exhibit.

If the Commission does not strike this incompetent evidence, then it must re-open the Hearing to permit Orion to engage in further factual development. According to the Supreme Court and prior orders of this Commission, where a late-filed exhibit is presented, the other party "unquestionably" has the right to demand that the hearing be reopened, to cross-examine witnesses

⁸ The only exception is the portion of the Late-Filed Exhibit recounting and providing more detail on Mr. Piper's hearing testimony discussing whether any further study would be required to establish the Upgrades required for the Orion project and stating that Duke had determined in the Tranche 1 study process that the Orion project does not trigger any Upgrades. Late-Filed Exhibit at 1-2. This issue is arguably implicated by Orion's Verified Petition, which requests that the Commission direct DEC to conduct an interconnection study to determine the cost of System Upgrades for the Project using an appropriate baseline that reflects the queue priority of the Project in the CPRE Tranche 1 grouping, and to file the results of such study with the Commission in this docket. Verified Petition at 16. Accordingly, Orion does not object to Items 1 and 2 (under the headings "Interconnection Study—Is further interconnection study needed for any of the Proposals in order to establish the Upgrades for each?" and "Interconnection Study—If further interconnection study is required, what is the appropriate base case to be used for study?") in the Late-Filed Exhibit.

⁹ As noted, while Duke speculated about the existence of such projects, it chose not to present information in its possession that could help resolve the question of whether the other projects eliminated for having a negative Net Benefit were over or under avoided cost, given the cost of their Upgrades. Moreover, as stated in Orion's post-hearing brief, no projects other than Orion's are before the Commission, and no party has requested that any other project be granted a CPRE PPA. Post-Hearing Brief of Orion Renewable Resources (Jan. 4, 2021) at 10.

who might sponsor the evidence, and to present its own evidence. *State ex rel. Utilities Commission v. Carolina Telephone & Telegraph Co.*, 267 N.C. 257, 148 S.E. 2d 100 (1966); *Order Dismissing Complaint*, Docket No. E-2 Sub 1195 (June 24, 2019) at 6-7. Such an opportunity is especially critical where, as here, much of the objectionable material consists of mere speculation about matters for which the relevant evidence is entirely in the hands of other parties (*i.e.*, Duke and Accion).

B. The Commission should strike or disregard portions of Duke’s Post-Hearing Brief.

Like the Late-Filed Exhibit, Duke’s Post-Hearing Brief raises factual arguments never before broached in this docket. Some of these assertions are supported only by citation to the Late-Filed Exhibit, while others are supported by no evidence at all. Accordingly, the Commission should strike or disregard these portions of Duke’s Post-Hearing Brief, as further detailed below.

1. Assertions concerning the Tranche 2 Memorandum

Duke’s most egregious attempt to raise new and unsupported factual issues concerns the Tranche 2 Memorandum. That Memorandum, which was discussed at length in Orion’s Petition as well as in pre-hearing briefs filed by Orion, Accion and the Public Staff, states that “Duke evaluation personnel believe that the Company 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.” In its Post-Hearing Brief, Duke reverses course completely, characterizing this clear and simple statement in the Tranche 2 Memorandum as a “simplistic formulation” of CPRE requirements and “not a coherent interpretation” of G.S. § 62-110.8(b)(2). Duke Post-Hearing Br. at 4, 7-8.

Rather than explain or justify its change in position, Duke tries to discount the Tranche 2 Memorandum by alleging for the first time in its Post-Hearing Brief that the Memorandum represents “a concession intended to avoid further costly disputes and avoid a delay in Tranche 2”; that Duke did not actually draft the Memorandum; and that the Memorandum “did not accurately capture the nuance of Duke’s position with respect to the change in approach between Tranche 1 and Tranche 2.” *Id.* at 11. Duke does not specify what “costly disputes” the Memorandum avoided;¹⁰ why it allowed Accion to state Duke’s legal position in the Memorandum without contradiction; or what “nuance” in Duke’s position could possibly reconcile two diametrically opposed interpretations of N.C. Gen. Stat. 62-110.8(b)(2). Nor does Duke cite any evidence to support the claim that Accion misstated Duke’s position in the Tranche 2 Memorandum. Indeed, it hardly seems credible that Accion would have published a memorandum to all CPRE participants without first obtaining Duke’s blessing of its recitation of Duke’s legal position. Nor does Duke explain why, since the publication of the Memorandum on February 28, 2020, it has never sought to correct this supposed misstatement of its position, either in this docket or in the CPRE stakeholder process — even though the purpose of the Memorandum was to respond to Stakeholder requests for guidance on the evaluation process. Had Duke previously asserted its current position, Orion could have conducted discovery as to the basis, if any, for these vague assertions and to determine whether they accurately reflect the facts.

Just as the Commission must base its decisions on competent evidence, G.S. § 62-65, a party must support the facts asserted in its pleadings by competent evidence that supports its

¹⁰ Orion filed its Petition after the Tranche 2 Memorandum was published and is not aware of any other CPRE disputes that arose before issuance of the Tranche 2 Memorandum, so it is unclear what “costly disputes” Duke refers to.

claims. R1-5(b)(2). Duke's argument on this issue is not only tardy but also lacks evidentiary support, and should be stricken.

2. Impact of Orion's request on Tranche 2 procurement target

Duke's Post-Hearing Brief also claims without evidence that the DEC capacity shortfall in Tranche 1 (upon which Orion's entitlement to relief relies) "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." Duke Post-Hearing Br. at 10. This assertion is not supported by any evidence before the Commission in this docket. Moreover, it appears to be factually incorrect.¹¹ The Commission should strike or disregard it.

3. Arguments relying on the Late-Filed Exhibit

Section II(b) of Duke's Post-Hearing Brief relies on factual assertions in Duke's Late-Filed Exhibit to argue that Orion's request for relief should be denied because it is *possible* that one or more other Tranche 1 proposals eliminated in Step 2 based on a Net Benefit analysis were also below avoided cost after consideration of their Upgrade costs. Duke Post-Hearing Br. at 12. In addition, Duke's Post-Hearing Brief raises several alleged "complexities and challenges" arising from changes in the company's policies after Tranche 1 was completed. *Id.* at 12-13. Neither Accion nor Duke ever raised these issues in pre-hearing briefing and they were only briefly discussed at the Hearing, so Orion has had no opportunity to develop evidence on them. Moreover, Duke's speculative arguments on these subjects are supported only by its own Late-Filed Exhibit, which is not competent evidence. Accordingly, these arguments should be stricken or disregarded.

¹¹ DEC's Petition for Approval of the CPRE Program Plan set a Tranche 2 procurement target of 700 MW (*see* Petition for Approval of Competitive Procurement of Renewable Energy Program to Implement N.C. Gen. Stat. § 62-110.8., Docket Nos. E-2, Sub 1159 and E-7, Sub 1156 (Nov. 27, 2017), at 12), but DEC later set a procurement target for Tranche 2 of only 600 MW (CPRE Tranche 2 Initial Status Report, Docket Nos. E-2, Sub 1159 and E-7, Sub 1156 (May 15, 2020) at 3). So rather than "rolling" the Tranche 1 shortfall into its Tranche 2 target, Duke actually adjusted its procurement target *downward* in Tranche 2.

4. New legal arguments

Much of Duke's Post-Hearing Brief is devoted to other legal arguments that Duke has never before presented in this docket, despite the fact that Orion's petition was filed in March 2020 and was fully briefed almost five months before the Hearing was held. Duke Post-Hearing Br. at 3-11. Although Duke states vaguely that it had not previously submitted any filings because "the IA is responsible for the primary evaluation of proposals submitted into CPRE," this fact did not prevent Duke from filing timely briefs in other dockets challenging the administration of CPRE. See, e.g., *In re Lick Creek Solar LLC*, Docket Nos. SP-8748 Sub 1, SP-8741 Sub 2, and E-7 Sub 1156; *In the Matter of Application of Stanly Solar, LLC, for a Certificate of Public Convenience and Necessity to Construct a 50-MW Solar Facility in Stanly County, North Carolina*, Docket No. SP-9590 Sub 0, E-2 Sub 1159, and E-7 Sub 1156.

That being said, Duke's legal arguments concerning Accion's discretion to disqualify Orion's Proposal suffer from the same fundamental flaw as those advanced by Accion itself. They confuse the discretion to *rank* CPRE proposals by economic factors, including the results of the Net Benefit analysis—which the IA indisputably has—with the discretion to *eliminate* otherwise-qualifying proposals from consideration based on a "cost-effectiveness" criterion that differs from the one established by the North Carolina General Assembly and was not disclosed in the Tranche 1 RFP—which it does not. See G.S. § 62-110.8(b)(2). Both Duke and the IA also erroneously conclude that a proposal with a negative Net Benefit is "not beneficial to customers." In so doing, they ignore not only the General Assembly's and the Commission's determinations that the "cost-effectiveness" of CPRE projects is to be judged by reference to published avoided cost rates, but also the procurement amounts set by the General Assembly and included by Duke in its own approved CPRE Program Plans.

For the foregoing reasons, Orion submits that the Commission should strike or disregard Section II(b) of Duke's Post-Hearing Brief in its entirety, as well as the specific arguments in Section II(a) relating to the Tranche 2 Memorandum and the Tranche 1 Procurement Target referenced above. Failing that, the Commission should not take adverse action on Orion's Petition without affording Orion the opportunity to conduct discovery on these issues, supplement the record, and submit additional briefing.


III. CONCLUSION

Orion has diligently pursued its claims in this matter and those claims have consistently relied upon the legal and factual contentions stated in its verified Petition, which was adopted as testimony at the Hearing in keeping with the Commission's directives. Duke, by contrast, sat on its hands for the better part of a year and only now introduces new factual issues and legal positions after the conclusion of the Hearing. In compliance with the Rules of Evidence and to avoid unfair prejudice to Orion, the Commission should strike Items 3, 4, 5, and 6 (pages 2-7) of Duke's Late-Filed Exhibit and strike or disregard new arguments asserted in DEC's Post-Hearing Brief.

If the Commission does not find such a remedy appropriate, Orion requests in the alternative that the Commission reopen the hearing record so that Orion may develop and submit additional evidence related to the factual issues raised in Duke's Late-Filed Exhibit and Post-Hearing Brief. However, given the amount of time this matter has already been pending, and the cost and delay entailed by additional proceedings, Orion submits that the appropriate remedy is to strike the relevant portions of Duke's filings.

Respectfully submitted, this the 25th day of January 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

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **Motion to Strike or in the Alternative to Reopen Hearing** upon all parties of record by electronic mail.

This the 25th day of January, 2021.

/s/ _____
Benjamin L. Snowden