

PUBLIC (REDACTED) VERSION

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

Docket No. SP-8748, Sub 1
Docket No. SP-8741, Sub 2
Docket No. E-7 Sub 1156

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
)	VERIFIED AMENDED PETITION
)	FOR DECLARATORY RULING AND
Lick Creek Solar LLC)	OTHER RELIEF
)	

NOW COMES Petitioner Lick Creek Solar LLC (“Petitioner”), pursuant to N.C. Gen. Stat. §§ 62-30, 62-110.8, and 1-253, and Rule R1-5 of the Commission’s Rules and Regulations, and file this Petition requesting that the North Carolina Utilities Commission (“Commission”) direct the Independent Administrator (“IA”) of the Competitive Procurement of Renewable Energy (“CPRE”) program to reverse its disqualification of Petitioner’s Proposals from Tranche 2 of the CPRE program based on the fact that Petitioner has an existing Power Purchase Agreement (“PPA”) with Duke Energy Carolinas LLC (“DEC”), requiring DEC to pay avoided cost rates for the purchase of energy and capacity for the Project’s output. Petitioner further requests that the Commission enter a declaratory ruling clarifying that Market Participants (“MPs”) shall not be required to terminate existing PPAs as a condition of bidding into CPRE, so long as such MPs commit to terminating those PPAs (and accepting the contractual consequences of such termination) in the event they are selected for a CPRE contract.

Allowing Petitioner’s projects to bid into CPRE will enlarge the pool of participating proposals, increasing the likelihood that DEC will meet its procurement target. If Petitioner’s project is selected, it will also benefit ratepayers by lowering the aggregate cost to ratepayers of

PUBLIC (REDACTED) VERSION

the Tranche 2 procurement, and also replacing a PPA at priced avoided cost with a CPRE PPA priced significantly below avoided cost.

Conversely, requiring projects with existing PPAs to terminate their contracts with Duke in order to bid into CPRE serves no legitimate policy purpose and would discourage such projects from participating in CPRE, reducing the pool of potential CPRE projects and depriving ratepayers of the possible benefits of contracting for energy and capacity from Petitioner's Project at rates below avoided cost.

In support of its Petition, Petitioner shows as follows:

I. PETITION

A. Parties

1. Petitioner Lick Creek LLC ("Lick Creek Solar") is a limited liability corporation organized under the laws of Delaware and certified to transact business in North Carolina. Its principal place of business is located at 880 Apollo Street, Suite 333, El Segundo CA 90245.

2. Petitioner is a wholly owned subsidiary of Silver Pine Energy Holdings, LLC.

3. Petitioner's counsel in this proceeding, to whom all notices, pleadings, and other documents related to this proceeding should be directed, is:

Benjamin L. Snowden
Kilpatrick Townsend Stockton LLP
4208 Six Forks Road, Suite 1400
Raleigh, NC 27609
Telephone: (919) 420-1719
Email: bsnowden@kilpatricktownsend.com

4. Respondent Accion Group, Inc. ("Accion") is the Independent Administrator of the CPRE Program. Accion's principal place of business is located at 244 North Main Street, Concord, NH 03301.

PUBLIC (REDACTED) VERSION

5. Respondent DEC is an electric public utility operating under the laws of the State of North Carolina for the purposes of generating, transmitting, and distributing electricity in its service territories in North Carolina. Respondent is an operating subsidiary of Duke Energy Corporation. DEC's principal office is located at 526 South Church Street, Charlotte, North Carolina 28202-1802.

B. Petitioner's Project

6. Petitioner is a special-purpose entity organized for the development of a solar photovoltaic ("PV") generating facility in North Carolina. Petitioner is developing a solar PV project in Stokes County, North Carolina, with a nameplate capacity of 50 MWac ("the Project"). The Project has a Certificate of Public Convenience and Necessity issued under Commission Rule R8-64.

7. The Project has a signed Interconnection Agreement with Duke Energy Carolinas LLC ("Duke"), pursuant to which it is already making payments for Interconnection Facilities and Upgrades. Accordingly, the Project qualifies as an "Advanced Stage Project" under the Request for Proposals for the Competitive Procurement of Renewable Energy Program Tranche 2 published by the IA on October 15, 2019 ("Tranche 2 RFP") (Attachment A).

8. The Project does not require significant Upgrades in order to interconnect safely and reliably to DEC's system. Under the terms of the CPRE Program, the cost of any such Upgrades will not be borne directly by ratepayers.

9. The Project has a signed PPA with Duke, entered into under the Public Utility Regulatory Policies Act, 16 U.S.C. §§ 824a-3, *et seq.*, ("PURPA"). The Project's PPA was executed on or around September 6, 2019, and has a duration of five (5) years. The Project's PPA requires Duke to purchase the Project's energy and capacity at avoided cost rates calculated as of

PUBLIC (REDACTED) VERSION

the date the Project established a Legally Enforceable Obligation (“LEO”) under PURPA, and implementing regulations. [REDACTED]

10. The Project’s PPA requires it to pay substantial liquidated damages to DEC if the Project fails to achieve commercial operation and commence delivering power under the contract.

[REDACTED] The Liquidated Damages provisions of the PPA state that these damages are reasonably calculated to compensate the utility for any damages that would result from the Project failing to deliver energy and capacity as required under the contract.

11. Petitioner submitted a PPA Proposal in CPRE Tranche 2. The Project opted to proceed as an Advanced Stage Proposal and submitted a bid substantially below avoided cost.

This pricing fully accounts for the cost of all Upgrades assigned to the Project, which will not otherwise be assigned to ratepayers.

12. Petitioner’s Proposal pricing is equivalent to an approximate “all-in” price of [REDACTED] which is below the analogous pricing under the Project’s existing PPA.

13. Petitioner believes that its bids will be highly competitive in Tranche 2. The Project bid at a significant decrement to avoided cost, even after accounting for integration costs, and

PUBLIC (REDACTED) VERSION

furthermore (because it is an Advanced Stage Project) has no Upgrade costs that would be charged to ratepayers.

C. The CPRE Program

14. North Carolina House Bill 589, S.L. 2017-192 (“HB 589”), created the CPRE program, which obligates DEC and Duke Energy Progress, LLC (“DEP,” and together with DEC, “Duke”)¹ to competitively procure energy and capacity from renewable energy facilities. The purpose of CPRE is to “add[] renewable energy to the State's generation portfolio in a manner that allows the State’s electric public utilities to continue to reliably and cost-effectively serve customers' future energy needs.”²

15. To ensure the cost-effectiveness of energy resources procured under CPRE, HB 589 provides that each utility’s procurement obligation shall be “capped by the public utility's current forecast of its avoided cost calculated over the term of the power purchase agreement.” The statute further provides that the utility’s current forecast of its avoided cost for these purposes “shall be consistent with the Commission-approved avoided cost methodology.”³

16. Under the CPRE program, Duke’s ratepayers generally pay the cost of any Upgrades required to interconnect the project, as determined in a “grouping study” performed on all projects bidding into each tranche. The cost of any Upgrades is considered in determining whether the project’s contract prices is at or below avoided cost, as require by HB 589. However, in Tranche 2 of the program, a project that has an executed Interconnection Agreement as of the

¹ Although the two utilities took bids separately and have distinct procurement targets, for most purposes related to CPRE, DEP and DEC have made joint proposals and the same rules apply to both utilities.

² N.C. Gen. Stat. § 62-110.8(a).

³ G.S. § 62-110.8(b)(2).

PUBLIC (REDACTED) VERSION

proposal deadline may opt to participate as an “Advanced Stage Proposal,” in which case the Project is not included in the grouping study, and the cost of its Upgrades is not directly borne by ratepayers but must be factored into the project’s Proposal price by the MP.

17. In addition to authorizing the procurement of energy and capacity at competitively-set prices at or below avoided cost, CPRE PPAs offer additional benefits to the utility and the ratepayer that would not otherwise be available, such the limited right to curtail the output of contracting facilities without compensation.

18. DEC’s procurement target for CPRE Tranche 1 was 600 MW of capacity. DEC failed to meet this target, and was able to procure only 465.5 MW of capacity.

D. Eligibility of Projects with Existing PPAs to Bid into Tranche 2

19. The IA has ruled with respect to both Tranche 1 and Tranche 2 of CPRE that a project with a non-contractual LEO may bid into CPRE and (i) terminate its LEO if it receives a CPRE award, or (ii) preserve its LEO if it is unsuccessful.

20. However, the Tranche 2 RFP states in a footnote that “an MP may not submit a Proposal for a Facility that has an existing off-take agreement.”⁴ This restriction on eligibility was not part of the Tranche 1 RFP and was not discussed in Duke’s Program Plan for Tranche 2.

21. In written and verbal comments provided during the stakeholder engagement process, Petitioner requested that the IA reconsider this requirement, arguing that it is unreasonable, anticompetitive, and not in the best interest of ratepayers. Petitioner further clarified

⁴ Tranche 2 RFP at 2 n.4.

PUBLIC (REDACTED) VERSION

to the IA that it would commit in writing to terminate its existing PPA and pay liquidated damages if awarded a CPRE PPA.⁵

22. The IA declined to reconsider this requirement, responding that “The Soliciting Entity [*i.e.*, Duke] has determined that the proposed arrangement requiring default on an existing legal obligation is not in the best interests of its ratepayers, and therefore, respectfully disputes the position taken by the prospective bidder.” No explanation was provided as to how or why the proposal would not be in the best interest of ratepayers.

23. Petitioner submitted its Tranche 2 Proposal on March 9, 2020. On March 11, Accion notified Petitioner that its Proposal was “ineligible to participate in CPRE” because the Project had an existing offtake agreement, and eliminated the Proposal from consideration in Tranche 2.

II. REQUEST FOR RELIEF

24. The disqualification of Petitioner’s proposal from CPRE Tranche 2 at the behest of Duke (the counter-party to Petitioner’s PPA) is unreasonable, anticompetitive, and not in the best interest of ratepayers. Specifically, the elimination of this Project, which is an Advanced Stage Project with minimal Upgrade costs (which will in any event be borne by the Petitioner and not by ratepayers), will most likely: (a) increase the average bid price for Tranche 2; (b) increase the

⁵ Although Petitioner has offered to pay liquidated damages for PPA termination as a result of being selected in CPRE, it should be noted that such liquidated damages are unreasonable in a circumstance such as this, where Duke and its ratepayers would actually benefit from termination of the PURPA PPA and replacing it with CPRE PPA at the pricing bid by Petitioner. Duke would obtain energy and capacity over a longer term at a substantially lower price, and also enjoy the advantages of CPRE-style PPAs (*i.e.*, curtailment rights, REC acquisition, and accounting for integration costs).

PUBLIC (REDACTED) VERSION

clearing price for Tranche 2; and (c) make it more difficult for DEC to achieve its procurement goals for Tranche 2.

25. If the Project were selected for a Tranche 2 CPRE PPA, it would be more advantageous to ratepayers for the Project to enter into a CPRE PPA than it would be to deliver power pursuant to its existing PPA, for several reasons: (1) the Project's CPRE bid is significantly below the avoided cost rates approved in the E-100 Sub 158 docket, inclusive of solar integration costs, and below the avoided cost rates in Petitioner's existing PURPA PPA; (2) CPRE PPAs give Duke limited curtailment rights that are not available under Petitioner's existing PURPA PPA; (3) CPRE PPAs, unlike Petitioner's existing PURPA PPA, transfer renewable energy certificates to Duke; (4) CPRE PPAs, unlike Petitioner's existing PURPA PPA, account for solar integration costs; and (5) if required by the Commission, DEC will receive substantial liquidated damages even though they will not in fact have been damaged at all by the termination of Petitioner's existing PURPA PPA.

26. More generally, Duke and the IA's decision not to allow projects with existing PPAs to bid into Tranche 2 lacks any rational policy justification. It is also inconsistent with the IA's decision to allow projects with existing LEO's to bid into Tranche 2 without compromising those LEOs. A PPA is a form of LEO under PURPA,⁶ and it is arbitrary and capricious to treat PPAs and non-contractual LEO's differently for purposes of determining CPRE eligibility.

27. Duke has repeatedly and publicly expressed its aversion to procuring energy and capacity through PURPA PPAs such as those Petitioner is a party to. Given the lack of any rational basis for Duke's conclusion (adopted by the IA) that MPs must terminate existing PPAs before bidding into CPRE, it is possible that this decision was intended to force Petitioner to cancel its

⁶ 18 C.F.R. § 292.304(b)(5), (e)(2)(iii).

PUBLIC (REDACTED) VERSION

existing PPA or be excluded from CPRE Tranche 2. If Petitioner elected to keep its PPA and not bid into Tranche 2, this would also benefit Duke by increasing the prospects of success of Duke's own Proposals. Given DEC's eligibility as a Market Participant in Tranche 2, it is particularly inappropriate that it should have any voice in the exclusion of other competitors based on how they conduct their business with DEC. It is also inappropriate for DEC to use its influence over CPRE policy decisions to pressure Petitioner to terminate its PPA as a condition of participating in CPRE.

28. Petitioner submits that it would support the goals of the CPRE program and would be in the best interest of ratepayers for the Commission to direct the IA to reinstate Petitioner's Proposal and consider it in Tranche 2, and to issue a Declaratory Order clarifying that Projects with existing offtake agreements may bid into CPRE.

III. REQUEST FOR EXPEDITED TREATMENT

29. The Tranche 2 Step 1 selection process is currently underway. The IA is ranking Proposals in order of competitiveness and is projected to conclude by the Step 1 selection process by April 17, 2020. It is imperative that the Commission grant any relief as soon as possible to avoid negative impacts on other Proposals.

30. This Petition presents a straightforward legal issue and no disputed factual issues. Petitioner submits that the Commission can resolve this issue without an evidentiary hearing.

31. Accordingly, Petitioner respectfully requests that the Commission consider their Petition on an expedited basis.

IV. RELIEF REQUESTED

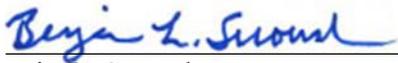
WHEREFORE, Petitioner respectfully requests that the Commission grant the following relief:

PUBLIC (REDACTED) VERSION

- A. Direct the IA to reinstate the Petitioner's Proposal into consideration in CPRE Tranche 2;
- B. Issue a declaratory Order pursuant to G.S. § 1-253, stating that Projects with existing offtake agreements are not barred from bidding into or being selected in any tranche of CPRE; and
- C. Grant such other and further relief as this Commission may find just and reasonable.

Respectfully submitted, this the 15th day of May, 2020.

KILPATRICK TOWNSEND & STOCKTON LLP

By: 
Benjamin L. Snowden
Counsel
4208 Six Forks Road, Suite 1400
Raleigh, NC 27609
Telephone: (919) 420-1719
Email: bsnowden@kilpatricktownsend.com

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

Docket No. SP-8748, Sub 1
Docket No. SP-8741, Sub 2
Docket No. E-7 Sub 1156

In the Matter of)
)

Lick Creek Solar LLC)
)
)

VERIFICATION

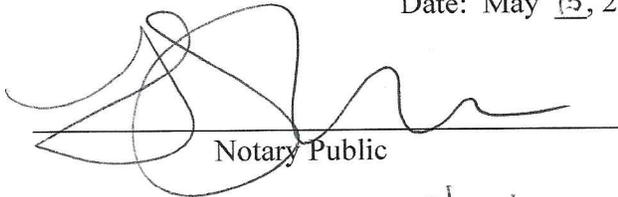
I, Ben Catt, being first duly sworn, depose and say that I am President of Silver Pine Energy Holdings, LLC, and in such capacity, I have read the foregoing Amended Petition for Declaratory Ruling and Other Relief and know the contents thereof, and by my signature below verify that the contents are true and correct to the best of my knowledge.



Buncombe County, North Carolina

Signed and sworn before me this day by Ben Catt

Date: May 15, 2020



Notary Public

[SEAL]

My Commission Expires: 8/24/2022

