

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. EMP-103, SUB 0
DOCKET NO. SP-6476, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Application of Albemarle Beach Solar, LLC,) ORDER TRANSFERRING
for a Certificate of Public Convenience and) RECORD, CLOSING DOCKET,
Necessity to Construct a 80-MW Solar) AND FINDING APPLICATION
Facility in Washington County, North Carolina) INCOMPLETE

BY THE CHAIRMAN: On September 21, 2015, in Docket No. SP-6476, Sub 0, Albemarle Beach Solar, LLC (Applicant), filed an application seeking a certificate of public convenience and necessity (CPCN) pursuant to G.S. 62-110.1(a) and Commission Rule R8-64 for construction of an 80-MW_{AC} solar photovoltaic (PV) electric generating facility to be located on both sides of Mackeys Road and Albemarle Beach Road in Roper in Washington County, North Carolina. The Applicant states that it is in discussions to sell the electricity generated at its facility to Dominion Energy North Carolina (Dominion), to one or more retail customers in deregulated states that allow for such sales, or into the PJM market.

On September 23, 2015, the Commission issued an Order Requiring Publication of Notice requiring the Applicant (1) to publish notice of the application in the manner required by N.C.G.S. § 62-82(a) and file an affidavit of publication with the Commission, and (2) to mail a copy of the application and notice to the electric utility to which the Applicant plans to sell and distribute the electricity, and file a signed and verified certificate of service that the application and notice have been provided to the utility. In addition, the Order directed the Chief Clerk of the Commission to deliver copies of the notice to the Clearinghouse Coordinator of the Office of Policy and Planning of the Department of Administration for distribution by the Coordinator to State agencies having an interest in the application.

On September 22, 2016, the Applicant filed an amendment to the application, removing parcels of land and adding another parcel to the site of the proposed facility.

Complaints were filed in this docket on or after November 5, 2015 by John B. Dunn, Norma Brown, Al and Brenda Hartkopf, and by Timothy J. Pharr.

On September 9, 2016, based upon the complaints and the record herein, the Commission issued an Order setting this matter for hearing for the purpose of receiving evidence as to whether the CPCN should be issued to the Applicant, and directing the Applicant to publish notice of the public hearing and to pre-file testimony in this docket.

On October 6 and 10, 2016, the Commission issued Orders cancelling the hearing previously scheduled and clarifying that all complaints filed in this docket remain pending and that the individuals who submitted those complaints are entitled to a hearing in this proceeding. In addition, the October 10 Order noted that the Applicant's plan to add an additional parcel to the site of the proposed facility justified requiring additional public notice and further review of the application by the State Clearinghouse. Finally, that Order further stated that unless the pending complaints are withdrawn and no further complaints received, a hearing in this matter would be scheduled at an appropriate place and time.

On November 12, 2018, the Applicant filed a second amendment to its application for a CPCN, noting that the location of the site of the proposed facility has changed as a result of the removal of parcels of land from, and the addition of parcels of land to, the site of the proposed facility. In addition, the Applicant states that an e911 address had been assigned to the property, and that the facility would come online in phases before December 2020.

The Applicant filed its application under Commission Rule R8-64. Commission Rule R8-64 applies to applications for a CPCN by any person, other than an electric public utility, who is an owner of a renewable energy facility that is participating in the Competitive Procurement of Renewable Energy Program established in N.C.G.S. § 62-110.8, or any person "who is seeking the benefits of" 16 U.S.C. § 824a-3 or N.C.G.S. § 62-156 as a qualifying cogenerators or qualifying small power producer as defined in 16 U.S.C. 796(17) and (18), or as a small power producer as defined in N.C.G.S. § 62-3(27a).¹ Commission Rule R8-64(a)(1). Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), codified at 16 U.S.C. 824a-3, requires electric utilities to offer (1) to sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities, and (2) to purchase electric energy from such facilities. 16 U.S.C. 824a-3(a). Section 292.203 of the Code of Federal Regulations provides that a small power production facility is a "qualifying facility" (QF) if it (1) does not exceed the maximum size criteria specified in § 292.204(a) (80 MW); (2) meets the fuel use criteria specified in § 292.204(b) (including the use of renewable resources to generate electric power); and (3) unless exempted by paragraph (d), has filed with the Federal Energy Regulatory Commission (FERC) a notice of self-certification pursuant to § 292.207(a), or an application for Commission certification, pursuant to § 292.207(b)(1), which has been granted.

¹ The Commission originally adopted Commission Rule R1-37, the predecessor to Commission Rule R8-64, by Order issued on October 25, 1984, in Docket No. E-100, Sub 41. At that time, the definition of "small power producer" included only persons that own or operate electrical power production facilities that use hydroelectric power as its fuel source. The enactment of House Bill 589 (S.L. 2017-192) amended N.C.G.S. § 62-2(27a) to include persons that own or operate an electrical power production facility that qualifies as a "small power production facility" pursuant to 16 U.S.C. 796. The effect of this amendment was to broaden the definition of "small power producer" to include persons that own or operate an electrical power production facility that uses as a primary energy source, biomass, waste, renewable resources, geothermal resources, or any combination thereof, which does not exceed a power production capacity of 80 MW.

On August 8, 2005, the Energy Policy Act of 2005 (EPAAct of 2005) was signed into law,² amending 16 U.S.C. § 824a-3 by adding subsection (m), which provides that an electric public utility shall not be required to purchase electric energy from a qualifying small power production facility under PURPA if the FERC finds that the facility has nondiscriminatory access to wholesale markets for long-term sales of capacity and electric energy, or transmission and interconnection services provided by a FERC-approved regional transmission authority, or wholesale markets of comparable competitive quality. In its Order No. 688, the FERC determined that the PJM Interconnection qualified as a market described in §§ 292.309(a)(1)(i) and (ii), establishing a rebuttable presumption that QFs with a capacity greater than 20 MW have nondiscriminatory access to PJM through open access transmission tariffs and interconnection rules, and determining that electric utilities that are members of PJM should be relieved of the obligation to purchase electric energy from such QFs, unless the QF rebuts the presumption.³ On July 17, 2008, the FERC issued an order terminating Dominion's obligation to enter into new contracts with QFs with a net capacity of more than 20 MW.⁴ Recently enacted House Bill 589 (S.L. 2017-192) recognized this termination in state law at N.C.G.S. § 62-156(d).

On the face of the application, the Applicant's small power production facility meets the requirements of being a QF, because the facility's maximum size does not exceed 80 MW, its primary energy source is a renewable resource, and it has filed a FERC Form 556 with the FERC. However, the question presented is whether the Applicant "is seeking the benefits of" 16 U.S.C. § 824a-3 or N.C.G.S. § 62-156.

Based upon the foregoing and the entire record herein, the Chairman determines that the Applicant is not seeking the benefits of 16 U.S.C. § 824a-3 or N.C.G.S. § 62-156, and, therefore, the Applicant erred in applying for a CPCN pursuant to Commission Rule R8-64. The Chairman concludes that a logical application of the words "seeking the benefits of" in Commission Rule R8-64(a)(1) is as a reference to the mandatory-purchase obligation of 16 U.S.C. § 824a-3(a)(2). Although there may be other "benefits" of being a QF provided by the provisions of 16 U.S.C. § 824a-3, when read together with the reference to N.C.G.S. § 62-156, which is specific to "power sales by small power producers to public utilities," it is clear that the "benefits" referenced is the mandatory-purchase obligation. The provisions of amended N.C.G.S. § 62-156 lend further support to this conclusion by implied reference to the mandatory-purchase obligation and by recognition of the termination of Dominion's must-purchase obligation. See N.C. Gen. Stat. §§ 62-156(a) ("...the commission shall require the utility to purchase the power...") and 62-156(m). By its application, the Applicant proposes to sell the electric output from its facility to Dominion, to one or more retail customers in deregulated states that allow for such sales, or into the PJM market. Lastly, Commission Rule R8-64 requires

² Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

³ New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities, FERC Order No. 688, FERC Stats. & Regs. ¶ 31,233 (2006).

⁴ See Virginia Electric and Power Company, 124 FERC ¶ 61,045 (2008).

no specific showing of need because that need is presumed given the right of the QF to require the interconnecting utility to purchase its output pursuant to 16 U.S.C. § 824a-3 and N.C.G.S. 62-156. Therefore, the Chairman further concludes that the Applicant has not proposed to sell electric power to Dominion pursuant to either 16 U.S.C. 824a-3(a)(2) or N.C.G.S. § 62-156, and that the Applicant erred in applying for a CPCN pursuant to Commission Rule R8-64.

In addition, the Chairman concludes that Commission Rule R8-63 is the rule governing the present application. Commission Rule R8-63 applies to “any person seeking to construct a merchant plant in North Carolina.” Commission Rule R8-63(a)(1). A “merchant plant” is “an electric generating facility, other than one that qualifies for and seeks the benefits of 16 U.S.C. § 824a-3 or G.S. § 62-156, the output of which will be sold exclusively at wholesale and the construction cost of which” would not be eligible for inclusion in a public utility’s rate base. Commission Rule R8-63(a)(2). The primary difference between Rule R8-63 and Rule R8-64 is the required contents of the application: Commission Rule R8-63(b) requires pre-filing of direct testimony, including “a description of the need for the facility in the state and/or region, with supporting documentation,” but Commission Rule R8-64(b) omits a similar requirement. The intent underlying the different filing requirements was two-fold: (1) to provide the Commission with evidence of the need for the proposed merchant plant facility under Rule R8-63, and (2) to streamline the application process under Rule R8-64, where, again, the need for the facility was presumed based on the requirements of 16 U.S.C. § 824a-3 or G.S. § 62-156.

The Chairman notes that the Applicant initially filed its application for a CPCN in September 2015, and subsequently sought to amend the site layout included in the application in September 2016. Most recently, on November 12, 2018, the Applicant requested a further amendment to the application, reflecting the removal and addition of certain parcels of land from the site of the proposed facility. The Chairman understands that during the interim period between filing the initial application and the subsequent amendments, the Applicant has undertaken significant efforts and expense in preparing the amended application and attempting to resolve the complaints filed in this proceeding. In light of the significant time that has passed and the effort and expense that the Applicant has incurred to date, the Chairman will treat the amended application as an application for a CPCN pursuant to Commission Rule R8-63, and undertake appropriate administrative actions to implement this determination. First, the Chairman will direct the Chief Clerk to transfer the entire record in Docket No. SP-6476, Sub 0, to Docket No. EMP-103, Sub 0, and to close Docket No. SP-6476, Sub 0. The complaints filed in Docket No. SP-6476, Sub 0 will remain pending in Docket No. EMP-103, Sub 0, and the persons who submitted these complaints remain entitled to a hearing. Second, the Chairman finds that the Applicant’s application, as transferred to Docket No. EMP-103, Sub 0, is incomplete because the Applicant did not include pre-filed direct testimony required pursuant to Commission Rule R8-63(b)(5).⁵ Therefore, the Chairman will afford the

⁵ In addition, the Applicant no longer benefits from the provisions of Commission Rule R8-63(b)(8) and will be required to obtain counsel in this proceeding. This would have been required in any event, as the Commission would have scheduled a public hearing based on the complaints filed in Docket No. SP-6476, Sub 0.

Applicant an opportunity to supplement its application by appropriate filing in Docket No. EMP-103, Sub 0, and to obtain counsel in this proceeding. Finally, after the Applicant supplements its application and the Applicant's counsel has made an appearance on behalf of the Applicant, the Commission will receive the Public Staff's recommendation required by Commission Rule R8-63(d) in Docket No. EMP-103, Sub 0, and then proceed to deliver a copy of the amended application to the Clearinghouse Coordinator in the Department of Administration for distribution to state agencies having an interest in the proposed facility, schedule a hearing on this matter, require public notice, and otherwise proceed appropriately in consideration of the Applicant's application for CPCN.

IT IS, THEREFORE, ORDERED as follows:

1. That the amended application for a CPCN filed by Albemarle Beach Solar, LLC, in Docket No. SP-6476, Sub 0, on November 12, 2018, shall be, and the same is hereby, declared to be an application for a CPCN for the construction of an electric generating facility that will be operated as a merchant plant within the scope of Commission Rule R8-63;

2. That Docket No. EMP-103, Sub 0, shall be, and the same is hereby, established as a proceeding for considering the application for CPCN filed by Albemarle Beach Solar, LLC, to construct a 80-MW solar PV electric generating facility that will be operated as a merchant plant in Washington County, North Carolina;

3. That the Chief Clerk shall transfer the entire record in Docket No. SP-6476, Sub 0, to Docket No. EMP-103, Sub 0, and close Docket No. SP-6476, Sub 0;

4. That all complaints filed in Docket No. SP-6476, Sub 0, remain pending before the Commission in Docket No. EMP-103, Sub 0; and

5. That, after Albemarle Beach Solar, LLC, has supplemented its application and counsel for Albemarle Beach Solar, LLC, has made an appearance in Docket No. EMP-103, Sub 0, the Commission will proceed appropriately to consider the amended application for a CPCN pursuant to Commission Rule R8-63.

ISSUED BY ORDER OF THE COMMISSION.

This the 29th day of November, 2018.

NORTH CAROLINA UTILITIES COMMISSION



Janice H. Fulmore, Deputy Clerk