

McGuireWoods LLP
501 Fayetteville St.
Suite 500
Raleigh, NC 27601
Phone: 919.755.6600
Fax: 919.755.6699
www.mcguirewoods.com

E. Brett Breitschwerdt
Direct: 919.755.6563

McGUIREWOODS

bbreitschwerdt@mcguirewoods.com

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Ms. A. Shonta Dunston, Chief Clerk
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, North Carolina 27603

*Re: Response of Duke Energy Carolinas, LLC and Duke Energy Progress,
LLC to Motion for Limited Reconsideration
Docket Nos. E-2, Sub 1297 and E-7, Sub 1268*

Dear Ms. Dunston:

Enclosed for filing in the above-referenced proceedings is Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Response to Motion for Limited Reconsideration.

If you have any questions, please do not hesitate to contact me. Thank you for your attention to this matter.

Very truly yours,

/s/E. Brett Breitschwerdt

EBB:kjg

Enclosure

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-2, SUB 1297
DOCKET NO. E-7, SUB 1268

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

<p>In the Matter of Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, 2022 Solar Procurement Pursuant to Session Law 2021-165, Section 2(c)</p>	<p>) RESPONSE OF DUKE ENERGY) CAROLINAS, LLC AND DUKE) ENERGY PROGRESS, LLC TO) MOTION FOR LIMITED) RECONSIDERATION</p>
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NOW COMES Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP”) (collectively “Duke Energy” or the “Companies”), by and through counsel and pursuant to Rule R1-7 of the Rules of Practice and Procedure of the North Carolina Utilities Commission (“Commission”) and the Commission’s June 13, 2022 *Order Establishing Procedures for Motion for Reconsideration and Staying Issuance of Requests for Proposals and Pro Forma Power Purchase Agreement*. As directed by the Commission, the Companies hereby respond to Clean Power Suppliers Association (“CPSA”) and the Carolinas Clean Energy Business Association’s (“CCEBA”) (collectively, “Solar Intervenors”) June 13, 2022 Motion for Limited Reconsideration (“Motion”) of the Commission’s June 10, 2022 *Order Approving Request for Proposals and Pro Forma Power Purchase Agreement Subject to Amendments* (“Approval Order”).

The crux of Solar Intervenors’ Motion is that longer-term market risks and uncertainty remain surrounding the future availability and cost of solar panels and that the 2022 Solar Procurement Program Request for Proposals (“RFP”) should allow bidders an opportunity late in the RFP bid evaluation process to increase their bids to account for potential market developments relating to the Auxin Solar antidumping / countervailing

duties petition pending before the U.S. Department of Commerce. *See* Department of Commerce Docket No. A-570-979, C-570-980 (“Auxin Solar AD/CVD Petition”). While the Companies recognize that the Biden Administration’s emergency action leaves some uncertainty about the pricing headwinds that the solar industry could face in the long term, the emergency declaration does—as Duke Energy’s June 7, 2022 Comments stated—resolve the near-term pricing risk that the Solar Intervenors face “due to possible new tariff action during the bid window[.]” Duke Energy June 10 Comments, at 3.

Duke Energy disagrees with the Solar Intervenors that reconsideration of the Approval Order is warranted and the Companies do not support revising the RFP to include an opportunity for an upward pricing adjustment to bids initially submitted into the RFP. To the contrary, the Commission’s Approval Order reasonably and appropriately found that “the proposed, one-way downward adjustment mechanism appropriately addresses known market uncertainties.” In sum, the 2022 Solar Procurement RFP is reasonable and appropriate, as designed, to only allow a single downward bid adjustment or pricing refresh during Step 2 of the evaluation process. Accordingly, the Companies respectfully request the Commission deny the Motion and allow the Companies to expeditiously open the 2022 Solar Procurement RFP without further delay.

In support thereof, the Companies state the following:

PROCEDURAL HISTORY

On May 26, 2022, the Commission issued an *Order Authorizing a Competitive Procurement of Solar Resources Pursuant to House Bill 951 and Establishing Further Procedures* (“May 26 Order”), which authorized Duke Energy to commence a system-wide competitive procurement seeking a minimum of 700 MW of utility-owned and third-

party solar energy resources sited in both North Carolina and South Carolina subject to other terms and conditions to be contained in the final, Commission-approved RFP and pro forma Power Purchase Agreement (“PPA”), and further allowed parties to file comments pertaining to the proposed RFP and pro forma PPA. The May 26 Order specifically directed the Companies to include a re-pricing mechanism in the final RFP, building on concepts introduced in the Companies’ March 14, 2022 Petition for Authorization of Solar Procurement Program, which the Commission recognized could lower the overall cost for the combined portfolio of Controllable PPA resource contracts for customers. May 26 Order, at 5.

On June 1, 2022, Duke filed its proposed final RFP and pro forma PPA, and Charles River Associates (“CRA”), the 2022 Solar Procurement Independent Evaluator (“IE”), filed the Independent Evaluator Pre-Solicitation Report. Section VI.D. of the June 1, 2022 RFP addressed the bid refresh concept incorporated into the RFP in response to the May 26 Order.

On June 3, 2022, the Solar Intervenors and the Public Staff filed comments on the proposed RFP and pro forma PPA and these parties along with Duke Energy also filed responses to the Commission’s questions about the evaluation of System Upgrades during the 2022 Solar Procurement process.

On June 6, 2022, the Biden Administration took action to mitigate near-term market uncertainty caused by the Auxin Solar AD/CVD petition, declaring an emergency over the insufficient market supply of solar panels in the United States that the Administration determined are needed to achieve the Country’s near-term solar development goals. *See* Motion at Attachment A. As a result, the Department of Commerce will issue regulations

providing the solar industry with 24 months of duty-free access to solar cells and modules from certain Southeast-Asian countries. *See* Motion at Attachment B.

On June 10, 2022, the Commission issued the Approval Order. The Approval Order approved Duke Energy's proposed RFP and pro forma PPA, subject to certain limited modifications that the Companies are currently working to incorporate into the final RFP to be issued in the near future. Approval Order, at 8 (Ordering Paragraph 1). The Approval Order also specifically recognized the Biden Administration's announcement finding it "material in the determination of this matter." Approval Order, at 4.

On June 13, 2022, the Solar Intervenors filed the Motion requesting reconsideration of the Approval Order's determination not to allow market participants an opportunity for an upward pricing adjustment to bids initially submitted into the RFP. The Solar Intervenors' Motion specifically seeks to modify the RFP's Bid Refresh Mechanism in Section VI.D. so that it permits an upward bid refresh if the Department of Commerce either (a) does not conclude its investigation into the AD/CVD petition by the time of re-pricing, or (b) imposes additional tariffs on imported solar modules as a result of the AD/CVD Petition.

RESPONSE TO MOTION FOR LIMITED RECONSIDERATION

I. Duke Energy Does Not Support Introducing an Upward Bid Refresh Price Adjustment Opportunity to Address Post-Emergency Period Market Risks.

The Companies recognize that developing large-scale solar projects for the 2022 Solar Procurement will require market participants to develop bids based on project development strategies informed by an ever-changing market. Duke Energy, however, does not agree that it must restructure the RFP to fully mitigate the potential for future tariff-related risks that may arise in the market for solar components—especially if such an

approach could shift future pricing risks to the Companies and customers in ways that cannot be fully anticipated at this time. The Solar Intervenors' Motion seeks to do just that, as they ask this Commission for relief that "fully mitigates" the negative consequences from the Auxin Solar AD/CVD Petition. *See* Motion at 5.

Duke Energy contends that the extent to which each market participant could be affected by potential tariffs will depend on the market participant's panel procurement strategy. The Solar Intervenors themselves concede that the potential issues arising from those tariffs will not be uniformly distributed across market participants. *See* Motion at 4 ("Although some solar project developers receiving 2022 RFP awards have the ability to procure and import solar modules well before construction begins and therefore may be able to take advantage of temporarily lower panel prices resulting from the Emergency Declaration, many other developers may not be able to do so."). The Solar Intervenors' Motion also fails to acknowledge that there are many factors besides the potential for tariffs that will also affect the cost of solar components over the period between when RFP awards are issued in 2023 and when projects come into service in 2025 and later. These pricing risks are generally well understood by Solar Intervenors and other sophisticated market participants and assessing such risks will be an essential aspect of developing their bidding strategies for the Companies' 2022 Solar Procurement as well as for other solar RFPs across the Country over the next few years. Said another way, accounting for development risks is part of the normal course of the solar development business and the RFP should not be restructured to shift responsibility of accounting for market participants' pricing risks to the Companies and customers.

The Companies expect that market participants will factor the potential for panel tariff action into their initial bid with the understanding that the RFP is designed for the most competitive projects to potentially be selected as “Early Winners” (*See* RFP, Section VI.C. at 18) at the end of Step 1 and for all competitive bids that are selected to proceed to Step 2 of the bid evaluation process to have a bid refresh opportunity to provide a downward adjustment to initially-offered pricing. Each market participant’s bid development process should include an individualized risk assessment that should account for both near and long-term risks and result in a bid that prices in those risks. In other words, a properly developed bid should negate the need for an upward price refresh whether the Department of Commerce imposes tariffs, or if it has not concluded its investigation by April 2023. In addition, the Companies have deliberately scheduled the downward bid refresh timing to occur after the latest anticipated date for a decision to be made by the Department of Commerce on the Auxin Solar AD/CVD Petition. This means that if that if no tariffs are imposed or the actual tariffs imposed are less than what bidders included price into their initial bids, bidders will be incentivized to reduce their bid in order to achieve an award, thereby achieving cost savings for customers.

Importantly, an upward refresh option creates more pricing risk for customers, especially since the final target volume of solar resources and depth of market participation in the 2022 Solar Procurement is not yet known. Allowing an upward adjustment during the April 2023 Step 2 bid refresh period would create a potential for unconstrained upward price adjustments to a currently unknown procurement volume, and without the benefit of

knowing how robust market participation will be. Including this change at the outset of the RFP could potentially create a price squeeze that inflates costs to customers.¹

The Companies do, however, continue to see the benefit of allowing a downward bid refresh during Step 2. As the Commission recognized in its Approval Order, “the proposed, one-way downward adjustment mechanism appropriately addresses known market uncertainties which may impact the 2022 Solar Procurement.” Approval Order at 4. The current bid refresh mechanism could result in lower costs for customers if panel tariffs are not imposed during the RFP period, or if Congress extends or expands the federal Investment Tax Credit at rates higher than under current law. In summary, Duke Energy continues to support the current Step 2 downward bid refresh adjustment opportunity but does not support allowing an upward refresh if customers must potentially bear increased procurement costs due to implementing such a refresh.

II. The IE Concurred with the Bid Refresh Mechanism as it is Currently Constructed, and Solar Intervenors have Identified No Other Solar RFPs Allowing the Upward Bid Adjustment They Propose.

The Solar Intervenor’s Motion question the Companies assertion that the Biden Administration’s emergency declaration substantially mitigates near-term risk for market participants during the bidding window. While Duke Energy continues to believe this statement about near-term risk mitigation is accurate, Duke Energy also recognizes Solar Intervenors’ perspective that market uncertainty remains beyond 24-month period, especially for bidders that do not take delivery for panel supply during the next two years.

¹ Duke Energy strongly opposes scenario (a) presented in the Motion allowing an upward bid refresh to be triggered in advance of the Commerce Department concluding its investigation into the AD/CVD petition by the time of re-pricing. To the extent the Commission is inclined to require Duke Energy to modify the RFP to allow potential upward adjustment to bids in Step 2, such adjustments should only be triggered where the Commerce Department has concluded its investigation and imposed additional tariffs on imported solar modules as a result of the Auxin Solar AD/CVD Petition.

However, in developing this aspect of the RFP (as directed by the Commission's May 26 Order), Duke Energy consulted with the IE on the potential for a bid refresh after the Auxin petition had been filed and accepted by the Department of Commerce, and the risk of tariff action was well understood. *See* IE's 2022 Solar Procurement Program Pre-Solicitation Report at 1 ("Duke Energy's evaluation of and response to Stakeholder feedback was fair and developed in a reasonable manner in consultation with the IE."); *id.* at 13 ("The IE believes Duke Energy has proposed an RFP that adequately considers market uncertainty and includes tools to mitigate uncertainty."). With the IE's input, Duke Energy designed the bid refresh mechanism to ensure that only downward adjustment to bid pricing will be allowed to potentially reduce costs for customers. *See id.* at 11 ("Under the price refresh, bidders invited to Step 2 may lower, but not raise, their Part A bid via the refresh mechanism. Early winners would not be subject to that refresh creating incentive to bid aggressively in order to meet the requirements associated with a Step 1 award.").

Duke Energy also notes that neither Solar Intervenors' June 3, 2022 Comments nor their June 13, 2022 Motion identify any other utilities' solar RFPs currently being developed contemporaneously with the 2022 Solar Procurement that specify a bid refresh mechanism in the RFP allowing upward adjustments to market participants' bids. Duke Energy is also not aware of other utilities allowing upward bid adjustment mechanisms as proposed by Solar Intervenors.

After consultation with the IE, Duke Energy continues to find the RFP downward bid refresh mechanism reasonable, adequately considerate of market uncertainty, and consistent with other known RFPs in its approach to managing future risk associated with

the Department of Commerce's investigation. Therefore, the Companies continue to support the current bid refresh construct as reasonable and appropriate.

III. The Commission Reasonably Considered the Biden Administration's Emergency Action and Applied its Expert Judgment to the Evidence in Deciding the Issues Presented in the Approval Order.

The Solar Intervenors argue that reconsideration is proper because "the Commission's finding that an upward pricing adjustment is inappropriate was *premised entirely*" on Duke Energy's statements regarding the Auxin Solar AD/CVD Petition and that "some change in circumstances or a misapprehension or disregard of a fact that provides a basis for the Commission to rescind, alter, or amend a prior order." Motion at 3-4 (emphasis added) (citing *State ex rel. Utilities Comm'n v. MCI Telecommunications Corp.*, 132 N.C. App. 625, 630, 514 S.E.2d 276, 280 (1999)). This argument mis-reads the Order and also ignores that "[t]he Commission has the ability to determine the credibility of the evidence presented," (*State ex rel. Utilities Comm'n v. N. Carolina Gas Serv.*, 128 N.C. App. 288, 293, 494 S.E.2d 621, 625 (1998) (citing *State ex rel. Utilities Comm'n v. Duke Power Company*, 285 N.C. 377, 390, 206 S.E.2d 269, 278 (1974))), and that "[t]he Commission may also use its own expert judgment to determine the weight to be given to the evidence." *N. Carolina Gas Serv.*, 128 N.C. App. at 293, 494 S.E.2d at 625.

The Biden Administration issued the emergency declaration on June 6. The Commission issued its Approval Order on June 10. The Approval Order specifically recognized the Biden Administration's emergency action and found it "material in the determination of this matter." Approval Order, at 4. Subsequent to the Commission's issuance of the Approval Order, there has not been a "change in circumstance or a misapprehension or disregard of a fact." *MCI Telecommunications Corp.*, 132 N.C. App. at 630, 514 S.E.2d at 280. Rather, the Commission reviewed Duke Energy's June 7

response and used “its own expert judgment to determine the weight to be given of the evidence” in its June 10 Approval Order. *Duke Power*, 285 N.C. at 390, 206 S.E.2d at 278. For that reason, reconsideration should be denied.

CONCLUSION

WHEREFORE, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC respectfully request that the Commission deny the Solar Intervenors’ Motion, authorize the Companies to open the 2022 Solar Procurement Program, and grant such other relief as the Commission deems reasonable and proper.

Respectfully submitted, this the 15th day of June, 2022.

By: /s/E. Brett Breitschwerdt

Jack E. Jirak
Deputy General Counsel
Duke Energy Corporation
PO Box 1551/NCRH 20
Raleigh, North Carolina 27602 Telephone:
(919) 546-3257
jack.jirak@duke-energy.com

E. Brett Breitschwerdt
Kristin M. Athens
McGuireWoods LLP
501 Fayetteville Street, Suite 500
PO Box 27507 (27611)
Raleigh, North Carolina 27601
(919) 755-6563 (EBB)
(919) 835-5909 (KMA)
bbreitschwerdt@mcguirewoods.com
kathens@mcguirewoods.com

*Counsel for Duke Energy Carolinas, LLC and
Duke Energy Progress, LLC*

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Response to Motion for Limited Reconsideration*, as filed in Docket Nos. E-2, Sub 1297 and E-7, Sub 1268, were served electronically or via U.S. mail, first-class, postage prepaid, upon all parties of record.

This, the 15th day of June, 2022.

/s/E. Brett Breitschwerdt

E. Brett Breitschwerdt
McGuireWoods LLP
501 Fayetteville Street, Suite 500
Raleigh, North Carolina 27601
Telephone: (919) 755-6563
bbreitschwerdt@mcguirewoods.com

*Attorney for Duke Energy Carolinas, LLC
and Duke Energy Progress, LLC*

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