

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

)
) **ORION RENEWABLE RESOURCES**
) **LLC'S MOTION TO COMPEL**
) **DISCOVERY AND FOR LEAVE TO**
) **PROVIDE SUPPLEMENTAL**
) **TESTIMONY**

NOW COMES Orion Renewable Resources LLC ("Orion"), by and through the undersigned counsel, and submits this Motion to Compel and for Leave to Provide Supplemental Testimony. Orion's Motion seeks to compel Accion Group, LLC ("Accion") to provide adequate responses to Orion's First Data Request to Accion, served on April 20, 2021 and its Second Data Request dated May 6, 2021 – specifically, the "Maximum Allowable T&D Upgrade Cost" for the Proposals corresponding to the following Step 1 Ranks: 10, 15, 16, 20, 28, 34, 38, 47 and 48. In support of its Motion, Orion shows the Commission as follows:

1. On November 2, 2020, an evidentiary hearing was held in this matter. On November 25, 2020, in response to a request from Commissioners at the Hearing, Duke Energy Carolinas LLC ("DEC") and Accion prepared and filed a Corrected Late-Filed Exhibit ("LFE"), which included information provided by Accion concerning three proposals (including Orion's) that were eliminated during Step 1 of Tranche 1 based on Accion's "Net Benefit" analysis ("the Step 1 Eliminated Proposals").

2. The information provided by Accion included a calculation of the "Maximum Allowable T&D Upgrade Cost" for each of the three proposals. The Maximum Allowable T&D

Upgrade Cost for a particular CPRE proposal represents the maximum amount (in dollars) of Upgrade costs the proposal could be assigned before it would exceed the Avoided Cost Cap for Tranche 1.

3. The LFE also referenced fifteen (15) proposals that were eliminated based on a Net Benefit analysis in Step 2 (“the Step 2 Eliminated Proposals”). The LFE claimed that “Extensive further analysis would ... be needed to assess each such Proposal to determine whether the applicable T&D costs, in addition to causing the Proposals to have a negative Net Benefit, also would have exceeded the Maximum Allowable T&D Upgrade Cost.”

4. In its Post-Hearing Brief filed on January 4, 2021, DEC argued that the existence of the Step 2 Eliminated Proposals means that “a finding that the IA did not have discretion to eliminate Proposals based on the Net Benefit Analysis [the central legal question in this matter] 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.”¹

5. On January 25, 2021, Orion filed a Motion to Strike or in the Alternative to Reopen Hearing. Orion’s Motion sought to strike portions of the LFE, but requested in the alternative that Orion be permitted to develop and submit additional evidence related to the factual issues raised in the LFE and DEC’s Brief. On April 14, the Commission denied Orion’s Motion to Strike but allowed its Motion to Reopen Hearing. The Commission permitted Orion to file written testimony by May 12, 2021, “limited to facts and matters contained in the Late-Filed Exhibit.”

¹ DEC Post-Hearing Br. at 3.

Orion's Discovery Requests

6. On April 20, 2021, Orion served its First Data Requests on Accion, attached hereto as Exhibit A. Item No. 1(f) requested the following information for the Step 2 Eliminated Proposals: "The Maximum Allowable T&D Upgrade Cost (in total \$), as that term is used in the LFE". Accion had provided this same information for the Step 1 Eliminated Proposals in the LFE.

7. On May 3, 2021, Accion provided responses to Orion's First Data Requests, attached hereto as Exhibit B. Although Accion did not object to any of Orion's data requests, Accion also did not provide any information for Items 1(e) (net benefit with T&D costs) or 1(f) (Maximum Allowable T&D Upgrade Costs), stating that "neither Net Benefit nor 'Maximum Allowable T&D Upgrade Cost' was calculated for these Proposals."

8. Orion's counsel contacted Accion's counsel by email on May 6, 2021 (see Exhibit C), requesting that Accion produce the Maximum Allowable T&D Upgrade information for a subset of the Step 2 Eliminated Proposals, subject to the Comprehensive Confidentiality Agreement entered into by Orion and Accion on October 30, 2020 ("Confidentiality Agreement"). Orion also tendered a Second Data Request (also included in Exhibit C) renewing its request for this information, specifically "the 'Maximum Allowable T&D Upgrade Cost' for the Proposals corresponding to the following Step 1 Ranks: 10, 15, 16, 20, 28, 34, 38, 47, 48".²

9. On May 11, 2021, Accion sent Orion a letter (Exhibit D) stating its refusal to provide any further responses to Orion's data requests because of "Accion's belief that the Market Participants or bidders whose data you seek provided proprietary information with the reasonable expectation that it would not be shared with competitors." As to the Confidentiality Agreement,

² Six of the Step 2 Eliminated Proposals were, according to Accion, impacted by a transmission constraint and were not selected in Step 2 despite having a positive Net Benefit. To reduce the burden of complying with the Request, Orion omitted these proposals from its Second Request.

Accion claimed that it “would not provide any assurance” that the requested information “would not be useful to and/or used by [Orion] in future competitive bidding situations”.³ In addition, Accion stated that it would not respond to Orion’s request regarding for Maximum T&D Upgrade Cost information because the data “does not currently exist” and “[i]t would be necessary to generate calculations to provide what you appear to be requesting.”

10. In an attempt to avoid having to seek recourse from the Commission, Orion contacted Accion early on May 12, offering to limit the scope of its requests to only the “Maximum Allowable T&D Upgrade Costs” for the nine specified Step 2 Eliminated Projects. Accion again refused to produce any of the requested information.

11. Orion filed the Prefiled Supplemental Testimony of Timothy Lasocki on May 12, 2021. In its testimony, Orion noted that a core issue raised by DEC in the LFE is whether any of the Step 2 Eliminated Proposals were under the Avoided Cost Cap, even though they had a negative Net Benefit. As noted in the testimony, this question can only be answered by comparing each proposal’s Upgrade costs to its Maximum Allowable T&D Upgrade Cost.⁴

Grounds for Motion

12. Accion has refused to provide complete responses to Orion’s discovery requests and has not articulated any objection to Orion’s requests.

13. To the extent that Accion’s refusal to provide Maximum Allowable T&D Upgrade Costs for the Step 2 Eliminated Projects (Data Request Nos. 1(f) and 2) is based on the fact that it would require Accion to perform a calculation, such refusal has no legal basis. An interrogatory may request information “regarding any matter, not privileged, which is relevant to the subject

³ Although the Confidentiality Agreement was limited in scope to use of confidential information in relation to the November 2020 Hearing in this docket, Orion requested that the agreement be amended to address all matters related to this docket. Accion has not responded to Orion’s request.

⁴ Supplemental Rebuttal Testimony of Timothy Lasocki at 5.

matter involved in the pending action.” N.C. R. Civ. P. 33, 26(b)(1). Discovery requests seeking calculated values are not prohibited, and this Commission has on multiple occasions granted motions to compel responses to requests that required the respondent to calculate values or otherwise create data.⁵ Accion does not claim that performing this calculation would be unduly burdensome – indeed, Accion voluntarily calculated these values for the Step 1 Eliminated Proposals and included them in the LFE. Rather, Accion appears to claim that there is a *per se* bar on data requests that require the respondent to perform even simple calculations. There is no basis for this claim.

14. To the extent that Accion’s refusal to provide Maximum Allowable T&D Upgrade Costs for the Step 2 Eliminated Projects (Data Request Nos. 1(f) and 2) is based on Accion’s “belief” that CPRE bidders have a “reasonable expectation that [this information] would not be shared with competitors”, such refusal has no legal basis. Under the Confidentiality Agreement, Orion is prohibited from using or disclosing the Maximum Allowable T&D Upgrade Cost for any proposal. In addition, such data would not be associated with any identifiable proposal or participant. And such data, which is based on bid information submitted in October 2018, has no conceivable commercial value now, and cannot qualify as protected information under the Trade Secrets Protection Act.⁶ While the Commission’s CPRE rules include extensive confidentiality requirements applicable during a solicitation, R8-71(e), those requirements do not apply after the solicitation has concluded (much less after the subsequent Tranche is finished).

15. Similarly, Accion’s claim that Orion cannot be trusted to adhere to the terms of the Confidentiality Agreement, and would use that information to its commercial advantage in

⁵ See, e.g., Order Granting In Part And Denying In Part Public Staff Motion To Compel, Docket No. E-7, Sub 1214 (May 26, 2020); Order to Compel, Docket No. P-19, Sub 277 (Dec. 28, 2004).

⁶ G.S. § 66-152(3).

contravention of the terms of the agreement, cannot be credited. Parties practicing before this Commission routinely obtain access to commercially sensitive information under the protection of nondisclosure agreements. A presumption, unsupported by any facts, that such agreements cannot be relied on would be crippling to parties seeking to participate in Commission proceedings.

16. As noted above, without the Maximum Allowable T&D Upgrade Cost for the Step 2 Eliminated Proposals, the Commission cannot determine whether there is substance to DEC's speculation about those proposals in the LFE. The information requested by Orion is therefore likely to lead to the discovery of admissible evidence and is needed to further assist Orion in responding to the factual matters raised in the LFE.

17. Orion diligently sought this information so it could be addressed in its Supplemental Testimony due on May 12. Therefore, if the Commission grants Orion's Motion to Compel, Orion also requests the opportunity to file, or to present from the stand at the June 3 Hearing, limited additional testimony addressing the significance of the Maximum Allowable T&D Upgrade Costs.

18. As set forth above, Orion has sought to confer with Accion to secure Accion's production but has been unable to secure Accion's compliance with its discovery obligations without the Commission's intervention.

WHEREFORE, Orion requests that the Commission enter an order:


A. Compelling Accion to produce a calculation of the Maximum Allowable T&D Upgrade Cost for the Step 2 Eliminated Projects identified in Exhibit B, in response to Data Request Nos. 1(f) and 2;

B. Authorizing Orion to file supplemental testimony regarding the information produced by Accion within five (5) business days after such receipt of such information, or in the alternative to present such testimony live at the hearing on June 3; and

C. Grant Orion such other and further relief as the Commission deems just and appropriate.

Respectfully submitted, this the 14th day of May, 2021.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **Motion to Compel Discovery and for Leave to Provide Supplemental Testimony** upon all parties of record by electronic mail.

This the 14th day of May, 2021.

/s/ _____