STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

Docket No. SP-8748, Sub 1
Docket No. SP-8741, Sub 2
Docket No. E-7 Sub 1156

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	**REPLY IN SUPPORT OF**
	)	**VERIFIED PETITION FOR**
Cool Springs Solar LLC and	)	**DECLARATORY RULING AND**
Lick Creek Solar LLC	)	**OTHER RELIEF**

NOW COME Petitioners Cool Springs Solar LLC and Lick Creek Solar LLC (collectively, "Petitioners"), pursuant to N.C. Gen. Stat. §§ 62-30, 62-110.8, and 1-253; and Rule R1-5 of the Commission's Rules and Regulations, and file this Reply in support of their Verified Petition for Declaratory Ruling and Other Relief, filed on March 30, 2020 ("Petition").

In its *Response In Opposition To Cool Springs Solar LLC's and Lick Creek Solar LLC's Verified Petition For Declaratory Ruling*, filed on April 8, 2020 ("Duke Response"), Duke Energy Carolinas LLC ("Duke") argues that the Commission should deny Petitioners' request that they be allowed to bid into CPRE Tranche 2 despite having previously executed five-year PURPA PPAs, which Petitioners have agreed to terminate if they are awarded CPRE PPAs. Duke opposes the requested relief because, in its view: (i) it is inconsistent with the CPRE statute, (ii) it will reduce the pressure on CPRE bidders such as Petitioners to submit the "lowest possible" bids, and (iii) it will make the administration of CPRE less efficient. These arguments have no basis in HB 589, in the Commission's CPRE Rules, or in sound public policy. They are also inconsistent with rational decision-making by potential CPRE Market Participants ("MPs"). For the reasons

discussed below, the Commission should grant Petitioners' request for relief. Doing so would be in the interest of ratepayers and would not disrupt the administration of CPRE Tranche 2.

Before discussing Duke's arguments, Petitioners take note of a few uncontested facts that the Commission should take account of. First, Duke does not dispute that the prohibition of projects with executed PURPA PPAs biding into CPRE (the "RFP Off-Take Restriction") was a policy decision made by Duke, not by the Independent Administrator. Second, Duke acknowledges that the restriction puts pressure on QFs that are currently parties to PPAs with Duke to terminate those contracts in order to bid into CPRE. And third, Duke does not dispute that if Petitioners were selected for CPRE Tranche 2 PPAs, ratepayers would be able to procure energy and capacity at prices significantly below the avoided cost rates in Petitioners' existing PURPA PPAs.

A. Petitioners' request is consistent with the intent of HB 589.

Duke claims that its RFP Off-Take Restriction is "supported by the structure of HB 589." Because the statute provides three distinct paths to an off-take arrangement with Duke for Qualifying Facilities ("QF") (PURPA PPAs, CPRE, and the Green Source Advantage program), and because Duke's procurement obligations under each program are subject to adjustment based on the number of QFs that participate in other programs, Duke argues that "the CPRE Statute … clearly contemplated that executing a Full Avoided Cost [PURPA] PPA or participating in a CPRE RFP are mutually exclusive." Duke Response at 3.

This is nonsensical for several reasons. First, such a restriction is nowhere to be found in the text of the statute. If such a restriction did exist, it would also bar a project with an executed PURPA PPA from terminating that PPA and subsequently bidding into CPRE – which Duke says is perfectly fine. Duke Response at 2 ("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."). Nor is the RFP Off-Take Restriction necessary to support the "mutual exclusivity" requirement posited by Duke. A QF with an executed PURPA PPA that bids into CPRE still can't avail itself of more than one off-take option, because it would have to terminate its PURPA PPA in order to sign a CPRE PPA.[1] If Petitioners' bids were selected in CPRE, they would simply be shifting from one form of offtake authorized under HB 589 to another.

Duke goes on to argue that Petitioners' request is problematic because HB 589 provides that the total volume of CPRE procurement is dependent on the volume of PURPA PPAs executed by Duke, and would have to be adjusted if Petitioners were to terminate their existing PURPA PPAs in favor of a CPRE PPA. But we are only in Tranche 2 now, and any adjustment to the total volume of CPRE procurement will not happen until Tranche 3 or later.[2] Even in the final tranche of CPRE, the Independent Administrator ("IA") could simply adjust the awarded amount to account for the number of selected projects with existing PURPA PPAs (or a different rule could be established for the final tranche).

Duke also suggests that granting Petitioners' request would open the door for parties with GSA PPAs to bid into CPRE, and if successful to terminate their GSA PPAs. But Petitioners are not requesting that QFs with existing GSA contracts be permitted to bid into CPRE. GSA advances an entirely different set of policy goals (authorizing "direct renewable energy procurement for major military installations, public universities, and large customers") than PURPA PPAs (which

[1] To be clear, Petitioners do not contend that a QF which has already been constructed and is currently delivering power under a PURPA PPA can bid into CPRE. Petitioners' facilities have not yet been constructed and they have not yet begun performance under their PURPA PPAs.

[2] Under the statute, the final adjustment of CPRE volumes can only happen at (or near) the end of the 45-month period, when it is clear not only whether, but by how much, the utilities have over- or under-shot the 3500 MW target for PURPA PPAs. G.S. § 62-110.8(b)(1).

under federal law are required to encourage the development of small power producers), and it would be entirely reasonable for the Commission to allow projects with PURPA PPAs to bid into CPRE while not allowing projects with GSA Contracts to do so. In any event GSA suppliers also have agreements with participating (non-Duke) customers that they would be highly unlikely to breach for both monetary and reputational reasons.

B. HB 589 does not demand that CPRE Market Participants be pressured into bidding as low as possible.

Duke also argues that the RFP Off-Take Restriction is necessary because CPRE Market Participants ("MPs") should be forced, "to the greatest extent possible, to bid the lowest PPA prices" they possibly can. Duke Response at 4-6. This is utter fabrication. HB 589 requires that PPA pricing under CPRE be set competitively, and that the resources procured be "cost-effective." G.S. § 62-110.8(a), (b)(2). The "cost-effectiveness" of a CPRE Proposal, according to the General Assembly and this Commission, is judged by whether the proposal pricing (inclusive of the cost of upgrades) is at or below avoided cost – not whether the pricing is as low as possible. *Id.*; Docket Nos. E-2 Sub 1159 and E-7 Sub 1156, *Order Modifying and Approving Joint CPRE Program* (Feb. 21, 2018) at 3, 17, 20-21; *Duke Energy Carolinas, LLC's & Duke Energy Progress, LLC's Competitive Procurement of Renewable Energy Program Guidelines* (Nov. 27, 2017) at 6. Duke's requirement that the CPRE process "yield the lowest possible prices" by forcing MPs to lowball bids is made up out of whole cloth. At the end of the day, what matters is that MPs' proposals are competitive, and that they be able to deliver on that pricing.[3] Duke completely ignores the fact that the RFP Off-Take Restriction has the potential to result in a *higher* average cost to ratepayers of CPRE Tranche 2 PPAs than if Petitioners are allowed to participate.

[3] Based on the number of projects (including Duke-sponsored asset acquisition proposals) that withdrew from Tranche 1 rather than sign PPAs because they could not deliver on their pricing, it is unlikely that pressuring MPs to bid "as aggressively as possible" will promote the success of the CPRE program.

CPRE is a competitive process and not every proposal will be selected. Duke's entire argument relies on the premise that a QF with an existing PURPA PPA would terminate that PPA (incurring hundreds of thousands of dollars in liquidated damages) for the mere chance to participate in CPRE – even though that QF would be left with no offtake option (and a six-figure liability) if it were not selected. No sensible developer would make such a decision. A rational developer would simply keep its PURPA PPA and forego participation in CPRE – just as Petitioners will do if Duke's RFP Off-Take Restriction remains in place. This will reduce the pool of projects participating in CPRE, making the process less competitive and potentially raising the price of CPRE procurement to ratepayers.

C. Petitioners' request will not undermine the administration of the CPRE program.

Duke claims that allowing projects with pre-existing PPAs to bid into CPRE will introduce "greater uncertainty into the overall procurement process," because it is possible that an MP might decide not to terminate its existing PPA if selected as a winner in CPRE. But again, this assumes irrational behavior on the part of MPs. A QF with an executed PURPA PPA would only make the substantial commitment to participate in CPRE (including the posting of sizable Proposal Security if it selected for the competitive tier) if it decided that a CPRE PPA, at the bid price, would be more favorable than its existing PPA.[4] Such an MP has no more reason not to sign a CPRE PPA than any other MP. In any event, the requirement to post Proposal Security will ensure that an MP selected for a CPRE PPA will enter into a PPA if at all possible. Petitioners' request would not create any uncertainty that would undermine the administrability of CPRE.[5]

[4] As Duke acknowledges, an MP with an existing PURPA PPA would factor the cost of PPA liquidated damages into its proposal pricing. Duke Response at 5.

[5] Petitioners have stated in writing their commitment to terminating their PURPA PPAs and executing CPRE PPAs if successful in Tranche 2. They are more than willing to enter into a binding contractual commitment to this effect.

D. Duke's claim that five-year PURPA PPAs are better for ratepayers than CPRE PPAs is not credible.

Duke now suggests that five-year PURPA PPAs, notwithstanding their several key disadvantages (to Duke) relative to CPRE PPAs, are in fact better for ratepayers because avoided cost rates *might* be lower after the initial five-year PPA term, and integration costs could also be recovered after the term ends. This is a remarkable turnaround from Duke, which has consistently touted the benefits to ratepayers of 20-year CPRE PPAs over "uncontrolled" PURPA PPAs throughout the legislative process leading to H.B. 589 and since the program's inception. It is also entirely speculative to assume that avoided costs six years from now will be even lower than the Petitioners' bid prices, which are already below avoided cost, even after accounting for solar integration costs. Duke also ignores the fact that under CPRE, the utility and the ratepayer would have the benefits of limited dispatchability and REC acquisition for the entire 20-year term of the PPA.

E. Duke's Response misstates the facts concerning the timeliness of Petitioners' request and their disclosures to the IA.

Duke's Response includes two significant inaccuracies that must be corrected. First, Duke claims that the Tranche 2 RFP made available for public comment on the IA's web site in August 2019 included the "express statement" that "for the avoidance of doubt, [a Market Participant] may not submit a Proposal for a Facility that has an existing off-take agreement." Duke Response at 2. Duke further claims that "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)." Although the RFP Off-Take Restriction was referenced in a footnote to the final RFP, Duke's claim is otherwise totally false.

In point of fact, the Draft RFP made available for comment on August 15, 2019 (Attachment A) did not include any statement about the RFP Off-Take Restriction. The restriction

first appeared in the final RFP published on October 15, 2019 (the date on which Tranche 2 opened for bids), tacked on to the end of a footnote discussing CPCN requirements. See Attachment B at fn 4 (redline of final RFP versus August 2019 draft).[6] To the best of Petitioners' knowledge, the restriction was not discussed in stakeholder meetings or other guidance provided prior to the opening of Tranche 2, and was not added in response to any comments by stakeholders (other than, presumably, Duke). And the comment period for the Draft RFP closed on September 5, 2019. So potential MPs had no opportunity comment on the restriction prior to it being included in the Final RFP. The addition of the RFP Off-Take Restriction to the RFP at the eleventh hour therefore violated Commission Rule R8-71(f), which requires publication of a draft RFP setting forth the "guidelines and documents, including RFP procedures, [and] evaluation factors" that will guide the process.

Petitioners[7] did raise the issue of the RFP Off-Take Restriction after publication of the Final RFP, and prior to submitting their Tranche 2 proposals. On January 23, 2020, Petitioners requested via the IA's web site that a party with an existing PPA be able to bid into CPRE Tranche 2, provided that it agrees that if awarded a CPRE PPA it will terminate its PURPA PPA and pay any damages due under that agreement. In a February 5 response evidently composed by Duke, the IA rejected the request.[8] *Duke Energy 2019 - DEC Questions & Answers Summary Page* (printed Apr. 27, 2020), available at https://decprerfp2019.accionpower.com/_rfp_1902/qanda_summary.asp (Attachment C) ("CPRE Q&A"), Ref. # 75. During the February 6, 2020

[6] The RFP was subsequently amended in February 2020 to reflect changes in the Tranche 2 timeline and the Commission's Order that a Solar Integration Services Charge should be imposed on CPRE projects. In this limited respect, it is the case that the October 2019 RFP was not the final document. However, comments were not permitted on other aspects of the October 2019 "Final" RFP, and the IA did not entertain other changes to the RFP between the October 2019 and February 2020 versions.

[7] In all cases, communications on behalf of Petitioners were made by their upstream owner Pine Gate Renewables, LLC.

[8] The response concludes with the following statement, which would be a non sequitur coming from the IA: "Duke Energy provides no legal advice to MP as to its rights or obligations under its existing contracts."

stakeholder meeting, Petitioners repeated their request, providing additional argument in support and asking if the answer would be different if the party terminating the PURPA PPA agreed to pay liquidated damages under that agreement. Duke's counsel said that the Company would further consider the request with that qualification. CPRE Q&A, Ref. no. 105.

Having not received a response, Petitioners again asked the question via the IA web site on February 26, 2020. CPRE Q&A, Ref. No. 105. On February 27, the IA posted a summary of questions raised during the February 6 stakeholder meeting and provided answers, including a reiteration of its position that projects with executed PURPA PPAs could not bid into Tranche 2. The stated justification was that "Allowing projects with existing off-take agreement to bid into CPRE would introduce too much uncertainty and complexity into the RFP process." *February Stakeholder Meeting, Questions and Answers* (Feb. 27, 2020) (Attachment D), at Q 26. On March 5, 2020, Petitioners communicated their objection to the IA's decision and their intention to submit applications into Tranche 2. The IA responded on March 6, 2020, standing by its previously stated position. CPRE Q&A, Ref. No. 126. Thus, Petitioners made repeated attempts to resolve this issue with the IA after it was revealed for the first time in the Final RFP in October 2019.

It bears noting that, in all of the back-and-forth with Petitioners regarding the RFP Off-Take Restriction, neither the IA nor Duke ever claimed that the restriction was mandated by HB 589 or was a prudent means to drive proposal pricing down.

In any event, there is no prejudice or delay to the process in having this issue resolved at this time. If Petitioners' request was granted, their Proposals would have to be evaluated by the IA and then placed in rank order among other Tranche 2 projects. If Petitioners' projects had to go in the Step 2 interconnection study, their addition after the study began could cause significant disruption. But Petitioners' projects already have Interconnection Agreements and, so qualify as

"Advanced Stage" projects under the Tranche 2 RFP. This means that they do not need to be included in the Step 2 T&D study. And because they are Advanced Stage projects, Petitioners' projects bear the cost of their own Upgrades, meaning they can be ranked and evaluated solely on the basis of their big pricing. After they are evaluated based on the IA's economic ranking criteria, they can simply be "slotted in" to the final ranked list of proposals to be delivered by the IA to the Evaluation Team at the conclusion of the Step 2 process, in keeping with Rule R8-77(f)(iv). So long as a decision is rendered in time for Petitioners' proposals to be ranked before that list is prepared at the end of Step 2, granting the requested relief should not cause any delay or disruption.

Duke also states that, according to the IA, "the existence of pre-existing PPA obligations was not disclosed by the Petitioners when the two Proposals were submitted." Response at 8. This could not be further from the truth. Petitioners told the IA via the web site they would be submitting proposals for projects with existing PPAs before submitting their proposals.[9] Petitioners' bid packages also included a cover letter clearly disclosing the existence of these PPAs and committing to terminating those PPAs and paying any liquidated damages if the projects were selected in CPRE (Attachment E). Petitioners again confirmed the existence of these PPAs in response to an inquiry from the IA the day after proposals were submitted, stating with respect to each proposal that "The project does have an existing offtake agreement, which we have committed to terminating upon award of a CPRE PPA as outlined in the submittal letter uploaded to Supplemental Materials." (Attachment F)

[9] Petitioners' March 5 submittal to the IA's web site, discussed above, stated that "we intend to make Tranche 2 submittals from projects with existing PPAs, accompanied by our commitment to terminate the pre-existing PPA if awarded a CPRE PPA." CPRE Q&A, Ref. No. 126.

F. Conclusion

Duke's arguments for denying Petitioners' request for relief are inconsistent with the text and structure of HB 589; with rational QF decision-making; and with the Company's own decision to allow projects that have already terminated existing PPAs to participate in CPRE. Granting Petitioners' request would not cause undue delay or disruption to the CPRE program, and would advance the interests not only of MPs but also of ratepayers, who stand to benefit from broader participation in CPRE. Petitioners accordingly submit that their request for relief be granted, and that the Commission order that the RFP Off-Take Restriction be lifted and Petitioners' projects be permitted to participate in CPRE Trance 2.

Respectfully submitted, this the 17th day of April, 2020.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **REPLY IN SUPPORT OF VERIFIED PETITION FOR DECLARATORY RULING AND OTHER RELIEF** upon all parties of record by electronic mail and/or first-class United States mail.

This the 17th day of April, 2020.

/s_____
Benjamin L. Snowden