STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 1281

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Duke Energy Carolinas, LLC,	)	
for Approval of CPRE Program Compliance	)	**BRIEF OF**
Report and CPRE Cost Recovery Rider	)	**THE PUBLIC STAFF**
Pursuant to N.C.G.S § 62-110.8 and	)	
Commission Rule R8-71	)	

NOW COMES the Public Staff – North Carolina Utilities Commission (Public Staff) by and through its Executive Director, Christopher J. Ayers, and pursuant to the North Carolina Utilities Commission's (Commission) directive made during the hearing in this matter on May 30, 2023, respectfully submits the following brief in the above-captioned matter addressing the Commission's authority to impose a penalty on Duke Energy Carolinas, LLC (DEC or the Company) without first determining fault for the Wilkes Solar PPA termination and the existence of any legal or procedural impediments preventing the Commission from making a determination as to fault for the termination in the current Competitive Procurement of Renewable Energy (CPRE) Rider proceeding.

I. Background

On August 23, 2022, DEC issued a letter to the 75-megawatt (MW) Wilkes Solar facility, which was selected as a winning bid in Tranche 2, notifying it of contract default and liquidated damages. However, Wilkes Solar disputed this default, stating that DEC caused unreasonable delays in completing required interconnection studies, which allegedly delayed the project's interconnection by at least two years, resulting in the project no longer being economically viable.

DEC attempted informal resolution with Wilkes Solar but was unsuccessful. It then attempted to pursue enforcement of its liquidated damages obligation under the Power Purchase Agreement (PPA). However, the performance assurance provided by Wilkes Solar was in the form of a parent company guaranty of DESRI Portfolios (DESRI), which expired on December 31, 2021, and was no longer enforceable at the time of Wilkes' PPA termination and default. Due to the dispute over termination fault and the unenforceable guaranty, DEC concluded that the cost of litigation was unduly risky, would face substantial challenges, and, even if DEC prevailed, recovery of the funds was not guaranteed.

On February 28, 2023, DEC filed its Application for Approval of CPRE Cost Recovery Rider and 2022 CPRE Compliance Report. On March 16, 2023, the Commission issued an Order Scheduling Hearing, Requiring Filing of Testimony, Establishing Discovery Guidelines, and Requiring Public Notice. The Commission's March 16, 2023 Order set this matter for expert witness hearing on May 30, 2023. On May 9, 2023, the Public Staff pre-filed the testimony and exhibits of witnesses Darrus Cofield and Jeff Thomas. On May 23, 2023, the Public Staff filed a Motion for Substitution of Witness and Adoption of Testimony, and pre-filed testimony of James L. McLawhorn. The Commission allowed that motion on May 30, 2023, during the hearing of this matter. (Tr., 11.) On May 24, 2023, DEC and the Public Staff filed a joint motion to excuse DEC witness Christy J. Walker and Public Staff witness Darrus Cofield from testifying at the hearing. The Commission allowed this motion on May 26, 2023.

In his pre-filed direct testimony, Public Staff witness McLawhorn discussed the circumstances of the Wilkes Solar parent guaranty expiration; DEC's failure to properly track this expiration date in its tracking system; DEC's decision not to pursue litigation against Wilkes Solar "[d]ue to the dispute over termination fault and the unenforceable guaranty" and because "recovery of the funds was not guaranteed"; and the recommendation of the Public Staff for an adjustment credit in the amount of 50% of the value of the total liquidated damages. (Tr., 25-28.)

In pre-filed rebuttal testimony, DEC witnesses Tabor and Holstein acknowledge that "due to a data entry error by the credit risk department" the expiration of the DESRI parent guaranty "was not prospectively identified by the Company as part of its normal security instrument management process." (Tr., 139.) DEC also acknowledges that it "would have a low probability of collecting on any judgement obtained against Wilkes Solar" and that any judgment "would likely not be enforceable against DESRI because the Guaranty expired prior to Wilkes Solar's default and the resulting termination of the PPA." (Tr., 140.)

At the May 30, 2023 expert witness hearing, in response to questions from the Commission, Public Staff witness McLawhorn testified that the Public Staff was not taking a position on the dispute between DEC and Wilkes Solar regarding which party was responsible for the interconnection delays and termination of the agreement. (Tr., 36.) Witness McLawhorn recalled his understanding of DEC's testimony in the 2021 CPRE proceeding that "DEC did not expect [that] any of the Tranche 2 projects, the winning projects, would achieve commercial operation in less than 24 months from the time that the Interconnection Agreement was signed." Witness McLawhorn noted that the approximate 14-month expiration date of the Wilkes Solar parent guaranty was for "such a short period" that it "should have been a red flag." (Tr., 38-39.)

In response to a question from Commissioner Duffley, witness McLawhorn summarized the Public Staff's position on the 50% credit for liquidated damages sought by the Public Staff by stating that "while there is no way to know for certain that Duke would have been able to collect the liquidated damages, the fact that the Guaranty was allowed to expire without Duke notifying the customer that they were in default if they didn't extend it, sort of removed any possibility of being able to attempt to recover the liquidated damages." (Tr., 57.) When asked to respond to DEC's position that it is speculative to assume that DEC could have recovered liquidated damages from Wilkes Solar, witness McLawhorn responded that "the failure to recognize the expiration date has removed that possibility. They could not have recovered [liquidated damages] because they missed [the expiration of the guaranty]." (Tr., 59.)

In response to a question from the Commission, DEC witnesses Holstein and Tabor did not disagree with Commissioner McKissick that seeking an expiration date of the parent guaranty that reasonably corresponded with the in-service date of the facility would be a good business practice. (Tr.,176-77.) DEC witnesses Holstein and Tabor acknowledged that DEC is able to negotiate the term of the expiration of the parent guaranty when it enters into these agreements. (Tr., 205.)

DEC and the Public Staff agree that the inclusion of the liquidated damages provision in CRPE contracts is meant to compensate both the Company and ratepayers for the cost of replacement for the contracted resources. (Tr., 58-59, 193.)

II. Discussion

The Public Staff is not aware of any prior Commission precedent that is directly “on point” as to the facts and circumstances presented in this docket. The Public Staff acknowledges that the facts and circumstances of its adjustment to remove 50% of the total liquidated damages amount contained in DEC’s contract with Wilkes Solar present a novel issue for the Commission. However, the Commission does not need to first determine the issue of fault between DEC and Wilkes Solar to decide this issue. Rather, the Commission can make this determination through application of its well-established prudency analysis to the actions of DEC that allowed the parent guaranty to expire.

The issue of fault between DEC and Wilkes Solar is irrelevant to determining whether the adjustment sought by the Public Staff is appropriate because DEC has already opted not to pursue this issue through litigation against

Wilkes Solar and its parent company DESRI. DEC opted not to pursue litigation because the expiration of the Wilkes Solar Parent Guaranty has led DEC to conclude that litigation would not lead to recovery of the liquidated damages amount. DEC's business practices relative to the Wilkes Solar Parent Guaranty, as demonstrated by the record in this case, by accepting the Parent Guaranty with an unreasonable expiration date and by failing to properly notate that expiration date in its tracking system amount to unreasonable and imprudent business practices. Requiring the Public Staff to show that DEC would have recovered the full value of the liquidated damages amount through litigation would ignore the primary issue that such litigation was not even possible because of DEC's own actions and practices. These unreasonable and imprudent business practices precluded ratepayers from realizing the value that a credit for liquidated damages would have had on CPRE Rider costs. While there is a reasonable argument that DEC should be assessed the total amount of the liquidated damages due to its imprudence, the Public Staff recommended a less draconian method by which the burden of the liquidated damages would be borne equally by DEC and ratepayers through the 50% adjustment proposed by the Public Staff.

Commission Rule R8-71(j) titled "Cost or authorized revenue recovery" allows an electric utility subject to the CPRE program to "recover in a timely manner the reasonable and prudent costs incurred and anticipated to be incurred to implement its CPRE Program[.]" Commission Rule R8-71(j)(2). Credits for liquidated damages recovered by a utility are inherent in "costs incurred" as applied in Commission Rule R8-71 as they could offset other prudently incurred costs. This is evidenced by DEC's Application seeking recovery of its CPRE costs in this docket, which includes provision for "Contract Fees Being Credited in CPRE Rider" as shown on Walker Revised Exhibit No. 3 and Walker Revised Workpaper No. 5. These documents reflect the total amount of liquidated damages collected by DEC credited to DEC's CPRE costs. As with other liquidated damages recovered by DEC in this docket, any adjustment owed to ratepayers for DEC's claim for the Wilkes Solar liquidated damages would be credited in a similar manner. DEC does not deny that any amount collected from the Wilkes Solar liquidated damages claim would have been credited to ratepayers through its CPRE rider. The adjustment sought by the Public Staff in this docket is appropriate and authorized under Commission Rule R8-71.

The Commission has articulated clear principles that it applies in determining whether the actions of a utility are reasonable and prudent. In its Order Accepting Stipulation, Deciding Contested Issues, and Requiring Revenue Reduction, Docket No. E-7, Subs 819, 1110, 1146, and 1152, *Application of Duke Energy Carolinas, LLC, for Adjustment of Rates and Charges Applicable to Electric Utility Service in North Carolina* (June 22, 2018) (Sub 1146 Order), the Commission referred to its Order Granting Partial Increase in Rates and Charges, *Application by Carolina Power & Light Company for Authority to Adjust and Increase Its Electric Rates and Charges*, Docket No. E-2, Sub 537, 78 N.C.U.C. Orders & Decisions 238, 251-52 (Aug. 5, 1988), *reversed in part, and remanded on other ground*, *Utilities Commission v. Thornburg*, 325 N.C. 484, 385 S.E.2d 463 (1989) when it noted that:

> First, the standard for judging prudence is 'whether management decisions were made in a reasonable manner and at an appropriate time on the basis of what was reasonably known or reasonably should have been known at that time. … [T]his standard … must be based on a contemporaneous view of the action or decision under question. Perfection is not required. Hindsight analysis – the judging of events based on subsequent developments – is not permitted.' 1988 DEP Rate Order, p. 14." P 258.
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> Second, challenging prudence requires a detailed and fact intensive analysis, and the challenger is required to (1) identify specific and discrete instances of imprudence; (2) demonstrate the existence of prudent alternatives; and (3) quantify the effects by calculating imprudently incurred costs.

Sub 1146 Order at 258, 259.

The record in this case shows at least two instances where DEC's conduct was unreasonable and imprudent. The first is DEC's acceptance of a Parent Guaranty from DESRI with an expiration date of approximately 14 months from the date of execution, ten months prior to DEC's earliest anticipated date of commercial operation for any of the winning Tranche 2 projects. The second is DEC's failure to properly track that expiration date in its Performance Assurance tracking system to ensure that a new Performance Assurance for Wilkes Solar was in place for the remainder of the CPRE contract period.

In evaluating the first instance of imprudence identified above, the record shows that DEC's decision to accept the Parent Guaranty with a 14-month expiration was not reasonable based on the understanding that DEC had known at that time that a CPRE facility would not interconnect in less than 24 months. DEC acknowledged that Parent Guaranty expiration dates are negotiable terms and that DEC could have negotiated for a longer expiration term or sought another form of Performance Assurance. (Tr., 205.) Thus, based on information known to DEC at that time, it was unreasonable for DEC to decide to accept a Parent Guaranty that was substantially shorter than, and that did not reasonably correspond to, its interconnection timeline. This particular action is a specific instance of imprudence. The prudent alternative for the Company would have been to insist on, and negotiate for, a longer term for the Parent Guaranty or another form of Performance Assurance. The effect of this imprudence is that the Parent Guaranty expired well before the facility was reasonably expected to interconnect, placing even greater importance on tracking the expiration date to ensure that, should the facility not interconnect within the term of the Parent Guaranty, DEC would retain the ability to seek liquidated damages for the replacement power costs. This specific and discrete instance demonstrates an unreasonable management decision when considering the information that was known to the Company at that time. There were reasonable and prudent alternatives to accepting the 14-month term of the Parent Guaranty that were available to DEC, and the effects of this imprudent decision are quantifiable based on the monetary figure identified for the liquidated damages in the PPA.

In evaluating the second instance of imprudence, the record shows that DEC admitted its failure to properly document the expiration of the Parent Guaranty in its existing tracking system, which was not reasonable based on the existing system and practice that DEC implemented to track Performance Assurances. DEC's failure to discover and correct the error prior to the expiration of the Parent Guaranty is likewise unreasonable given its ongoing review of this

CPRE project at multiple points. The Public Staff does not expect for utilities to be flawless, however failure to perform core business functions, especially when that failure affects ratepayers financially, is not excusable. The Company's failure to properly track the expiration of the Parent Guaranty was not reasonable based on the information known to DEC at that time. The existence of DEC's CPRE Performance Assurance tracking system shows that DEC was aware of the importance of ensuring that Performance Assurance is in place throughout the pendency of a CPRE project. This specific and discrete instance of imprudence in failing to properly enter the expiration date, or to discover the error before the 14-month expiration date had passed, perhaps through an audit or ongoing review, is unreasonable given the existence of this tracking system. A prudent alternative to allowing an error of this magnitude to go unnoticed for 14 months would be to have redundancy in data entry, data-entry checklists, or regular audits of performance assurance data. In rebuttal testimony, DEC witnesses Tabor and Holstein state that "the Company audited all the Performance Assurance for CPRE Program PPAs after discovering that the DESRI parent guaranty was erroneously allowed to expire." (Tr., 156.) Regular audits of Performance Assurance would have been a prudent alternative for ensuring such errors do not occur.

As discussed above, the effect of this imprudence is that the Parent Guaranty was allowed to expire and that ratepayers lost the ability to benefit from the potential collection of liquidated damages that serve as a proxy for the cost of replacement for the contracted resources from this contracted facility. This specific and discrete instance demonstrates an unreasonable action by the Company, especially when considering the importance the Company placed on tracking Performance Assurance as evidenced by the existence of its CPRE Performance Assurance tracking system. There were reasonable and prudent alternatives to data entry and monitoring of Parent Guaranty expirations, such as redundancy or regular auditing, that were available to DEC, and the effects of this imprudent decision are quantifiable based on the costs that have now been incurred by ratepayers.

The Public Staff is concerned about the future ramifications that this issue could cause ratepayers as it relates to the Company and to solar facilities in general. The recovery of liquidated damages provides ratepayers an offset to the substantial future costs of procuring replacement solar generation and cannot be understated. As DEC – and DEP – are required to procure significant amounts of solar generation through competitive procurements to meet interim Carbon Plan goals, it is imperative that both parties are held accountable to the terms of the PPAs that are executed in an effort to ensure the Companies meet those goals. The Company should bear the burden with ratepayers when liquidated damages are not recovered from a defaulting facility, otherwise there is no disincentive to the Company should it decide not to pursue recovery of liquated damages from a defaulting facility. Likewise, given the current landscape of solar procurement, both under CPRE and HB 951, it is important that solar facilities see that liquidated damages provisions in CPRE contracts will be enforced in every possible circumstance to ensure that they do not withdraw from existing contracts to pursue more favorable terms.

III. Conclusion

The Public Staff contends that it is unnecessary for the Commission to find that liquidated damages would have been collected by DEC in a claim against Wilkes Solar and its parent company. DEC's failure to create the circumstances necessary to assert a claim for the liquidated damages it contracted for demonstrates imprudence. Based upon the evidence in the record, and the well-established principles that the Commission applies in determining whether the actions of a utility are reasonable and prudent, the Commission should determine that the actions of DEC in accepting a Parent Guaranty with a 14-month expiration and failing to initially properly document that expiration nor discover it during the 14-month pendency of the Parent Guaranty were unreasonable and imprudent. Based on that determination, the Commission should allow the adjustment sought by the Public Staff in the amount of 50% of the total liquidated damages amount contained in DEC's contract with Wilkes Solar.

Respectfully submitted this 24th day of July, 2023.

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing on all parties of record in accordance with Commission Rule R1-39, by United States mail, postage prepaid, first class; by hand delivery; or by means of facsimile or electronic delivery upon agreement of the receiving party.

This, the 24th day of July, 2023.

Electronically submitted
/s/ Thomas Felling