

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. SP-4158, SUB 0
DOCKET NO. SP-4159, SUB 0
DOCKET NO. SP-4160, SUB 0
DOCKET NO. SP-4161, SUB 0
DOCKET NO. SP-4172, SUB 0
DOCKET NO. SP-4173, SUB 0
DOCKET NO. SP-4176, SUB 0
DOCKET NO. SP-4177, SUB 0
DOCKET NO. SP-4996, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Requests for Waivers by WBJE Solar LLC,)	
Pridgen Solar Group LLC, Double R Solar)	ORDER DENYING REQUEST
LLC, Southside Solar LLC, Son Power)	FOR WAIVERS
LLC, Merritt Energy Partners LLC, 6 Acre)	
Field LLC, 4-Lane Solar LLC, and GTOP)	
Merritt Solar)	

BY THE COMMISSION: On February 27, 2015, WBJE Solar LLC, Pridgen Solar Group LLC, Double R Solar LLC, Southside Solar LLC, Son Power LLC, Merritt Energy Partners LLC, 6 Acre Field LLC, 4-Lane Solar LLC, and GTOP Merritt Solar (collectively, Applicants) filed verified requests for waivers from the requirement to obtain a legally enforceable obligation (LEO) in the above-captioned dockets. In summary, the Applicants have pending applications for certificates of public convenience and necessity (CPCNs) to construct solar energy facilities in Columbus County, North Carolina. Each application states that the Applicant intends to sell the electricity generated by its facility to Duke Energy Progress, Inc. (DEP). In their request for waivers of the LEO requirement, the Applicants explain that they seek to become eligible for the avoided cost rates established in the Commission's February 21, 2014 Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, In the Matter of Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities - 2012, Docket No. E-100, Sub 136 (Sub 136 Order). The Applicants further submit that the Commission should exempt them from the LEO requirement because their facilities support the North Carolina General Assembly's objectives for growth in renewable energy facilities.

On March 25, 2015, the Commission issued an Order Serving Request for Waivers and Requiring Response. The Order directed that the Commission's Chief Clerk serve a copy of the Applicants' request for waivers on DEP and that DEP file a response to the Applicants' request on or before April 17, 2015.

On April 17, 2015, DEP filed its response. In summary, DEP first discusses the establishment of the LEO concept by the Federal Energy Regulatory Commission (FERC). DEP states that FERC established the concept of a LEO as part of FERC's rules implementing the requirements of the Public Utility Regulatory Policies Act of 1978 (PURPA). DEP states that 18 C.F.R. § 292.304(d) provides qualifying facilities (QFs) with two options: (1) the QF can provide energy to the purchasing utility as available from the QF for purchase at the utility's avoided costs calculated at the time of delivery of the energy, or (2) the QF can provide energy or capacity pursuant to a LEO. According to DEP, under the first option a QF does not need a LEO to sell energy at the utility's avoided cost and, thus, a LEO is not a legal necessity. Rather, it is a mechanism that a QF can use to exercise a different payment option if it meets certain qualifications.

In addition, DEP notes that in the Sub 136 Order the Commission discussed the two-prong test for establishing a LEO:

[I]n interpreting PURPA, the Commission has determined that a LEO arises when the QF: (a) commits itself to sell its output to a utility (which concomitantly commits the utility to purchase the output from the QF); and (b) has a CPCN.

Sub 136 Order, at 35.

DEP opines that the second criterion exists because the Commission must determine that the public convenience and necessity will be served by the QF's construction of the proposed facility before a utility should be required to purchase the QF's output. DEP states that the Applicants have provided no justifiable reason for the Commission to change this requirement. DEP further states that the Applicants are "rate shopping" in an attempt to lock in DEP's avoided costs rates under the Sub 136 Order, rather than being subjected to the potentially lower avoided cost rates that might result from DEP's current application in Docket No. E-100, Sub 140.

DEP further notes that its current avoided cost Cogeneration and Small Power Producer Schedule CSP-29 (Schedule CSP-29), approved by the Commission on April 1, 2014, in Docket No. E-100, Sub 136 (Sub 136 Rates) provides the criteria for a QF's eligibility for the long-term rates that the Applicants appear to be seeking.

[T]he Fixed Long-Term Credit rates are available only to otherwise eligible Sellers that establish a Legally Enforceable Obligation by November 1, 2014 (or the actual filing date of proposed rates in the biennial avoided cost proceeding in Docket No. E-100, Sub 140 at the North Carolina Utilities Commission, if later).

In addition, DEP states that Schedule CSP-29 provides that if a QF does not qualify for the Sub 136 Rates, then the QF is eligible for the Variable Credit rates or the Fixed Long-Term Credit Rates proposed by DEP in Docket No. E-100, Sub 140 on

March 2, 2015, subject to adjustment if different rates are approved by the Commission. DEP states that if the Commission allows the Applicants to receive the Sub 136 Rates without obtaining the required CPCN, then the result would be contrary to the plain language of Schedule CSP-29 and discriminatory to those QFs that did not obtain a CPCN by March 2, 2015, and consequently are not eligible for the Sub 136 Rates. Further, DEP maintains that the Applicants present no compelling reason for the Commission to find that they are eligible for the Sub 136 Rates when other similarly situated QFs are not. Moreover, DEP submits that the Applicants' contribution to North Carolina's economic growth, while laudable, is not a justification for departing from the procedures and framework that the Commission has determined are fair to renewable energy companies, public utilities and ratepayers. Indeed, the significant growth in QF solar facilities in North Carolina demonstrates that the Commission's current rules are working and are adequate to attract solar participants and investors.

DEP also notes that another justification cited by the Applicants in support of their request is the Applicants' need to obtain new investors, a need that apparently arises because the Applicants' previous investor is under investigation by the Federal Bureau of Investigation for wire fraud. DEP states that it is not the Commission's obligation to enable QFs to find investors or to inflate a QF's potential returns on a selective basis for specific investors, particularly at the expense of the purchasing utility's customers.

In conclusion, DEP requests that the Commission deny the Applicants' request for a waiver from the requirement to obtain a LEO.

On April 28, 2015, Merritt Energy Park, Inc., the development agent for the Applicants, filed a reply to DEP's response. In summary, the Applicants note that DEP's Initial Statement and Exhibits in Docket No. E-100, Sub 136 included a proposed Schedule CSP-29 that stated:

[T]he Fixed Long-Term Credit rates on this schedule are available only to Sellers under contract with the Company on or before November 1, 2014 for delivery of power beginning on or before the earlier of thirty (30) months from the date of execution of the contract or May 1, 2017.

Progress Energy Carolinas, Inc., Initial Statement and Exhibits, Attachment 1, p. 1 (November 1, 2012).

The Applicants contend that DEP extended the time for DEP to file its new rates by amending Schedule CSP-29 to include the phrase "or the actual filing date of proposed rates." According to the Applicants, they should be afforded the same opportunity for an extension of the Sub 136 Rates.

In addition, the Applicants clarify that they are not requesting to be exempt from obtaining CPCNs for their facilities. Rather, they are requesting a waiver to extend the

deadline for obtaining their CPCNs. Further, the Applicants submit that if the waiver is granted it should apply to all similarly situated QFs. In addition, the Applicants state that the waiver is not needed in order to help them attract an investor. They state that they have a potential investor that is in the process of making a proposal for funding their projects. Finally, the Applicants reiterate their position that their projects are vital to the economic growth of Columbus County.

Discussion

Procedural History

Merritt Energy Park, Inc., is the development agent for the Applicants' facilities. The applications were all filed and have proceeded in the same manner and time frame. The following summary of the procedural course of WBJE Solar LLC's application in Docket No. SP-4158, Sub 0 is representative of the procedural course of the other eight Applicants.

On July 23, 2014, WBJE Solar, Inc. (WBJE), filed an application in Docket No. SP-3975, Sub 0 seeking a CPCN pursuant to G.S. 62-110.1(a) for construction of a 4.99-MW solar photovoltaic electric generating facility to be located at 752 Georgia Pacific Road in Whiteville, Columbus County, North Carolina.

On August 4, 2014, WBJE filed a letter with the Commission requesting that the application for the CPCN be changed to the name of WBJE Solar LLC (Applicant). The letter further stated that WBJE no longer exists as a corporate entity.

On August 5, 2014, the Commission issued an Order Requiring Publication of Notice in Docket No. SP-3975, Sub 0 requiring WBJE to publish a public notice of its application.

On August 14, 2014, the Clearinghouse Coordinator of the Office of Policy and Planning of the Department of Administration filed an email stating that the Clearinghouse expected to complete its review of the application by September 12, 2014.

On September 11, 2014, the Commission issued an Amended Order Requiring Publication of Notice that, among other things: (1) transferred the application and all other filings by WBJE from Docket No. SP-3975, Sub 0 to Docket No. SP-4158, Sub 0 in the name of WBJE Solar LLC; (2) requested that the State Clearinghouse continue and complete its review in the name of the new Applicant; (3) required the publication of a revised Public Notice in the name of the new Applicant; (4) required the Applicant to file an affidavit of publication with the Commission; (5) required the Applicant to mail a copy of the application and Public Notice, no later than the first date that such Public Notice was published, to the electric utility to which the Applicant plans to sell and distribute the electricity; (6) required the Applicant to file a signed and verified certificate of service that the application and notice have been provided to the utility;

and (7) closed Docket No. SP-3975, Sub 0. Further, the Order included the following statement:

The Commission cannot take any action until after the Applicant has filed both the affidavit of publication and the certificate of service. The Applicant is urged to file both the affidavit and the certificate promptly following the last date of publication of the notice.

Amended Order Requiring Publication of Notice, p. 2 (emphasis in original).

On September 18, 2014, the Clearinghouse Coordinator of the Office of Policy and Planning of the Department of Administration filed final comments with the Commission stating that because of the nature of the comments no further review is needed by the Commission to determine the compliance of the Applicant's proposed project with the North Carolina Environmental Policy Act.

As of the date of this Order, the Applicant has not filed an affidavit of publication with the Commission or a verified certificate of service that the application and notice have been provided to DEP.

Purpose of the LEO

The concept of a legally enforceable obligation was created by FERC in its rules implementing the requirements of PURPA. Section 292.304(d) of the rules provides:

(d) Purchases “as available” or pursuant to a legally enforceable obligation. Each qualifying facility shall have the option either:

(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

18 C.F.R. § 292.304(d) (2014).

FERC has left it to the states to decide how and when a LEO is created. See New PURPA Section 210(m) Regulations, FERC Order No. 688-A, 119 FERC ¶ 61,305, at ¶¶ 136, 139 (June 22, 2007). As discussed by DEP in its response, the Commission has adopted a two-pronged test. In order to establish a LEO, a QF must: (1) have made a commitment to sell the generating facility's output to a utility pursuant to PURPA, and (2) have received a CPCN for the construction of the facility. See Sub 136 Order, at 35.

The need to establish a LEO arises in large part due to the PURPA requirement that the Commission review each utility's avoided cost rates every two years. The Commission does so in a generic E-100 docket in which all of the electric utilities present their case for changes to avoided cost rates offered in their standard contracts for those projects eligible for the standard contract and avoided cost rates. The evidence in these proceedings usually is voluminous and the issues complex. As a result, the proceedings are at times protracted. Meanwhile, QFs are applying for and receiving CPCNs and interconnection agreements throughout the time required for the Commission to complete its biennial reviews of avoided costs. Therefore, questions arise as to which set of biennial avoided cost rates apply to a particular power purchase agreement (PPA). For example, a QF might prefer to bargain for the applicability of the higher avoided cost rates established in the 2012 avoided cost proceeding in Docket No. E-100, Sub 136, rather than the potentially lower rates that might result from the pending avoided cost docket, E-100, Sub 140, and the electric utility might want the opposite. Thus, the purpose of the LEO is to establish a date certain for determining the applicable avoided cost rates to be used in the PPA negotiations by the QF and utility. By doing so, the LEO protects the QF from delays in PPA negotiations and helps to match current avoided cost rates with current QF projects. In addition, the LEO serves to ensure that QFs that are at the same development stage are generally treated the same with regard to avoided cost rates. Further, it protects the utility from having to waste time engaging in negotiations and signing a PPA when a QF might never obtain a CPCN to build its proposed facility.

In the present circumstances, all of the above purposes of the LEO appear to be applicable. For example, there are literally hundreds of QFs with applications for CPCNs pending before the Commission. To waive or extend the LEO requirement for all of these QFs, as advocated by the Applicants, would create the potential for unequal treatment of QFs and inappropriate avoided costs to be paid by ratepayers. The Commission is unable to discern any compelling reason to create the potential for such inequities.

With regard to the Applicants' contention that DEP extended the time for DEP to file its new rates by amending Schedule CSP-29 to include the phrase "or the actual filing date of proposed rates," DEP's amendment to Schedule CSP-29 was made in compliance with the Commission's Finding of Fact No. 15 in the Sub 136 Order:

Each QF eligible for long-term rates that (a) has obtained a CPCN or filed an RPC, as applicable, no later than November 1 of the

year in which a biennial proceeding has been initiated (or the actual filing date of proposed rates if later) and (b) has indicated to the relevant North Carolina utility that it is seeking to commit itself to sell its output should be entitled to the fixed, long-term avoided costs rates approved in the immediately preceding biennial proceeding.

Sub 136 Order, at 9.

In addition, this amendment to DEP's Schedule CSP-29 did not prejudice the Applicants' efforts to obtain the Sub 136 Rates. Indeed, it provided the Applicants and other QFs several additional months in which to establish their LEOs and qualify for the Sub 136 Rates.

Conclusion

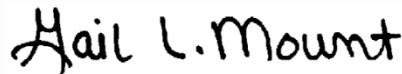
Based on the foregoing and the record, the Commission is not persuaded that there is good cause to grant the waivers requested by the Applicants, and, therefore, the Applicants' request for waivers is denied.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 12th day of June, 2015.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink that reads "Gail L. Mount". The signature is written in a cursive, flowing style.

Gail L. Mount, Chief Clerk