

STATE OF NORTH CAROLINA UTILITIES COMMISSION
RALEIGH

DOCKET NO. SP-9590, Sub 0
DOCKET NO. E-2, Sub 1159
DOCKET NO. E-7 Sub 1156

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

Application for CPCN and Registration)
Statement for 50MW Facility Located at)
20217 Old Aquadale Road Albemarle,)
NC 28001 Stanly County)
In the Matter of Joint Petition of Duke)
Energy Carolinas, LLC, and Duke)
Energy Progress, LLC, for Approval of)
Competitive Procurement of Renewable)
Energy Program)

**MOTION FOR RETURN OF
CPRE PROPOSAL SECURITY**

MOTION FOR RETURN OF CPRE PROPOSAL SECURITY

Pursuant to North Carolina Utilities Commission (“Commission”) Rules R1-7 and R8-71, and the Tranche 1 Request for Proposal document filed in Docket No. E-2 Sub 1159 and E-7 Sub 1156 on July 10, 2018 (“RFP”), Stanly Solar LLC (“Stanly”) hereby requests that the Commission order Duke Energy Progress (“Duke”) to return the one million dollar surety bond provided by Stanly as Proposal Security for its bid in Tranche 1 of the Competitive Procurement of Renewable Energy (“CPRE”) program authorized by North Carolina H.B. 589.¹

¹ Stanly Solar requests limited intervention in Docket Nos. E-2 Sub 1159 and E-7 Sub 1156, for the sole purpose of making this Motion. Stanly’s interest in the issues presented in those dockets (*i.e.*, the administration of the CPRE program according to the rules established by the Commission, Duke, and the Independent Administrator) is based on its participation in CPRE and on the facts described in this motion. Stanly does not at this time request to participate in further rulemaking proceedings in those dockets. Stanly’s limited intervention in the CPRE rulemaking dockets is also intended to ensure that Duke and all other interested parties receive notice of this Motion and related filings.

Stanly was selected as a winning bid in CPRE Tranche 1, but was unable to execute a PPA because of changes in project economics after it posted Proposal Security in January 2019. Under the terms of the RFP, Stanly should have been given the opportunity to withdraw from Tranche 1 without a financial penalty during the “Step 2” evaluation process, because Duke’s interconnection studies as well as other communications from Duke indicated that the project would not be able to come online by January 1, 2021, the in-service deadline for Tranche 1. However, the CPRE Independent Administrator (“IA”) deviated from the procedures in the RFP and did not give Stanly this opportunity.

Despite this issue having been brought to their attention, neither the IA nor Duke has supported release of Stanly’s Tranche 1 Proposal Security. Stanly requests that the Commission remedy the IA’s failure to follow RFP procedures by directing Duke to release Stanly’s surety bond. The return of Stanly’s Proposal Security would not cause harm to any party, and in fact is necessary to rectify the inequitable treatment of Stanly in comparison to a Duke-sponsored asset-acquisition proposal in Tranche 1.

I. BACKGROUND

A. Relevant Provisions of the Tranche 1 RFP

Several provisions of the Tranche 1 RFP and related Commission rules are relevant to Stanly’s request. These relate to the Tranche 1 in-service deadline, the Proposal Security requirement, and Stanly’s status as a “Late Stage” project.

1. The Tranche 1 In-Service Deadline

The CPRE Program Guidelines approved by the Commission for Tranche 1 provide that to be eligible for a Tranche 1 PPA, an MP’s facility must be capable of being placed in service prior to January 1, 2021. *Duke Energy Carolinas, LLC’s And Duke Energy Progress, LLC’s Petition*

For Approval Of Competitive Procurement Of Renewable Energy Program To Implement N.C. Gen. Stat. § 62-110.8 (Nov. 27, 2017), Att. 1 (Initial CPRE Program Guidelines (Rule R8-71(c)) at 3. The RFP procedures incorporate that in-service deadline, but in recognition of the uncertainty in the interconnection process, provide in Section VI(A) that:

In the event that the T&D Sub-Team determines during the Step 2 evaluation process that any required Interconnection Facilities or System Upgrades cannot be completed by January 1, 2021, but can be completed by July 1, 2021, the IA will notify the MP of the projected completion date of the Interconnection Facilities and System Upgrades **and the MP will have the option to elect to either allow the Proposal to remain in the RFP or withdraw the Proposal from the RFP.**

Request For Proposals For The Competitive Procurement Of Renewable Energy Program - Tranche 1 (July 10, 2018) (“RFP”) at 16 (emphasis added). As discussed below, the IA’s Final Report for Tranche 1 states that the Duke T&D Team determined the likely completion date of Interconnection Facilities and System Upgrades for all projects that advanced to Step 2. In its responses to Frequently Asked Questions by Market Participants (“MPs”), the IA clarified that Section VI(A) “provides the MP with the opportunity to withdraw a proposal in the event that the projected completion date for Interconnection Facilities and System Upgrades cannot be completed by January 1, 2021, but can be completed by July 1, 2021. **In such a case, if the MP decides to withdraw the Proposal, the Proposal Security would be released.**”

2. Proposal Security

The RFP required a Third-Party MP to provide Proposal Security in the amount of \$20/kW in order to proceed to Step 2 of the evaluation process. RFP at 8. Duke-sponsored asset acquisition proposals, by contrast, were not required to provide Proposal Security.

Generally speaking, an MP selected as a winning bid in Step 2 that did not sign a PPA would forfeit its Proposal Security to Duke. However, the RFP describes certain situations in which an MP’s Proposal Security would be released without penalty, including if the Proposal

were eliminated by the IA due to failure to meet any required RFP criteria or action, or if the MP elected to withdraw the Proposal pursuant to Section VI(A), described above. *Id.* at 8.

3. Late Stage Proposals

The Tranche 1 RFP provided that a project that had executed a state-jurisdictional Facilities Study Agreement and committed to fund any Network Upgrades identified in its System Impact Study would be designated a “Late Stage Proposal.” RFP at 17. Late Stage Proposals would not be evaluated as part of the System Impact Grouping Study, but would instead be studied under the default interconnection study process (at the Project’s expense) and would bear the cost of their own Network Upgrades. Stanly Solar was designated a Late Stage Proposal.

B. Stanly Solar’s Bid

Stanly Solar is a 50 MW solar project under development in Stanly County, North Carolina. Stanly initially entered Duke’s FERC-jurisdictional interconnection queue but transferred to the state-jurisdictional queue so that it could participate in CPRE. Stanly Solar had received a system impact study in December 2017 and was designated as a “Late-Stage Project,” meaning that it was not included in the Tranche 1 “grouping study” and would solely bear the cost of its own network upgrades.

Stanly Solar submitted a third-party PPA bid into CPRE Tranche 1. On December 6, 2018, Stanly was notified that it had been selected in Step 1. At that time, based on the rough interconnection timelines set out in Stanly’s System Impact Study as well as correspondence with Duke’s interconnection team, it appeared that the project probably would not be able to achieve interconnection by the January 1, 2021 in-service deadline, depending on how quickly Duke was able to issue the Interconnection Agreement and complete construction under the agreement. In addition to potentially impacting Stanly’s eligibility for Tranche 1, a late interconnection could

negatively impact the economics of the project due to increased carrying costs, expiration of project agreements, and increased exposure to changes in available financing.

However, in reliance on the RFP's assurance that Stanly would be allowed to withdraw from CPRE without penalty if it was ultimately determined that the project could not be interconnected by January 1, 2021, Stanly opted to proceed to Step 2. Stanly posted a \$1 million surety bond as Proposal Security on January 4, 2019.²

On June 7, 2019, Stanly received a Facilities Study Report indicating that it would take approximately two years from the start of construction activity to complete interconnection work for the project. This meant that even if work were to begin immediately upon execution of an Interconnection Agreement, the project would most likely not be interconnected until July 2021. At a construction planning meeting held on June 21, 2019, Duke indicated that April 2021 was a more likely in-service date. However, Stanly did not receive any notification from the IA during Step 2 that its interconnection date might be later than January 1, 2021, and it was not provided the option to withdraw in Step 2 of the selection process.

On April 10, 2019, Stanly was notified that it had been selected as a winning bid and would have to sign a PPA or withdraw from CPRE and forfeit its Proposal Security. On June 26, Stanly informed the IA that based on the most recent information received from Duke, the Interconnection Facilities and System Upgrades for the Stanly Solar project would not be completed by January 1, 2021. Stanly accordingly requested, pursuant to Section VI(A) of the RFP, to withdraw its proposal and have its Proposal Security released.³ As discussed above, this Section of the RFP

² Due to issues in the form of the surety bond provided by Stanly on January 4, Duke rejected Stanly's surety bond. After some back-and-forth, Stanly posted a revised surety bond meeting the Company's requirements on February 5.

³ Stanly had previously asked the IA for authorization to withdraw from Tranche 1 without forfeiting its Proposal Security. On May 6, 2019, Stanly Solar informed the IA that because of

provides that if the IA determines that any required Interconnection Facilities or System Upgrades cannot be completed by January 1, 2021, but can be completed by July 1, 2021, the IA will notify the MP of the projected completion date of the Interconnection Facilities and System Upgrades and the MP will have the option to elect to either allow the Proposal to remain in the RFP or withdraw.

The IA refused Stanly's request on July 5, 2019, stating by way of justification that: (1) "The IA has not informed the MP that interconnection cannot be completed by January 1, 2021"; (2) "Duke Transmission has yet to establish a date for completion of associated system upgrades, and, ergo, there has not been a determination that the system upgrades 'will not be completed until at least July 2021'"; and (3) "Should Duke Transmission fail to complete its responsibilities necessary for the MP to interconnect by the established COD, that would be a contract dispute pursuant to the terms of the PPA and not something to be adjudicated before the fact."

On July 8, Stanly responded to the IA, clarifying that Duke's Transmission Group had consistently told Stanly that the project's interconnection facilities and upgrades would not be

significant changes in project economics due to an increase in solar panel prices after Stanly posted its Proposal Security in January 2019, its construction costs had increased and Stanly likely would not be able to post PPA security at the completion of Stage 2. Stanly requested that the IA authorize the project to withdraw from Tranche 1 without forfeiting its Proposal Security. The IA denied Stanly's request.

The basis for the Stanly's request to the IA was as follows: Stanly was selected with the initial Competitive Tier and was required to post Proposal Security in January 2019. However, many MPs (according to the IA's Final Report) were not asked to post Proposal Security until March or April 2019, after the increase in panel prices discussed above had occurred. A significant proportion of those projects opted not to post Proposal Security and proceed to Step 2, and it appears that the price increase was a significant factor in those MPs' decisions to withdraw. This created an unintended but nonetheless unfair advantage for the later-selected MPs, as they had more current market knowledge at the time they were asked to post their Proposal Security. If Stanly had been given the same opportunity to post in March/April, with knowledge of the increase in module prices, it would have elected not to do so.

completed until at least April 2021. Stanly also rebutted the IA's claim that a delay in interconnection until after the in-service deadline would give rise to a contract dispute, noting that neither the CPRE PPA nor the form Interconnection Agreement would give Stanly a remedy if Duke failed to complete the interconnection facilities by January 1, 2021. Stanly received a final Interconnection Agreement on July 11, 2019, which confirmed that the projected in-service for the project would not occur until May 31, 2021.

The IA did not respond to Stanly's July 8, 2019 request. On July 16, Stanly asked Duke to return Stanly's Proposal Security, explaining that Stanly had improperly been denied the opportunity to withdraw during Step 2 based on its projected in-service date being after January 1, 2021. Despite numerous follow-up inquiries from Stanly's counsel over the next several months, Duke did not provide a substantive response to Stanly's request, simply stating several times that a response would be forthcoming soon. Instead, on November 25, 2019, Stanly's surety received from Duke a demand for payment on the surety bond within ten days (as provided in the terms of the bond). Duke had not given Stanly any notice of the payment demand or otherwise told Stanly that it was refusing the request for return of the Proposal Security. To this day, Duke has not provided any rationale for refusing Stanly's request to return the Proposal Security, and the IA has not explained why the information Stanly provided in its July 8, 2019 correspondence does not justify return of Stanly's Proposal Security.

At the request of Stanly's counsel, and to avoid the need for Stanly to seek emergency relief from this Commission, Duke agreed to temporarily withdraw its request for payment under the Surety Bond so that Stanly could seek relief from the Commission.

Stanly Solar's Interconnection Agreement is still in effect and Stanly has met all financial commitments under that agreement. At this time Stanly intends to bid into CPRE Tranche 2,

although the economics of its bid will likely be impacted by whether its Tranche 1 Proposal Security is returned.

II. STANLY IS ENTITLED TO THE RETURN OF ITS PROPOSAL SECURITY.

A. Under the RFP, Stanly Solar should have been able to withdraw during Step 2 without forfeiting its Proposal Security.

As discussed, the in-service deadline for Tranche 1 projects is January 1, 2021. The Tranche 1 RFP provided that Duke and the IA would determine during Step 2 which projects might not be able to go into service by that date, and would give them the opportunity either to stay in the process (with the hope of going into service by July 1, 2021) or to withdraw from Tranche 1 without any financial penalty.

The IA's Final Report on Tranche 1 claims that Duke and the IA did in fact perform this analysis, stating that "The DEC T&D Team identified the transmission upgrades required for all Proposals analyzed. These upgrades were then evaluated and a determination was made as to whether the necessary upgrades could be completed by the required date." *CPRE Tranche 1 Final Independent Administrator Report* (July 18, 2019) ("Final Report") at 42. The IA emphasized the importance of this analysis, stating that "After the extent of the upgrade requirements [for each project in Step 2] was known, the time taken to complete the field construction was predicted. It was important to understand this length of time when determining whether a Proposal could be operational by the time required in the RFP." *Id.* at 45 (emphasis added).

By the time the Step 2 analysis was performed, Duke's T&D Team knew the extent of Stanly's required upgrades knew that Stanly could not be interconnected by January 1, 2021. Whether the IA was not informed of this fact or simply ignored it, the IA did not give Stanly the option to withdraw during Step 2 as required by the RFP. Thus the procedures set forth in the Tranche 1 RFP were not followed, and as a result Stanly was denied the opportunity to withdraw

during Step 2. Given the changes in project economics after Stanly was required to post Proposal Security, Stanly would have taken the opportunity to withdraw if it had been available.

And in fact Stanly did request the opportunity to withdraw, well before the Step 2 PPA execution deadline. In making its request, Stanly informed the IA of the situation regarding its projected in-service date, but neither the IA nor Duke has ever provided a satisfactory explanation as to why Stanly was not given the opportunity to withdraw from Step 2. The IA's Final Report appears to describe its decision to reject Stanly's request to withdraw based on its in-service date as follows:

After being selected as a finalist for DEC, one of the MPs indicated a desire to amend the PPA price bid due to changes in the cost of materials. The IA declined to permit the change. Subsequently the MP asserted the desire to withdraw claiming that Duke personnel affirmatively declared that the interconnection for the associated project would not be completed in time to meet the in-service date the MP identified in its Proposal. The claim was erroneous.

IA Final Report at 60. The Final Report provides no basis for the claim that Stanly's account of its likely in-service date, which was based exclusively on information provided by Duke, was "erroneous."⁴ Nor was it erroneous: at every stage past the System Impact Study, Duke had consistently projected an in-service date after January 1, 2021.

In rejecting Stanly's request to withdraw based on its in-service date, the IA also claimed that "Duke Transmission has yet to establish a date for completion of associated system upgrades, and, ergo, there has not been a determination that the system upgrades 'will not be completed until at least July 2021.'" The first part of this statement is simply untrue, as Stanly's System Impact Study and its Facilities Study (which were provided by Duke several months before the IA made

⁴ The Final Report (assuming this excerpt refers to Stanly) is also inaccurate in that Stanly never asked to amend its bid price. Had that option been available (as it apparently was to the project that was asked to substitute for the Duke-sponsored asset acquisition project that withdrew, as discussed below), Stanly might well have been able to sign a Tranche 1 PPA, as it is otherwise "shovel-ready."

this statement in July 2019) included projected in-service dates after January 1, 2021.⁵ In any event, the relevant question under the RFP is not whether the in-service date was after July 21, 2021 (which is not the in-service date established by the Commission), but whether it was after January 1, 2021.

To remedy the IA's failure to follow the procedures set forth in the Tranche 1 RFP – procedures upon which Stanly and other MPs relied – the Commission should require the release of Stanly's Proposal Security.

B. Not returning Stanly's Proposal Security will result in severely inequitable treatment as compared to Duke-sponsored proposals.

Stanly Solar was not the only project to withdraw during Step 2 of Tranche 1. In August 2019, Duke cancelled an asset acquisition project in Onslow County that had been selected for a PPA. According to media reports, the cancellation was driven by the project's inability to deliver at the bid price.⁶ But because Duke-sponsored asset acquisition proposals were not required to post Proposal Security in Tranche 1, the project was allowed to withdraw without any financial penalty. The IA noted this disparity in the Final Report, stating that “in effect, the DEP/DEC Team and the developer [of the asset acquisition proposal] had a free option to withdraw at any time, which the IA believes was an unanticipated result.” Final Report at 6.

One of the IA's duties under Commission Rule R8-71 is to “ensur[e] that all responses to a CPRE RFP Solicitation are treated equitably.” The IA must further certify to the Commission

⁵ Even if a projected in-service date for Stanly had not yet been established at that time, it would make no sense to interpret this as a sign that the project actually would be interconnected by January 1, 2021. A project that is not far enough along in the interconnection process to have a projected in-service date is less likely, not more likely, to achieve timely interconnection.

⁶ “Duke Drops Largest Solar Project in North Carolina Procurement — Its Own,” *GreenTech Media* (August 6, 2019), available at <https://www.greentechmedia.com/articles/read/duke-drops-largest-solar-project-in-north-carolina-procurement-its-own>. According to media reports, the project was replaced by a Cypress Creek project, whose bid price appears to have been in excess of \$38.30 / MWh (based on the project's impact on the average bid price).

“that all proposals were treated equitably through the CPRE RFP Solicitation(s).” R8-71(d)(5)(ix). To require Stanly to forfeit a million dollars for withdrawing from Tranche 1, especially where Stanly should have been given that right, would result in severely inequitable treatment of Stanly as compared to the Duke-sponsored asset acquisition proposal that was allowed to withdraw from Tranche 1 without any financial penalty.

C. Refunding Stanly Solar’s Proposal Security will not cause harm to any party.

Returning Stanly’s Proposal Security would not result in any harm. As indicated in the IA’s Final Report, every eligible project was ultimately offered a PPA in Tranche 1, so Stanly’s selection in Step 2 did not deprive any other MP of the opportunity to be selected. In addition, because Stanly was a late-stage project and was not included in the Step 2 “grouping study,” Stanly has paid all of its own interconnection study costs. Consequently, Duke did not incur any unfunded study costs for Stanly that might be offset by the Performance Security. If Duke were to retain Stanly’s Performance Security it would simply be a one million dollar windfall for the company.

It must also be noted that Stanly Solar is not and was not a speculative project. Stanly’s developers have invested hundreds of thousands of dollars in development and interconnection costs, have already funded the project’s network upgrades, and have provided millions of dollars in financial security for interconnection facilities. Stanly Solar intends to bid into CPRE Tranche 2, although if its Proposal Security is not released, Stanly will most likely have to increase its bid price to compensate for the financial impact of losing its Proposal Security.

III. CONCLUSION

Stanly Solar followed and relied on the procedures established by Duke and the IA and published in the Tranche 1 RFP. Had those procedures been followed, Stanly would have had the opportunity to withdraw its bid during Step 2 without forfeiting its Proposal Security. But despite

clear indications from Duke that Stanly would not be able to meet the Commission-approved in-service deadline of January 1, 2021, the IA failed to follow Tranche 1 procedures and deprived Stanly of that opportunity. The only way to remedy this failure is for Stanly's Proposal Security to be returned. Returning Stanly's security would not cause harm to any party and would help to prevent unintended discrimination against Stanly and in favor of a Duke-sponsored asset acquisition proposal that was allowed to withdraw during Step 2 with no financial penalty.

Wherefore, Stanly respectfully requests that the Commission direct Duke to release and return Stanly's Tranche 1 Proposal Security.

Respectfully submitted, this the 14th day of January, 2020.

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By: 

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VERIFICATION

I, Dennis Richter, being first duly sworn, depose and say that I am Manager of Stanly Solar LLC, and in such capacity, I have read the foregoing Motion for Return of CPRE Proposal Security and know the contents thereof, and by my signature below verify that the contents are true and correct to the best of my knowledge.



Dennis Richter

Mecklenburg County, North Carolina

Signed and sworn before me this day by Dennis Richter

Date: January 14, 2020



Notary Public

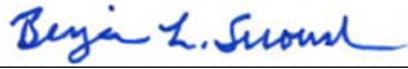
My Commission Expires: Oct. 21, 2024



CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing MOTION FOR RETURN OF SECURITY upon all parties of record by electronic mail and/or first-class United States mail.

This the 14th day of January, 2020.



Benjamin L. Snowden