STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1220

In the Matter of Williams Solar, LLC, Complainant, v. Duke Energy Progress, LLC Respondent.	)))))))	**WILLIAMS SOLAR LLC'S POST-HEARING MEMORANDUM OF LAW**

PROCEDURAL HISTORY AND FACTS

Williams Solar, LLC incorporates by reference the procedural history and findings of fact set forth in its Proposed Order. Specific facts relevant to the legal analysis are set forth below.

ARGUMENT

Duke Energy Progress, LLC ("DEP") breached its duty of good faith with respect to its obligation to provide costs estimates to Williams Solar for interconnection facilities and upgrades necessary to complete the interconnection of Williams Solar's solar facility to the DEP grid. As detailed below, it did so by providing estimates to Williams Solar that DEP knew were inaccurate products of a fatally flawed estimating process in which uncontrolled construction costs are simply passed on to solar developers as another means to thwart interconnection.

I. DEP owed Williams Solar a duty of good faith with respect to its provision of interconnection facilities and upgrade estimates.

In providing interconnection facilities and upgrade estimates to Williams Solar, DEP owed Williams Solar a duty of good faith and fair dealing arising from (a) the contractual relationship between DEP and Williams Solar; and (b) the NC Procedures. Indeed, while this appears to be a question of first impression for the Commission as it relates to the interconnection process, DEP has never denied that it owed Williams Solar a duty of good faith and fair dealing. *See, e.g.*, DEP Answer ¶¶ 35-36.

A. DEP's contractual duty of good faith and fair dealing

The performance and delivery of the system impact study report and the facilities study report is governed by the Commission-prescribed form agreements that impose both express and implied obligations on DEP with respect to the upgrade estimating process—including an implied duty of good faith.

On September 8, 2016, the parties executed a System Impact Study Agreement, which specifically stated that the "validity, interpretation and enforcement of this Agreement and each of its provisions shall be governed by the laws of the State of North Carolina." *See* JB Rebuttal Ex. 1 ¶ 22. *See also* Tr. Vol. 1, p. 23; Williams Solar Complaint, ¶ 14; DEP Answer ¶ 8.[1] This

[1] The System Impact Study Agreement proffered by DEP for execution by Williams Solar was identical to the form agreement adopted and mandated by the Commission in its 2015 order in the generic interconnection procedures docket. *See* Order Approving Revised Interconnection Standard, Docket No. E-100, Sub 101 (May 15, 2015), at Attachment 7 to North Carolina Interconnection Procedures, Forms, and

agreement governed the terms under which the System Impact Study report would be prepared, and it imposed affirmative obligations on DEP to prepare a report that met certain standards.

The System Impact Study Agreement required, among other things, that DEP examine "the feasibility of any interconnection at a proposed project site," "a short circuit analysis, a stability analysis, a power flow analysis, voltage drop and flicker studies, protection and set point coordination studies, and grounding reviews," and "an analysis of distribution and transmission impacts as may be necessary to understand the impact of the proposed Generation Facility on electric system operation." *Id.* ¶¶ 4-10. The System Impact Study Agreement further required DEP to provide the Preliminary Estimated Upgrade Charge, a "preliminary indication of the cost and length of time that would be necessary to correct any System problems identified in those analyses and implement the interconnection," (*id.* ¶ 12.0), and a Preliminary Estimated Interconnection Facilities Charge, a preliminary indication of the cost and length of time that would be necessary to provide the Interconnection Facilities (*id.,* ¶ 13.0). The Agreement specifies that the system impact study shall be performed "consistent with the North Carolina Interconnection Procedures." *Id.*, ¶ 2.0.

On February 25, 2019, the parties executed the Facilities Study Agreement, which governed the preparation of the Facilities Study. *See* Burke

---

Agreements.

Ex. JB-3.[2] It also contained a choice-of-law provision stating that the "validity, interpretation and enforcement of this Agreement and each of its provisions shall be governed by the laws of the State of North Carolina." Burke Ex. JB-3 ¶ 11.

The Facilities Study Agreement required DEP to "estimate the cost of the equipment, engineering, procurement and construction work (including overheads) needed to implement the conclusions of the system impact studies," to identify "the electrical switching configuration of the equipment, including, without limitation, transformer, switchgear, meters, and other station equipment," and to analyze "the nature and estimated cost of the Utility's Interconnection Facilities and Upgrades necessary to accomplish the interconnection." *Id.* ¶ 4.

Under North Carolina law, "[e]very contract in our State contains an implied covenant of good faith and fair dealing which works to prevent any party to a contract from doing anything to destroy or injure the right of the other party to receive the benefits of the contract." *Howse v. Bank of Am., N.A.*, 255 N.C. App. 22, 37, 804 S.E.2d 552, 562 (2017) (citing *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56-57, 607 S.E.2d 286, 291 (2005)). Given that both the System Impact Study Agreement and the Facilities Study

[2] The Facilities Study Agreement proffered by DEP for execution by Williams Solar was identical to the form agreement adopted and mandated by the Commission in its 2015 order in the generic interconnection procedures docket. *See* Order Approving Revised Interconnection Standard, Docket No. E-100, Sub 101 (May 15, 2015), at Attachment 8 to North Carolina Interconnection Procedures, Forms, and Agreements.

Agreement expressly incorporate North Carolina law, each of these agreements is subject to this implied duty. Therefore, in addition to the express obligations set forth in the System Impact Study Agreement and the Facilities Study Agreement, these contracts imposed on DEP an implied duty to ensure that in preparing the studies it did not engage in conduct that would effectively rob Williams Solar of the benefit of the agreements. *See Howse*, 255 N.C. App. at 37, 804 S.E.2d at 562. In other words, Williams Solar had the right to expect that it would receive true and honest estimates under these agreements, and DEP cannot contend that it has satisfied the requirements under these agreement by "going through the motions" and preparing and delivering documents it called "estimates" but which do not project interconnection costs in good faith.

B. DEP's duty of good faith under the NC Procedures

In addition to the parties' agreements, the North Carolina Interconnection Procedures (both the 2015 and 2019 versions; the "NC Procedures") also impose a duty of good faith on DEP in its treatment of Williams Solar with respect to interconnection costs.

For example, Section 2.2.1.2 of the NC Procedures requires that "the Utility will provide the Interconnection Customer a non-binding good faith estimate of the cost of interconnection."). The same is true if the project is eligible for the "Fast Track Process" detailed in the NC Procedures. *See id.* § 3.2.2.2 ("[T]he Utility will provide the Interconnection Customer a non-binding

good faith estimate of the cost of interconnection. . . ."); *id.* § 3.2.2.5 (same); *id.* § 3.3.1 ("[T]he Utility shall: . . . [o]ffer to perform facility modifications or minor modifications to the Utility's System (e.g., changing meters, fuses, relay settings) and provide a non-binding good faith estimate of the limited cost to make such modifications to the Utility's System.").

While these provisions do not directly apply to the System Impact Study Report or the Facilities Study, they make clear that embedded in the NC Procedures is an obligation of good faith on the part of DEP that comes with its effective and practical control of the mechanics of the interconnection process. Similar to the implied duty for contracts under North Carolina, the Commission expects that public utilities subject to its jurisdiction will discharge their obligations under Commission orders with earnest diligence. The Commission fairly expects that utilities will honor the letter and spirit of its regulations and not simply feign compliance or go through the motions in such a way that undermines the reason for the regulation in the first place. Accordingly, the NC Procedures are properly read to confirm that the Commission expects that DEP will manage the interconnection process—including any associated construction estimates—in good faith.

Again, DEP has not disputed its obligation of good faith. *See, e.g.*, DEP Answer ¶¶ 35-36; Tr. Vol. 2, pp. 154-64, 180 (discussing whether DEP acted in good faith).

II. DEP breached its duty of good faith with respect to its provision of facilities and upgrade estimates.

A. The legal standard

Good faith is defined as:

> [a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.

Evans v. Neill, 217 N.C. App. 195, 719 S.E.2d 255, 2011 WL 5542875 at *2 (2011) (unpublished) (quoting BLACK'S LAW DICTIONARY (7th ed.1999)). On cross examination, DEP's lead witness, Ken Jennings, the General Manager of Renewable Integration and Operations, conceded that this was a "good definition" of "good faith." Tr. Vol. 3, pp. 37-38.

By contrast, "'[bad faith] implies a false motive or a false purpose, and hence it is a species of fraudulent conduct. Technically, there is, of course, a legal distinction between bad faith and fraud, but for all practical purposes bad faith usually hunts in the fraud pack.'" *Shannon v. Testen*, 243 N.C. App. 386, 390, 777 S.E.2d 153, 156 (2015) (quoting *Bundy v. Commercial Credit Co.*, 202 N.C. 604, 163 S.E. 676, 677 (1932)).

DEP's obligation of good faith is analogous, under the unique circumstances here, to those owed by a fiduciary who has superior knowledge and information that could be used to the detriment of the other party.[3] Under

[3] Williams Solar's claims do not depend on the Commission finding that DEP owed Williams Solar a fiduciary duty, and Williams Solar does not request such a finding.

North Carolina law,

> A fiduciary relationship exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. . . .
>
> Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen.

S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, 189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008) (quotations and citations omitted).

The facts established at the hearing confirm that, with respect to the interconnection and upgrade process, DEP "held all the cards" in terms of "financial power or technical information." DEP enters into the contract with the third party contractor; DEP is in complete control of the vendor relationship and does not share any information about the relation with Williams Solar; and DEP does not share any information concerning the work being done other than the estimates in question here and a final bill once the work is complete. Williams Solar, like other solar developers, is at the mercy of DEP to get interconnected in a timely, economical fashion. DEP controls the interconnection process, while, at the same time, it is a competitor in the development of solar power. Tr. Vol. 4, pp. 111-12 ("It is important to

---

North Carolina law on fiduciary duty is instructive, however, on the nature and extent of DEP's duty of good faith and fair dealing.

acknowledge that Duke is a 'competitor' in this space—both in terms of its own generation facilities, regardless of fuel type, and in terms of its competitive solar investments.").

Moreover, DEP provides no financial transparency to developers like Williams Solar, even when asked. In this case, on two occasions Williams Solar was simply presented with an estimate of upgrade costs. Even though DEP knew that Williams Solar's success as a business depended in large part on understanding and managing those upgrade costs, DEP provided no data to support the estimates; it provided no information on historical costs; it provided no disclosure of DEP's ongoing analysis of upgrade estimates. *See* Burke Ex. JB-6 (July 31, 2019 DEP email response stating that, with regard to Williams Solar's request for a "detailed cost break down," DEP "cannot provide this level of detail"). Finally, given that the solar developer is contractually required to pay for all interconnection and upgrade costs, DEP has little incentive to control interconnection and upgrade costs charged to developers, and, more important, the undisputed evidence shows that DEP has done almost nothing in fact to control those costs. Remarkably, DEP's Ken Jennings testified that DEP "just recently developed tools for that" and that actually monitoring the costs is "still a challenge" because of the short project life cycle. *See* Tr. Vol. 4, pp. 76-77. The costs were simply passed through to the developers.

Under these circumstances, DEP owes Williams Solar a legal duty of transparency and honesty that goes beyond what it might owe a typical counter-party to a contract. *Cf.* In the Matter of Investigation Regarding the Approval & Closing of the Bus. Combination of Duke Energy Corp. & Progress Energy, Inc., Docket No. E-7, Sub 1017, 2012 WL 6511117 (Dec. 12, 2012) ("The integrity of the Commission to carry out its statutory mandate relies on the openness and honesty of the regulated public utilities, and in granting a public utility a monopolistic franchise, a presumption is created between the parties that a public utility will not engage in fraud, deception, or misrepresentation." (citing *J.P. Morgan Ventures Energy Corp.*, 140 FERC ¶ 61,227 (Sept. 20, 2012)).

DEP contends that its obligation of good faith may be acquitted simply by not engaging in outright fraud. Ken Jennings testified that, in his opinion, "the opposite of 'good faith' is 'bad faith'" and that "'bad faith' typically involves some level of intentionality—a specific intent or motive to harm or deceive." Tr. Vol 2, p. 52. Even assuming his understanding of "bad faith" is correct, the evidence detailed below establishes that DEP knew that its estimating process was broken and yet continued providing estimates to Williams Solar and others that it knew were inaccurate and unreasonable.[4]

[4] To conclude that DEP failed to act in good faith, the Commission need not determine that any particular DEP employee acted in bad faith. In this case, the overall circumstances and DEP's conduct on the whole demonstrate that it failed to act in good faith.

Moreover, DEP points to no legal authority for the proposition that a party's conduct must reach the level of fraud to breach a duty of good faith. As detailed above, absence of fraudulent intent is just one way (out of four) to breach a duty of good faith. *See Evans*, 2011 WL 5542875 at *2 (quoting BLACK'S LAW DICTIONARY).

B. DEP breached its duty of good faith in providing the System Impact Study estimate to Williams Solar.

The System Impact Study Agreement imposed numerous express and implied duties on DEP with respect to its preparation of the System Impact Study Report and associated facilities and upgrade estimate. The System Impact Study Agreement's express requirements include:

> 6.1 The System Impact Study Report shall provide the following analyses for the purpose of identifying any potential adverse system impacts that would result from the interconnection of the Generating Facility as proposed:
>
> 6.2 Initial identification of any circuit breaker short circuit capability limits exceeded as a result of the interconnection;
>
> 6.3 Initial identification of any thermal overload or voltage limit violations resulting from the interconnection;
>
> 6.4 Initial review of grounding requirements and electric system protection.
>
> 7.0 The System Impact Study shall model the impact of the Generating Facility regardless of purpose in order to avoid the further expense and interruption of operation for reexamination of feasibility and impacts if the Interconnection Customer later changes the purpose for which the Generating Facility is being installed.
>
> 8.0 The study shall include the feasibility of any interconnection at a

proposed project site where there could be multiple potential Points of Interconnection, as requested by the Interconnection Customer and at the Interconnection Customer's cost.

9.0 A System Impact Study shall consist of a short circuit analysis, a stability analysis, a power flow analysis, voltage drop and flicker studies, protection and set point coordination studies, and grounding reviews, as necessary.

10.0 The System Impact Study will also include an analysis of distribution and transmission impacts as may be necessary to understand the impact of the proposed Generation Facility on electric system operation.

11.0 A System Impact Study shall state the assumptions upon which it is based, state the results of the analyses, and provide the requirement or potential impediments to providing the requested interconnection service.

12.0 The System Impact Study will provide the Preliminary Estimated Upgrade Charge, which is a preliminary indication of the cost and length of time that would be necessary to correct any System problems identified in those analyses and implement the interconnection.

13.0 The System Impact Study will provide the Preliminary Estimated Interconnection Facilities Charge, which is a preliminary indication of the cost and length of time that would be necessary to provide the Interconnection Facilities.

14.0 A system impact study shall provide the information outlined in Section 1.2.3 of the Interconnection Procedures.

15.0 A distribution System Impact Study shall incorporate a distribution load flow study, an analysis of equipment interrupting ratings, protection coordination study, voltage drop and flicker studies, protection and set point coordination studies, grounding reviews, and the impact on electric system operation, as necessary.

See JB Rebuttal Ex. 1.

Underlying these express requirements is the implied duty taken on by DEP that the System Impact Study Report would be prepared in good faith and would not be knowingly inaccurate.

i. DEP admits that it knew the System Impact Study estimate was not accurate.

It is undisputed that DEP knew at the time it sent Williams Solar its System Impact Study in January 2019 that its upgrade estimate was substantially inaccurate, as least based on DEP's own analysis. It is also undisputed that, despite this knowledge, DEP never told Williams Solar or any industry group that might have reported to Williams Solar that DEP believed its own estimating process to be badly flawed and that it was in the midst of revamping that process to produce estimates that would increase by approximately 100%.

A timeline, based on the evidence established at the hearing, makes these dispositive facts clear:

- First quarter of 2018: DEP became aware that the experienced costs of constructing completed interconnection facilities and system upgrades coming online in the fourth quarter of 2017 had greatly exceeded the estimates provided to interconnection customers. DEP began an analysis of the issue that continued throughout 2018 and into 2019. *See* Burke Ex. JB-9, p. 28; Tr. Vol. 2, p. 175.

- Late 2018: DEP had developed a preliminary version of a new estimating tool to develop estimates in connection with Facilities Studies. However, DEP did not revise or update the cost estimating data used to generate estimates in connection with System Impact Studies during at least the four years from January 2015 to December 2018. Tr. Vol. 2, pp. 175-76.

- January 28, 2019: DEP transmitted to Williams Solar a System Impact Study Report dated December 20, 2018. In this Report, DEP notified Williams Solar that certain System Upgrades costing an estimated $774,000 and Interconnection Facilities costing an estimated $60,000 would be required in order to effectuate the requested interconnection. *See* Burke Ex. JB-2.

- First Quarter 2018 through July 30, 2019: DEP did not inform Williams Solar that DEP's recent experience showed that the actual costs incurred for interconnection construction projections were significantly higher than DEP's cost estimates; did not inform Williams Solar about DEP's investigation into such cost discrepancies or that DEP intended to revise its cost estimating methodology; and did not inform Williams Solar of the fact that DEP's System Impact Study cost estimating tool had not been updated for at least four years. Tr. Vol. 4, p. 109.

In short, DEP knew for at least nine months before it sent the Williams Solar System Impact Study in January 2019 that its upgrade estimates were substantially lower than the actual costs DEP claims it was experiencing. But DEP said nothing, even as it ultimately provided the System Impact Study estimate to Williams Solar with the acknowledgment and understanding that Williams Solar would rely on the estimate "for a decision to be made whether or not to continue moving forward with the project for the final costs or to withdraw. " Burke Ex. JB-1; *see also* Tr. Vol. 4, p. 109 ("Duke had multiple venues and opportunities over the eighteen-month period of time to make stakeholders aware of its concern, but it chose not to do so."). As Jon Burke testified:

> GreenGo relies on the results of the SIS as an important proxy of potential economic viability in determining whether to proceed with a specific project or divert time and resources to others with greater likelihood of economic viability/success. That

> is how GreenGo used the Williams Solar SIS cost estimate in its decision making process on allocation of development capital.

Tr. Vol. 1, p. 26.

Williams Solar's expert, Charles Bolyard, confirmed the reasonableness of relying on the initial estimate to make important business decisions.

> The purpose of an early project estimate is to provide the project developer a reliable and reasonable basis for evaluating the viability of the project and making an informed investment decision as to whether to move forward to the next step in project development. Stated another way, it would serve no purpose—and would be actively harmful to the project developer—to provide an early estimate that was completely without basis and that the estimator knew was unreasonable and unreliable.

Tr. Vol. 2, p. 55.

As detailed in the direct testimony of Jon Burke, Williams Solar did in fact rely on DEP's initial estimate and made the decision to move forward with the project. During the period from January 28, 2019, through July 30, 2019, Williams Solar spent $56,213.80, primarily in furtherance of obtaining certain property rights necessary for the project. Tr. Vol. 1, p. 35.

These facts establish that in providing the System Impact Study estimate that it knew was inaccurate, DEP failed to act with "honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage," as required by North Carolina law. *Evans*, 217 N.C. App. 195, 719 S.E.2d 255,

2011 WL 5542875 at *2.

C. DEP breached its duty of good faith in providing a Facilities Study estimate to Williams Solar that contravenes industry standards for estimates of this nature.

Like the System Impact Study Agreement, the Facilities Study Agreement between the parties imposed on DEP both express and implied duties with respect to its preparation of the facilities and upgrade estimate associated with the Facilities Study. Among the express duties[5]:

> 4. The facilities study shall specify and estimate the cost of the equipment, engineering, procurement and construction work (including overheads) needed to implement the conclusions of the system impact studies. The facilities study shall also identify (1) the electrical switching configuration of the equipment, including, without limitation, transformer, switchgear, meters, and other station equipment, (2) the nature and estimated cost of the Utility's Interconnection Facilities and Upgrades necessary to accomplish the interconnection, and (3) an estimate of the construction time required to complete the installation of such facilities.
>
> If the study is for a Project B, the study shall assume the interdependent Project A is interconnected.
>
> 5. The Utility may propose to group facilities required for more than one Interconnection Customer in order to minimize facilities costs through economies of scale, but any Interconnection Customer may require the installation of facilities required for its own Generating Facility if it is willing to pay the costs of those facilities.

[5] It should be noted that in addition to breaching its implied duty of good faith, DEP also breached the express terms of the System Impact Study and Facilities Study agreements. For example, DEP agreed to complete the Facilities Study within 45 days of its receipt of the Facilities Study Agreement. *See* Burke Ex. JB-3 ¶ 7. That agreement was signed on February 25, 2019, and the study was not completed for more than five months.

6. A deposit of the good faith estimated facilities study cost is required from the Interconnection Customer. If the unexpended portion of the Interconnection Request deposit made for the Interconnection Request exceeds the estimated cost of the facilities study, no payment will be required of the Interconnection Customer.

7. In cases where Upgrades are required, the facilities study must be completed within 45 Business Days of the Utility's receipt of this Agreement, or completion of the Facilities Study for an Interdependent Project A whichever is later. In cases where no Upgrades are necessary, and the required facilities are limited to Interconnection Facilities, the facilities study must be completed within 30 Business Days. The period of time for the Utility to complete the Facilities Study shall be tolled during any period that the Utility has requested information in writing from the Interconnection Customer necessary to complete the Study and such request is outstanding.

See Burke Ex. JB-3.

On June 30, 2019, at the conclusion of its 18-month investigation and analysis of its upgrade estimates, DEP sent Williams Solar the result of its Facility Study, which—at least in theory—represented a much more detailed engineering study of the Williams Solar project.[6] Burke Ex. JB-4. In a two-page email with no elaboration, DEP informed Williams Solar that the System Upgrades identified in the System Impact Study would cost an estimated $1,388,274.26 and the Interconnection Facilities identified in the System Impact Study would cost an estimated $196,495.13. The revised estimate was, in total, nearly 90% higher than the initial estimate of $834,000 just six

[6] As discussed below, the evidence shows that the reason for this substantial difference in cost estimates was mostly due to DEP's new estimating tool which was adopted for the sole purpose of driving up the output of its estimates. The difference had nothing to do with "detailed engineering studies."

months earlier.

In contrast to the detailed System Impact Report provided to Williams Solar, the two-page email constituting the "Facilities Study Report" was bereft of any back-up supporting information, including any studies or analyses forming the basis for the report.

The increased estimate was surprising to Williams Solar, especially given that there had been no change in any of the project technical specifications, no change in its location or point of interconnection, and no change in applicable interconnection standards (at least none that had been communicated to Williams Solar). Immediately upon receipt of the revised estimate, Williams Solar personnel asked for additional explanation. The answer they received from DEP was an intentional half-truth. According to Burke (citing Burke Ex. JB-6):

> DEP responded on July 31, 2019, confirming that the scope of work to be completed had not changed but stating with regard to the request for a "detailed cost break down" that DEP "cannot provide this level of detail." DEP stated with regard to the reasons for the increase that
>
> > After several true-ups that we have conducted on similar projects, we have found the initial costs that were provided historically (both ballpark costs, and detailed estimates) to be significantly underestimated.

As Bolyard further explained:

> DEP did not identify any differences in scope of work from the Initial Estimate and confirmed by e-mail on

> July 31, 2019, that "[t]he scope of work has not changed." Exhibit CEB-11. Typically, one would expect that revisions in cost estimates would be driven by changes in the project design and scope, as it is quite common for projects to evolve over time or to be more or less complicated than originally envisioned. Where the scope does not change, one would expect that the revised estimate would be very similar to the original estimate.

Tr. Vol. 2, p. 60.

Bolyard's testimony shows the duplicity of DEP's response to Williams Solar. While DEP's response does signal, for the first time, a concern that its "actual" costs were not aligning with its estimated costs, the response does not disclose that the revised estimate was the product of an entirely new estimation tool—applied for the first time to the Williams Solar project[7]—which relied on a series of multipliers to generate higher estimates. Rather, the response incorrectly implies that the revised estimate was a careful consideration of the costs to be incurred in connection with the Williams Solar project. The evidence adduced at hearing shows that this implication was false.

i. The flawed Revised Estimating Tool

The evidence established that DEP created the Facilities Study Estimate by designing the necessary facilities and then generating associated work orders in Maximo, an industry standard construction management software platform, which output a preliminary estimate of labor hours and

[7] Ex. CEB-15 (describing rollout of RET).

costs. Maximo estimated that the System Upgrades identified in the System Impact Study would cost an estimated $679,419.31, including 4,580.43 labor hours and materials costs of $167,693.47, and the Interconnection Facilities identified in the System Impact Study would cost an estimated $61,246.82, including 213.69 labor hours and materials costs of $37,395.81. Ex. JB-13, p. 7. The total Maximo estimate was less than the System Impact Study Estimate.

Bolyard testified that

> the cost data DEP had loaded into Maximo was out of date—i.e., four years old. Based on DEP's responses and documentation provided thus far, DEP was not updating the historical cost data in Maximo and its other cost estimating tools from its experience on actual interconnection construction projects. Instead, DEP's revised estimating tool essentially assumes that the data output by Maximo is not reliable.
>
> That the estimated costs DEP derives from Maximo are not reliable is supported by other documents provided in discovery. DEP internal communications from June 10, 2019, discussed research on estimate calculations in Maximo compared to what is "real world." June 10, 2019 DEP internal e-mail, attached as Exhibit CEB-19. The hourly labor rate used in Maximo was roughly based on 4 men and 2 trucks. Hours for each compatible unit (CU) was roughly based on Work Management Information System (WMIS) plus 20%, with WMIS based on a 3-man crew. Currently base crew size is 5 men but due to ramp up efforts in late 2017 and throughout 2018 crews were generally 6 men including a foreman with 2 bucket trucks, 1 line truck and 1 pick-up truck. DEP concludes the communication stating, "[T]his would explain the estimates from Maximo being nearly 50% below the

> actuals. The labor cost is the largest contributing factor in the overrun. This looks to be an opportunity within our Maximo program that needs to be addressed as soon as possible." More problematically, rather than fixing the underlying Maximo data, DEP put together the RET to simply multiply the Maximo output by certain factors.

Tr. Vol. 2, pp. 65-66.

The labor hour and cost data output by Maximo were then entered manually into a spreadsheet based tool referred to as the "Revised Estimating Tool." The Revised Estimating tool applied a series of upward adjustments to the Maximo output, including (1) increasing the estimated labor hours by one-third; (2) adding a vehicle cost factor; (3) applying a 6% inflation factor; (4) increasing materials overheads from 17% to 48.75%; (5) applying a 20% contingency to the total of labor, vehicle, and materials costs (including materials overheads); and (6) applying a 25% overhead charge to all costs other than materials costs and materials overheads, but including the contingency on materials and materials overheads. The amount of the adjustments applied by the Revised Estimating Tool were not justified by any data, analyses or studies produced or put in evidence by DEP.

According to Bolyard:

> The problem with DEP's approach should be apparent. Maximo is a tool—which DEP apparently uses for its own network upgrades—that generates estimated costs by matching the various components of the project to a database of equipment costs, labor rates, expected labor time for specified activity, applicable taxes, and overheads. This is the way cost estimates should be performed—developing

> costs from the "bottom up." If labor rates or equipment costs change, then the appropriate approach is to go into the database and input cost data to reflect those updated rates. If the time associated with a specific task changes, then the database should also be updated accordingly.
>
> By contrast, what DEP did here was multiply the Maximo output (which, again, is apparently satisfactory for Duke's own purposes) by a series of mathematical multipliers solely to get to a higher number—i.e., a "top down" approach to estimating. DEP wanted the estimates to yield higher results, so it started from this premise and worked backward to find the "right" combination of multipliers that achieved the top line number they wanted. The effect of using blunt multipliers is that it divorces the estimation process from the specifics of the project in question.

Tr. Vol. 4, pp. 156-57.

ii. DEP's lack of cost control measures

DEP presented no evidence that it has taken any measures to control costs charged by its subcontractors in completing system upgrades. To the contrary, because of the unique nature of the interconnection process, DEP has no incentive to control the costs that will be charged to solar developers to interconnection because DEP is a competitor of those developers. Accordingly, from DEP's standpoint, higher costs charged to solar developers are a welcome obstacle to interconnection. *See* Tr. Vol. 4, pp. 115-16 ("For Duke, uncontrolled costs charged to solar developers for installation of interconnection facilities and system upgrades are a feature of the interconnection process, not a bug. Duke treats cost overruns as a mathematical exercise—how to add to estimates

so they match up with the overruns rather than trying to control costs in a prudent manner. ").

Astoundingly, when asked at hearing how DEP tracks spending on interconnection construction projects against budgeted amounts, DEP witness K. Jennings explained that DEP "just recently developed tools for that" and that actually monitoring the costs is "still a challenge" because of the short project life cycle. Tr. Vol. 4, pp. 76-77. Witness K. Jennings also explained that DEP is working with NCCEBA regarding cost controls—further admitting that no meaningful cost control measures are currently in place. Tr. Vol. 3, p. 36. This testimony supports a conclusion that the 2018 and earlier costs used to develop the RET may have been DEP's actual costs, but they do not represent *reasonable* costs of construction. Rather, the costs relied upon by DEP in developing the RET represent *uncontrolled* costs.

For example, the evidence indicates that, in creating its revised estimating tool, DEP initially imputed a guaranteed 60-hour work week on the part of its subcontractors, with a 50% "productivity rate" applied to those hours. *See* CEB Rebuttal Ex. 1, p. 17; Williams Solar Cross Ex. 4. While DEP testified that no such guarantee existed, *see* Tr. Vol. 3, pp. 56-60, that testimony was inconsistent with the draft revised estimating tool spreadsheets produced by DEP.

Given DEP's quasi-fiduciary obligations to Williams Solar resulting from its superior knowledge and information, *see infra* at 7-8, this failure to

implement the most basic cost controls renders DEP's entire approach to cost estimation suspect. Even if DEP were to adopt a methodology that was consistent with industry standards, if that methodology is wholly reliant on inputs which are inherently unreliable, the outputs will similarly be unreliable.

iii. DEP's unreasonable contingency factor

In calculating the revised estimate, DEP added a 20% contingency factor. Bolyard testified that this level of contingency was facially unreasonable.

> [B]ased on DEP's purported level of engineering design and site investigation performed prior to developing its Revised Estimate, I find 20% to be an excessive amount of contingency and would expect the contingency applied in the Revised Estimate to be significantly less than the 20% used by DEP.

Tr. Vol. 2, p. 48.

In fact, according to Bolyard, the purpose of the excessive contingency "appears to be merely a factor to increase the estimated costs rather than a true contingency." Tr. Vol. 4, p. 146.

iv. DEP's unreasonable assessment of "overhead" costs

The issue of overheads illustrates DEP's unreasonable approach to cost estimation, an approach that is transparently intended to drive up the estimated cost of interconnection. The RET increased the Interconnection Facilities estimate from $60,000 to $196,495.13, including additional "overhead" costs of $20,000—representing 15% of the total increase. Burke Ex.

JB-4, p. 1; Bolyard Ex. CEB-12, p. 8. The RET increased the System Upgrades estimate from $774,000 to $1,388,374.26, including $203,011.20 in overheads on labor, $74,064.61 in materials overheads, $11,299.60 in overheads on the contingencies applied to direct material costs and materials overheads.[8] Bolyard Ex. CEB-12, pp. 3-4, 7; see Tr. Vol. 2, p. 64 (witness Bolyard calculation of overheads relating to System Upgrades). In other words, 22% of the increase, net of taxes, was due to "overhead" costs.[9]

Williams Solar expert Bolyard testified that DEP's calculation of overheads in this manner was inappropriate.

> DEP's application of overhead expenses at the purported rate of 25% after the inclusion of "contingency" in its cost estimating process is contrary to industry custom and practice and unreasonably inflates the contingency. More particularly, DEP applied overhead to materials costs at the rate of 48.75%, then computed contingency at the rate of 20%, and further added another 25% of overhead to the contingency applied to materials costs. In addition, DEP's application of overheads to the estimated costs of work to be performed by DEP's contractors and/or subcontractors indicates the potential duplication of overhead costs charged by DEP to the

[8] To be sure, this is stated correctly. DEP's RET applied overheads on contingencies on overheads. Tr. Vol. 2, p. 64. This stacking of multipliers aptly illustrates the basic flaw of RET. It was not intended to produce a real estimate of costs; rather it was intended to produce a higher estimate.

[9] Although not directly in issue here, Williams Solar contests, and has disputed, DEP's imposition of sales tax on its "flow through" invoices rendered to solar developers at the completion of interconnection work. These impositions are not insubstantial. DEP apparently takes the position that sales tax is due under N.C. Gen. Stat. § 105-164.4(a)(9), which applies to separately stated charges billed to a customer for repair, maintenance and installation services or "contribution in aid of construction". Williams Solar questions whether the charges in issue fairly fall within this statute.

> Interconnection Customers for a project.

Tr. Vol. 2, pp. 71-72.

DEP contends that it may unilaterally impose "overhead" costs on Williams Solar, based on the Commission's January 17, 2017, REPS compliance report order, as well as the 2019 Interconnection Procedures Order. See Tr. Vol. 2, p. 184, n.18. Neither of these orders does what DEP contends.

In its 2017 REPS order, the Commission held that:

> DEP shall continue to refine its interconnection cost allocation procedures to ensure that interconnection costs are not recovered through the REPS rider charges and more interconnection costs are recovered from the developer or interconnection customer through Commission approved interconnection charges. DEP shall work with the Public Staff in making these refinements and shall submit a report on these efforts to the Commission no later than March 1, 2017, such that the information gathered can be utilized in future discussions or proceedings related to potential modifications of the North Carolina Interconnection Procedures in Docket No. E-100, Sub 101. In its future REPS rider applications, DEP shall be more transparent regarding the inclusion of costs as "other incremental costs" and shall file detailed worksheets and testimony explaining the discrete costs that the Company includes as "other incremental costs," listing separately labor and non-labor costs. The Public Staff shall continue to provide testimony discussing its review of those items in future REPS rider proceedings.

Order Approving REPS and REPS EMF Rider and REPS Compliance Report, Docket No. E-2, Sub 1109 (Jan. 17, 2017), at Decretal ¶ 2. In response to this order, Duke advised the Commission that both DEC and DEP would work with

the Public Staff to ensure "that more interconnection costs are recovered from the developer or interconnection customer through Commission-approved interconnection charges." Letter from Robert W. Kaylor, Docket Nos. E-100, Sub 101, E-2, Sub 1109, and E-7, Sub 1131 (March 1, 2017). With this letter, Duke provided the Commission an initial report "to be utilized in future discussions or proceedings related to potential modifications of the North Carolina Interconnection Procedures in Docket No. E-100, Sub 101." *Id.*

In other words, what DEP was directed to do, and what DEP promised to do, was to work with the Public Staff on a proposal, which would be considered by the Commission in connection with Docket E-100, Sub 101, for recovering these additional costs from Interconnection Customers. The order did not direct DEP to unilaterally impose these costs on the solar community without their opportunity to participate and without Commission oversight.

DEP also claims that the administrative charges were implemented "beginning April 1, 2018 after consultation with the Public Staff." *See* Tr. Vol. 2, p. 185. But that contention is more notable for what it does not say than what it does say. DEP presented no evidence concerning exactly what was discussed with the Public Staff, what was presented to the Public Staff for consideration, or what the Public Staff may have said response. Divorced from any factual support, DEP's reference to the Public Staff is entitled to no weight whatsoever. Moreover, whatever may have been discussed with the Public Staff, that discussion did not comport with the Commission's directive, and

Duke's corresponding promise, to make a formal proposal on the issue in Docket E-100, Sub 101.

DEP suggests that the Commission approved the assessment of overhead charges in its June 2019 interconnection procedures order but this contention is without basis. First, by its own testimony, DEP unilaterally imposed overhead charges beginning April 1, 2018, more than a year before DEP implies the Commission "approved" the charges. Tr. Vol. 2, p. 185. Second, while the order does have language directing DEP to seek to recover its costs from Interconnection Customers, this statement of policy should not have been read to endorse the unilateral imposition of new costs on Interconnection Customers outside of normal Commission processes. Certainly, the Commission did not have in front of it at that time the specific charges sought to be imposed by DEP, nor did it have any specific request from DEP to approve the imposition of overhead charges. Indeed, in this proceeding DEP's witnesses did not provide any information relating to overhead costs for interconnection requests for projects sized greater than 2 MW in the proceeding leading to the 2019 order. *See, e.g.*, Rebuttal Exhibit JWR-3, Rebuttal Testimony and Exhibits of Jeff Riggins, Docket E-100, Sub 101 (Jan. 8, 2019).

On February 28, 2020, Duke did provide the Commission with an Internet link to its Administrative Overhead and Commission Costs fee schedule—albeit in the context of a Commission-required report on

"interconnection-related expenses and revenues associated with fee-related work for the prior year" and without any request for action on the schedule. *See* Interconnection Fee-Related Work and Post-Commercial Operation Inspection Report, Docket No. E-100, Sub 101 (Feb. 28, 2020). It appears that this Internet link is the first time Duke provided the Commission any visibility into its newly minted "overheads" policy. But this list of overhead charges has no relationship to the seemingly random overheads charges added by the RET in this case, and it certainly cannot be used as any form of justification for the charges. In fact, DEP has produced no evidence in this proceeding to justify the imposition of these charges.

For DEP to now imply that the Commission has directed it to impose these charges when Duke has never sought approval of them, it has never submitted studies seeking to justify the charges sought, and the specific charges have never been before the Commission for approval, is misleading.[10]

Finally, under Section 4 of the Facilities Study Agreement signed by the parties: "The facilities study shall specify and estimate the cost of the equipment, engineering, procurement and construction work (*including overheads*) needed to implement the conclusions of the system impact studies." Burke Ex. JB-3 (emphasis added); *see also* 2015 NC Procedures at 5 ("The

[10] Williams Solar also submitted unrebutted evidence that DEP's overhead charges have no connection to reality. For example, DEP invoiced another GreenGo project $3,000 in "overhead" costs where the invoice states that DEP had incurred $242.50 in "study expenses," no overhead costs relating to any study, and $3,000.00 in unrelated and unexplained "Overhead Costs." JB Rebuttal Ex. 2.

Facilities Study specifies and estimates the cost of the equipment, engineering, procurement and construction work (including overheads) . . ."); *id.* § 4.4.4 (same).

Under well-settled canons of interpretation, the parenthetical "including overheads" applies only to "construction work," not to the other items in the preceding list. *See HCA Crossroads Residential Centers, Inc. v. N. Carolina Dep't of Human Res., Div. of Facility Servs., Certificate of Need Section*, 327 N.C. 573, 578, 398 S.E.2d 466, 469 (1990) ("By what is known as the doctrine of the last antecedent, relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding and, unless the context indicates a contrary intent, are not to be construed as extending to or including others more remote.").

In *HCA Crossroads*, the North Carolina Supreme Court applied that doctrine to the sentence: "The Department shall issue as provided in this Article a certificate of need with or without conditions or reject the application within the review period." The Court held that the modifier "within the review period" only applied to the last item in the list, i.e., "reject the application." *Id.*

Applying that doctrine here, DEP has been authorized by the Commission, for the purposes of the agreements in issue here, only to assess overheads for construction work, and not for "equipment, engineering, [or] procurement." DEP can point to no Commission order approving its attempted excessive and abusive overhead charges in issue here in its estimates, and its

effort to do so raises issues of equity vis-à-vis developers and ratepayers that remain unresolved by the Commission.

D. DEP defenses lack merit.

In response to Williams Solar's evidence of bad faith, DEP offers several defenses, each of which should be rejected.

i. There is no credible evidence the RET was based on an analysis of actual cost data.

DEP witnesses Ken Jennings and Scott Jennings both testified that the RET was the product of a "multivariate analysis" relating to actual costs, but neither witness was involved with its creation. Tr. Vol. 3, pp. 47, 65-68. Neither witness offered any explanation nor did DEP provide any evidence at the hearing substantiating the connection between the RET multipliers, any analysis of "actual" costs, or any connection between the Williams Project and these "actual" costs. Given this evidentiary failure, DEP's witnesses' unsupported statements should be given no weight. *See Brooks v. Austin Berryhill Fabricators, Inc.*, 102 N.C. App. 212, 219, 401 S.E.2d 795, 799 (1991) (holding that "conclusory testimony [was] insufficient to establish" factual contention). The Commission is not required to assume evidence not presented. DEP's failure to substantiate the basis for this tool, which is central to DEP's defense, is telling.

In any event, as described above, the "actual" cost data DEP claimed to rely on was the product of a process in which DEP did nothing to control costs and, instead, simply passed those costs on to developers. As Charles Bolyard

testified, the RET is an example of "garbage in, garbage out" cost analysis. Tr. Vol. 2, pp. 65-66, 71.

ii. DEP's treatment of other solar developers is irrelevant to Williams Solar's claim.

DEP argues that in its *overall* management of solar interconnection in North Carolina, DEP has acted in good faith, and, therefore, Williams Solar's *specific* claims in this case should be denied. To that end, DEP's Ken Jennings devoted a substantial portion of his testimony to extolling DEP's "nation-leading track record" of interconnecting solar projects. Tr. Vol. 2, p. 161. Of course, the issue in this proceeding is whether DEP acted in good faith with respect to its provision of construction estimates to Williams Solar, not whether DEP is doing an adequate job managing solar interconnection in North Carolina.[11]

When confronted in this case with evidence that DEP knowingly provided inaccurate estimates to Williams Solar, DEP claimed, essentially, that it was not acting in bad faith; it was just clueless. *See* Tr. Vol. 2, p. 175 ("While Williams Solar's witnesses are critical of the time it took to update its cost estimating methodologies, Duke did not have enough information at that

[11] Although, to be clear, the volume of recent formal complaints against DEP arising from the solar interconnection process, coupled with an examination of the interconnection queue reflecting that numerous projects have languished for years, indicates that substantial questions remain about DEP's management of the interconnection process. Similarly, it was demonstrated at hearing that Ken Jennings' presentation of data on the extent of Duke's record of achieving success interconnection in comparison to other states was cherry-picked in a misleading fashion. *See* Williams Solar Cross Exhibit 3; Tr. Vol. 3, pp. 9-11.

time to justify a substantial change in its interconnection cost estimating process.").

But DEP cannot have it both ways. As DEP itself proclaimed in its testimony, the company does have substantial experience with solar interconnection such that North Carolina is among the leading states. This experience was already established at the time Williams solar sought interconnection in 2016. Given this, it can hardly claim that it was writing on a blank slate when preparing Williams Solar's construction estimates. DEP's "ignorance" defense is an effort at rationalizing its substantial failings here.

iii. DEP's claim that the estimates are "non-binding" does not absolve the company of its obligation to act in good faith.

DEP also leans heavily on the "non-binding" nature of the estimates (DEP Answer at 2)[12], but the concomitant requirement of "good faith" detailed above (and not disputed by DEP) means that DEP must provide an estimate that is tethered to reality, not one that DEP knows for a fact is the product of a broken estimating process.

Indeed, while DEP attempts to split evidentiary hairs about whether it "knew" the System Impact Study estimate provided to Williams Solar was flawed, DEP witness Ken Jennings conceded on cross-examination that if DEP

[12] DEP also quotes from the 2019 version of the NC Procedures, which describe the System Impact Study estimate as "high level," but that language was adopted in June 2019, well after the System Impact Study estimate was provided to Williams Solar. Even if the 2019 NC Procedures applied here, they would not authorize DEP to provide estimates that it knew were inaccurate.

did, in fact, know the estimate was wrong that would constitute bad faith. Tr. Vol. 3, p. 41. Jennings also conceded that DEP's primary concern when it came to inaccurate estimates was making sure that actual costs lined up with the final estimates provided by DEP so that DEP would not risk any financial exposure if solar developers were unable to pay the final construction costs. Tr. Vol. 3, pp. 45-47.

As a result, DEP wholly ignored the fact that developers were making business decisions—and spending substantial funds—in reliance on DEP's knowingly inaccurate initial estimate. That willful ignorance is the definition of "bad faith." *See In re Taneja*, 743 F.3d 423, 435 (4th Cir. 2014) ("[Defendants] may not bury their heads in the sand, 'willfully turn[ ] a blind eye to a suspicious transaction[,]' and then expect to reap the benefits of the good faith defense.").

iv. The evidence contradicts DEP's contention that its initial estimate was simply a back-of-the-napkin calculation.

Despite DEP's contention to the contrary, the evidence offered at the hearing establishes that the construction estimate DEP provided to Williams Solar with the System Impact Study Report was, at least, a "Class 4" estimate as defined by the AACE International Cost Estimating Framework, not a "Class 5" estimate as DEP now argues.[13] Accordingly, DEP had an obligation

[13] To be clear, DEP offered no evidence that it applied or considered the AACE standards when it provided either the initial or revised estimates. Even assuming those standards are applicable, DEP's post-hoc reliance on them does not support its

to ensure that the estimate met certain standards of accuracy, an obligation that it ultimately breached.

Under the current AACE definitions (adopted on July 31, 2019), a Class 5 estimate is one that "may be prepared within a very limited amount of time and with little effort expended—sometimes requiring less than an hour to prepare. Often, little more than the proposed nominal kV and length over approximate alternate routes on large scale maps is known at the time of estimate preparation." *See* Jennings/Holmes Ex. 1, p. 8. According to the AACE, Class 5 estimates are also described as: "Ballpark, conceptual, gross, blue sky, back of envelope, high level, seat-of-pants, rough order of magnitude (ROM), idea study, indicative, scoping, prospect estimate, guesstimate, rule-of-thumb." *Id.*

By contrast, a Class 4 estimate is "typically used for project screening, determination of feasibility, concept evaluation, and preliminary budget approval. Typically, engineering is from 1% to 15% complete, and would comprise at a minimum the following: line capacity (kV), route topographic mapping with aerial photography, preliminary conductor and structure types with span lengths, and major environmental, community, regulatory and ROW concerns identified. In some cases, stakeholder consultation is in progress." *Id.* at 9.

First, the notion that the 21-page System Impact Study Report (Burke

---

legal position.

Ex. JB-2) meets the definition of a "Class 5" estimate is not credible and should be rejected by the Commission. That report indicates that DEP had, in fact, undertaken substantial analysis of the project's siting (*id.* at 6-7) and technical requirements (*id.* at 9-17), and it had identified in great detail what equipment would be required to make the proposed upgrades (*id.* at 9-10). Indeed, the Report itself indicates that it took more than four months to prepare (*id.* at 20).

Second, Williams Solar expert Charles Bolyard testified conclusively based on his extensive experience with industry estimation standards that the estimate prepared with the System Impact Study Report was "at least a Class 4 estimate." Tr. Vol. 4, p. 148. Mr. Bolyard has nearly 50 years' experience in construction management and estimating, including with respect to large-scale power generation projects (*see* Ex. CEB-1). DEP attempted to rebut this opinion with the testimony of an employee with project estimation experience, but that testimony was not compelling. Steven Holmes testified that he only gave the System Impact Study Report a "cursory review," and he conceded, on cross examination, that the System Impact Study estimate "may be a Class 4 [estimate] with exceptions." Tr. Vol. 2, pp. 278-279.

Finally, on its face, the System Impact Study estimate is not a "back-of-the-envelope" estimate intended for initial "ballparking" purposes. As shown above, the System Impact Report was the product of numerous detailed studies conducted using Williams Solar's actual project plans. Further, the evidence shows that the estimate was developed to give Williams Solar an initial

estimate of projected expenses so that it could make decisions about whether to proceed with the project.

As a Class 4 estimate, under the AACE's framework the System Impact Study estimate should have been, at most, too low by up to 30%. *See* Jennings/Holmes Ex. 1, p. 4. Instead, in comparison to the Facilities Study estimate provided to Williams Solar, DEP's initial estimate was too low by more than 90%, three times the limit of the range set by the AACE.

It should also be noted that, while DEP seeks to discard (and does not defend) the System Impact Study estimate, that estimate closely aligned with the estimate produced by the industry-standard Maximo software. Ex. JB-13, p. 7.

v. DEP cannot shift the blame to Williams Solar.

At hearing, DEP sought to excuse its deficient initial estimate by arguing that (1) Williams Solar knew that the initial estimate did not include all of the items of cost, and (2) when you exclude consideration of these items the difference between estimates was not that great. Tr. Vol. 2, pp. 180-81. This argument does nothing to help DEP. First, as discussed above, DEP knew that its estimates where erroneous at the time they were provided and it failed to exercise reasonable diligence to keep its data updated. This ends the inquiry.

Second, this mathematical example is highly misleading. The evidence shows that there was no expectation on the part of Williams Solar that more

than $300,000 of overheads had not been accounted for in the System Impact Study estimate. As to contingencies, while DEP witness Holmes conceded that an estimate like the System Impact Study estimate would typically have a contingency built into it, Tr. Vol. 4, pp. 8-9, the estimate in this case in fact included no contingency and DEP did not inform Williams Solar of that fact, Tr. Vol. 3, p. 119. Accordingly, Williams Solar would have had no reasonable expectation that additional contingency of nearly $200,000 had been excluded from the System Impact Study estimate.

III. The Commission has broad authority to grant the relief requested by Williams Solar.

Williams Solar has requested the following relief to remedy DEP's violations:

- A declaration that all upgrade estimates must be provided in good faith, which includes a requirement that any estimate of costs be based on commercially reasonable actual cost data (Tr. Vol. 1, pp. 52-53);

- A declaration that DEP failed to provide a good faith cost estimate to Williams Solar (*id.*; Verified Compl. at 9-10);

- An order requiring DEP to refund all charges incurred by Williams Solar in connection with the Facilities Study and an order accounting for all monetary losses caused by Respondent's breach of its obligation of good faith (Verified Compl. at 9-10);

- An order requiring DEP to promptly render a revised facilities study estimate capped at DEP's initial SIS estimate, adopting a rebuttable presumption that any actual costs exceeding 110% of the revised estimate are unreasonable, requiring DEP to provide an executable interconnection agreement with a projected in-service date within six months after posting of required funds, and requiring DEP to provide Williams Solar with a standard offer Power Purchase Agreement subject to preservation of the

economic benefits of the entire 15-year term afforded by HB 589 (Tr. Vol. 1, pp. 52-53); and

- Issuance of a penalty against DEP as allowed by N.C. Gen. Stat. § 62-310(a) (*id.*; Verified Compl. at 9-10).

The first two requests seek only declarations from the Commission, which are squarely within the Commission's authority to provide. It is undisputed that the Commission has the authority to determine how its own rules should be interpreted and whether those rules have been violated. *See* Order Adopting Procedures for Regulatory Condition Filings, Docket Nos. E-2, Sub 740; G-21, Sub 377; E-2, Sub 753 (Jan. 29, 2002) ("The Commission has plenary authority to order these procedures under its statutory authority to govern its internal affairs, to interpret its own orders, and to regulate public utilities . . . .").

A. The Commission has broad authority to provide relief other than compensatory damages.

The Commission possesses "such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or incident to the proper discharge of its duties." N.C. Gen. Stat. § 62-30. Further, the Commission has the "full power and authority to administer and enforce the provisions of [the Public Utilities Act], and to make and enforce reasonable and necessary rules and regulations to that end." N.C. Gen. Stat. § 62-31. Additionally, when acting in its judicial capacity, as it is in this proceeding, the Commission "shall be deemed to

exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law." N.C. Gen. Stat. § 62-60. Together, these grants provide the Commission broad power and authority to fashion appropriate relief in this proceeding given that it arises in the context of a complaint proceeding involving the Commission's judicial capacity, against a public utility, and involves the administration of rules and regulations duly adopted by the Commission to effectuate rights granted by the General Assembly under state law and delegated to this Commission under federal law.

While the Commission has previously concluded it does not have the legal authority to award compensatory damages, it does have the authority to (1) condition operation as a public utility upon making payments to compensate a local carrier for revenue lost through the improper routing of calls, *State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.*, 88 N.C. App. 153, 173, 363 S.E.2d 73, 84–85 (1987); and (2) order the payment of money owed under a Commission-approved tariff in order to enforce the tariff, *State ex rel. Utilities Comm'n v. Thrifty Call, Inc.*, 154 N.C. App. 58, 70, 571 S.E.2d 622, 631 (2002).

In other words, the Commission can mandate the payment of money in order to enforce its rules.

Furthermore, under N.C. Gen. Stat. § 62-314,

> If any public utility doing business in this State by its agents or employees shall be guilty of the violation of the rules and regulations provided and prescribed by the Commission, and if after due notice of such violation . . . *ample and full recompense for the wrong or injury done thereby to any person as may be directed by the Commission* shall not be made within 30 days from the time of such notice, such public utility shall incur a penalty for each offense of five hundred dollars ($500.00).

N.C. Gen. Stat. § 62-314 (emphasis added).

This statutory provision (or its predecessor) has only been considered by the courts on a handful of occasions, and those cases provide little guidance. However, in *Mayo v. W. Union Tel. Co.*, 112 N.C. 343, 16 S.E. 1006 (1893), the North Carolina Supreme Court held:

> In our opinion, for any violation of the rules prescribed by the commission, fixing the rates to be charged for transmission of messages by telegraph, the commission may cause notice to be served upon the companies or persons charged with such violation; and, upon a proper hearing before them, under such procedure as they may legally prescribe, they may ascertain and direct ample and full recompense to be made by the company, corporation, or person so offending against said rules, which recompense may be enforced by civil action, as prescribed in section 10.

Id. at 1008. *See also R.R. Comm'n v. W. Union Tel. Co.*, 113 N.C. 213, 18 S.E. 389, 389–90 (1893) (citing *Mayo*).

Taken together, *Thrifty Call* and Section 62-314 (and the cases interpreting its predecessor statute) make clear that if the Commission finds that DEP's failure to provide good faith estimates was a violation of

Commission rules, the Commission has broad authority to structure appropriate remedies for Williams Solar, short of awarding compensatory damages.

Williams Solar's third and fourth requests above are just such remedies. The evidence is overwhelming that Williams Solar was the victim of an upgrade estimating process that was broken in almost every way, and that DEP knew it was broken before it provided its initial estimate to Williams Solar. DEP knew that Williams Solar was making important business decisions on the basis of the initial estimate, and DEP knew that its initial estimate was substantially and materially inaccurate but said nothing to Williams Solar (or anyone else) about that fact.

DEP has failed to provide a cost estimate that satisfies basic obligations of good faith, and DEP has failed to control costs in such a way that actual observed costs cannot be assumed to be reasonable costs. The System Impact Study estimate was prepared using a methodology that should produce a valid estimate but was reliant on data that had not been updated and was inconsistent with actual costs observed by DEP. The Facilities Study estimate was the product of a flawed methodology that was intended primarily to generate a higher estimate—not to more fairly estimate costs. The only estimate that was generated using a valid methodology was the System Impact Study estimate. Furthermore, the evidence in this case shows that the SIS Estimate was substantially similar to the estimate produced by Maximo—the

tool used by DEP for its own internal purposes. Under these circumstances, the Commission should give Williams Solar the benefit of the bargain it struck with DEP when they signed the System Impact Study Agreement. DEP, not Williams Solar, should bear the risk of final upgrade costs being substantially higher than estimated in the System Impact Study Report.

Williams Solar's request for a power purchase agreement that preserves the economic benefits of N.C. Session Law 2017-192 (H.B. 589) is likewise appropriate. Under Section 1(c) of Session Law 2017-192, qualifying small power production facilities are eligible for grandfathered treatment under Docket No. E-100, Sub 140, but the "term of a power purchase agreement eligible for such rate schedules and terms and conditions pursuant to this section shall commence on September 10, 2018, and shall end on the date that is 15 years after the commencement date." DEP's conduct here has impaired Williams Solar's ability to achieve timely interconnection in accordance with the time frame established by H.B. 589, and therefore, it is appropriate for the Commission to give Williams Solar the benefits intended by that law.

Such remedies are completely consistent with the requirement of good faith imposed on DEP by its contracts and by the NC Procedures.

B. The Commission has broad authority to impose the requested penalties on DEP.

As to the penalties requested by Williams Solar, N.C. Gen. Stat § 62-310(a) provides:

> Any public utility which violates any of the

> provisions of this Chapter or refuses to conform to or obey any rule, order or regulation of the Commission shall, in addition to the other penalties prescribed in this Chapter forfeit and pay a sum up to one thousand dollars ($1,000) for each offense, to be recovered in an action to be instituted in the Superior Court of Wake County, in the name of the State of North Carolina on the relation of the Utilities Commission; and each day such public utility continues to violate any provision of this Chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the Commission shall be a separate offense.

Such penalties are authorized "for willful conduct in defiance of a Commission rule, order or regulation." *In Re Quality of Serv. Objectives for Local Exch. Tel. Companies*, Docket No. P-100, Sub 99, 2002 WL 31991560 (Dec. 27, 2002).

As detailed above, the NC Procedures have embedded throughout both an express and implied obligation of good faith with respect to construction estimates provided by DEP as part of the interconnection process. The evidence stablishes that DEP knowingly and willfully violated these duties under the NC Procedures.[14]

DEP's intent not to follow the Commission's requirement to provide a "good faith" estimate with regard to the SIS report can be inferred from (1) the amount of time between when DEP learned its estimates were too low in Q1 2018 to the Q1 2019 provision of the Williams Solar SIS report; (2) DEP's knowledge that Williams Solar would depend on the estimate; (3) DEP's

[14] The text of Section 62-310(a) is silent on the question of what level of intent is required to impose penalties, but that legal question is not determinative here, because the evidence establishes willfulness on the part of DEP

admitted failure to inform GreenGo or other developers about the inaccurate estimates; and (4) DEP's acknowledgements that it is supposed to act in good faith in performing its obligations under the NC Procedures.

As to the System Impact Study, DEP's violations began, as early as March 31, 2018 (end of Q1 2018). The violations were never rectified, meaning that DEP was in violation of its obligations for up to 898 days and counting (March 31, 2018 to present).

DEP's intent with regard to the Facilities Study report can be inferred from (1) its failure to control costs, meaning DEP lacked information on reasonable costs and instead based its new estimates on "actual" costs, i.e., whatever the contractor charged; (2) DEP's failure to use a recognized estimating methodology; and (3) the testimony of DEP witnesses that the RET is producing estimates that, on average, exceed the actual costs experienced by DEP, Tr. Vol. 4, p. 67. As to the Facilities Study report, DEP's violation began by July 30, 2019, and continues to today (412 days).

D. DEP's remedies arguments fail.

i. The NC Procedures' liability limitation provision has no application here.

DEP's Ken Jennings argues that Section 6.13 of the NC Procedures (Limitation of Liability) bars Williams Solar's claim for monetary relief because those procedures limit damages claims to any "direct damages." He is incorrect.

First, as detailed above, Williams Solar is not seeking compensatory (or

direct) damages in the sense that term is used by the courts.

Second, even if the monetary relief sought by Williams Solar were considered "damages," it would not be barred by the NC Procedures' liability limitation provision. Under North Carolina law, "direct damages" are defined as "the economic losses that usually or customarily result from a breach of contract." NC PATTERN JURY INSTRUCTION § 503.15; *see also First Nat'l Bank of Omaha v. Fed. Deposit Ins. Corp. for Coop. Bank*, No. 7:09-CV-191-FL, 2010 WL 11622677, at *4 (E.D.N.C. Apr. 27, 2010) ("Based on the common definitions of 'actual damages,' 'direct damages,' and 'compensatory damages,' it appears Congress used this phrasing to limit defendant's liability to only 'those damages, flowing directly from the repudiation, which make one whole, as opposed to those which go farther by including future contingencies such as lost profits and opportunities or damages based on speculation.'") (citation omitted).

In this case, Williams Solar is not seeking damages for lost profits or business opportunities. It simply seeks to be made whole for the harm it suffered as a direct, foreseeable result of DEP's provision of a willfully inaccurate System Impact Study estimate. Williams Solar relied on that estimate—as DEP knew it would—to make important decisions about moving forward with the project, and in so doing Williams Solar spent $56,213.80, primarily in furtherance of obtaining certain property rights necessary for the project.

The fact that Williams Solar made its initial variance request relating to the proposed solar facility site in Johnston County before the System Impact Study estimate was provided by DEP is irrelevant. Williams Solar incurred the sum requested *after* the estimate was provided and after Williams Solar decided to move forward on the basis of that estimate. *See* Burke Ex. JB-5.

Put simply, DEP's position is that it should bear no responsibility for foreseeable costs incurred by Williams Solar even though Williams Solar incurred those costs in reasonable reliance on the estimates provided by DEP. That position is contrary to settled North Carolina law. *See* NC PATTERN JURY INSTRUCTION § 503.15.

ii. DEP belatedly insists on strict adherence to its agreements.

Finally, DEP's Ken Jennings contends that Williams Solar should not be granted any relief that would alter the terms of the parties' Interconnection Agreement. Tr. Vol. 2, pp. 214-20. It is ironic that DEP opposes any Commission action that would change the bargain it struck with Williams Solar. As set forth above, it was DEP's wrongful conduct that, in fact, robbed Williams Solar of the bargains it struck in signing the System Impact Study Agreement and Facilities Study Agreement.

For example, Williams Solar seeks to preserve the economic benefits of the entire 15-year term afforded by HB 589. DEP has managed to undercut those benefits by dragging out the interconnection process and imposing artificial obstacles, such as dramatically increased upgrade costs, that

effectively shorten the term of the protections in HB 589. DEP now argues that, effectively, "a deal is a deal" and so the Commission should deny Williams Solar's requested relief.

But where DEP has ignored its contractual obligations—both express and implied—throughout the interconnection process, it is inequitable to in turn insist that Williams Solar live with the consequences of DEP's wrongful conduct. To the contrary, it is DEP, not Williams Solar, that should bear the cost of restoring Williams Solar to the status quo ante. *See Lumsden v. Lawing*, 107 N.C. App. 493, 503, 421 S.E.2d 594, 600 (1992) (holding "that the defendant-builder should bear the loss incurred as a result of his breach.").

Contrary to the argument made by DEP witness K. Jennings, Tr. Vol. 2, pp. 118-19, there is no provision in H.B. 589 that prohibits the Commission from requiring DEP to provide the requested power purchase agreement. The Commission has the authority under law to fashion relief to effectuate the purpose of state and federal law, and DEP has the authority under state and federal law to enter into power purchase agreements with provisions that deviate from those required by law. Again, it was DEP's failure to comply with its obligations that impaired Williams Solar's ability to take advantage of the benefits established by the General Assembly in creating the grandfathered eligibility in H.B. 589 in the first place. DEP cannot, on the one hand, intentionally fail to comply with its obligations to interconnect with Williams Solar and then use its own failure as grounds to deny Williams Solar the

benefits established by the General Assembly in H.B. 589.

CONCLUSION

As detailed above, the evidence establishes that Williams Solar is entitled to the relief it has requested. Moreover, the requested relief is well within the scope of the Commission's legal authority.

Respectfully submitted, this 14th day of September, 2020.

Marcus W. Trathen
N.C. State Bar No. 17621
Eric M. David
N.C. State Bar No. 38118
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
Suite 1600, Wells Fargo Capitol
Center
150 Fayetteville Street
P.O. Box 1800 (zip 27602)
Raleigh, NC 27601
(919) 839-0300, ext. 207 (phone)
(919) 839-0304 (fax)
mtrathen@brookspierce.com
edavid@brookspierce.com

Matthew B. Tynan
N.C. State Bar No. 47181
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
Suite 2000 Renaissance Plaza
Greensboro, North Carolina 27401
(336) 373-8850
(336) 378-1001 (fax)
mtynan@brookspierce.com

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by electronic mail on the following:

Jack E. Jirak
Associate General Counsel
Duke Energy Corporation
P.O. Box 1551/NCRH20
Raleigh, North Carolina 27602
Jack.Jirak@duke-energy.com

E. Brett Breitschwerdt
McGuireWoods LLP
434 Fayetteville Street, Suite 2600
PO Box 27507 (27611)
Raleigh, North Carolina 27601
bbreitschwerdt@mcguirewoods.com

This the 14th day of September, 2020.

Marcus W. Trathen