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January 5, 2021

VIA ELECTRONIC FILING

Ms. Kimberley A. Campbell, Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4300

RE: Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Joint Response to Petition for Reconsideration
Docket Nos. SP-9590, Sub 0; E-7, Sub 1156; E-2, Sub 1159

Dear Ms. Campbell:

Enclosed for filing is Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Joint Response to Petition for Reconsideration.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

Jack E. Jirak

Enclosure

cc: Parties of Record

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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

DOCKET NO. SP-9590, SUB 0	)	
	)	
In the Matter of	)	
Application of Stanly Solar, LLC, for a	)	
Certificate of Public Convenience and	)	
Necessity to Construct a 50-MW Solar	)	
Facility in Stanly County, North	)	DUKE ENERGY CAROLINAS,
Carolina	)	LLC'S AND DUKE ENERGY
	)	PROGRESS, LLC'S JOINT
DOCKET NO. E-2, SUB 1159	)	RESPONSE TO PETITION FOR
DOCKET NO. E-7, SUB 1156	)	RECONSIDERATION
	)	
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	)	

NOW COME Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP" and together with DEC, the "Companies" or "Duke"), pursuant to N.C. Gen. Stat. § 62-80 and North Carolina Utilities Commission ("Commission") Rule R1-7, and hereby jointly respond to the Petition for Reconsideration ("Petition") filed in the above-captioned dockets on November 20, 2020 by Stanly Solar LLC ("Stanly").[1]

I. Background

[1] To the extent deemed necessary, Duke requests limited intervention in Docket No. SP-9590, Sub 0 for the sole purpose of responding to the Petition. Duke's interest in Docket No. SP-9590, Sub 0 at this time relates solely to responding to the Petition, which concerns the implementation of CPRE, for which Duke is responsible and the disposition of surety bond currently held by Duke in connection with CPRE.

Stanly was selected as a winner in Tranche 1 of the Competitive Procurement of Renewable Energy ("CPRE") for DEC but then subsequently declined to execute the CPRE power purchase agreement ("PPA") as was required under the terms of the CPRE Request for Proposals ("RFP").

Under the terms of the Tranche 1 RFP and the Proposal security posted by Stanly, Duke was entitled to draw on the Proposal security due to Stanly's failure to execute the PPA. On January 14, 2020, Stanly filed a Motion for Return of CPRE Proposal security ("Motion") with the Commission. Duke voluntarily agreed to refrain from drawing on the Proposal security until the Commission's decision on the Motion. In its October 20, 2020 Order Denying Motion for Return of CPRE Proposal Security ("Order"), the Commission denied the Motion, finding that Duke was reasonable in not releasing Stanly's Proposal security. Duke has once again voluntarily refrained from drawing on the security until after a Commission ruling on this Petition.

Finally, Stanly was selected as a winner in Tranche 2 of CPRE and has executed its Tranche 2 PPA. Stanly's Interconnection Agreement remains substantially unchanged from what was presented to it during the Tranche 1 process.

II. Response

State ex rel. Utilities Comm'n v. North Carolina Gas Service, 128 N.C. App. 288, 293-294, 494 S.E.2d 621, 626, rev. denied, 348 N.C. 78, 505 S.E.2d 886 (1998) states that a Commission may only modify its order "due to a change of circumstances requiring it for the public interest. In the absence of any additional evidence or a change in conditions, the Commission has no power to reopen a proceeding and modify or set aside an order made by it." (internal citations omitted). *State ex rel. Utilities Comm'n v. Edmisten*, 291

N.C. 575, 584, 232 S.E.2d 177 (1977) further states that Commission may also modify its order due "misapprehension of the facts, or disregard of facts."

a. <u>The Order correctly interpreted the RFP's application to Stanly and its withdrawal.</u>

The Order rightly concludes that Section VI(A) "did not apply to the evaluation of Stanly's proposal as a Late State Proposal under Section VI(C)."[2] Stanly seeks to reargue this point by asserting that the Commission's interpretation is "inconsistent with the text of the RFP"[3] but fails to introduce any new evidence, change in conditions or misapprehension or disregard of fact to support such argument. In its Petition, Stanly attempts to parse the various subsections of Section VI of the RFP to ascertain which were applicable to Late-Stage Proposals (as hereinafter defined) but, in so doing, misses the forest for the trees.

Once again, Section VI(A) of the Tranche 1 RFP described a potential scenario that, by its express terms, could only arise "during the Step 2 evaluation process." The Step 2 evaluation process is that portion of the process in which T&D costs were assessed for *non*-Late Stage Proposals.[4] The "Late Stage Proposal" concept was included in CPRE Tranche 1 at the behest of market participants based on feedback provided through the CPRE stakeholder process. In order to qualify as a Late-Stage Proposal, a project must have already been assessed in a System Impact Study in the standard serial study process prior to bidding into CPRE and then have executed its Facilities Study Agreement (the next step in the serial study process). As was well understood by all market participants through

[2] Order, at 10.

[3] Petition, at 10.

[4] Commission Rule R8-71(f)(3)(iii).

extensive stakeholder engagement and as was further made clear in Section IV(C) of the RFP, the entire point of the Late Stage Proposal concept was to exempt such projects from the Step 2 T&D evaluation process, since the T&D costs for Late Stage Proposals were already identified through the serial interconnection study process. Late Stage Proposals were required, pursuant to Section VI(C) of the RFP, to include any applicable T&D costs in their bid price.

By its very terms, Section VI(A) of the RFP was not applicable to Stanly, as was correctly determined by the Commission in its Order, since Stanly was a Late Stage Proposal and therefore not included in the Step 2 T&D evaluation process. Having already received its System Impact Study results and then having applied to participate as a Late Stage Proposal, it is simply inconceivable that Stanly believed it would need to be assessed for T&D purposes in Step 2.[5] Stanly has identified no new evidence that would be sufficient to alter the Commission's prior conclusion in this respect.

Duke also notes the fundamental inequity that would occur by allowing Stanly to avoid its Proposal security obligation based on a fact—that its interconnection would not be completed until after January 1, 2021—that Stanly itself acknowledged it understood at the time of its posting of Proposal security.[6] That is, Stanly already understood its interconnection would be delayed beyond January 1, 2021 but elected to post its Proposal security, only to turn around and demand that its Proposal security be returned due to the

[5] In fact, Stanly submitted a Notice of Dispute seeking an exemption to allow it to participate in CPRE Tranche 1 as a Late Stage Proposal.

[6] Order at 9-10.

fact that its interconnection would be delayed beyond January 1, 2021.[7] In essence, Stanly objects to not being notified of a fact of which it was already aware.

b. <u>The Commission did not misapprehend or disregard the fact that there were differing security requirements in Tranche 1.</u>

Stanly asserts in its position that the Order somehow reflected a "misapprehension or disregard" of the fact that there were differing security requirements in Tranche 1 that applied to third-party PPA Proposals and Duke-sponsored Asset Acquisition Proposals, respectively.[8] Nothing could be further from the truth. On Pg. 5, the Order directly acknowledges Stanly's allegation of inequitable treatment, quoting from Stanly's motion on these issues. Later, the Order also acknowledges Duke's argument concerning the basis for the differing security requirements. Therefore, it is clear that the Commission fully understood Stanly's argument concerning inequitable treatment, but simply did not find such argument persuasive or correct.

c. <u>Equitable treatment is not synonymous with treatment that is identical in each and every respect</u>.

To the extent that the Commission deems it appropriate to address Stanly's "equitable treatment" argument more directly, Duke believes that there is ample basis on which to reject such argument for the reasons set forth in this section and the following sections. As was explained in Duke's reply, there are fundamental, real-world differences in risk and timing between the two different types of Proposals that were permitted in Tranche 1, and these differences provide a reasonable basis for the differing security requirements.

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[7] Id.

[8] *See e.g.*, Petition, at 6-7.

On the one hand, PPA Proposals were those Proposals that were solely within the control of the market participant submitting the Proposal, as such market participant had complete control of every aspect of the development process and, in most cases, would likely have been developing the project for one or more years prior to participation in CPRE. These PPA Proposals were bid in on an energy price basis ($/MWh).[9] On the other hand, Asset Acquisition Proposals are those Proposals that were developed by third-party market participants with no input from Duke and then bid into CPRE for potential acquisition by Duke. Under the CPRE structure, Duke was then required to evaluate such third-party Asset Acquisition Proposal from scratch under a very short time period (1-2 months) before electing whether to "sponsor" (*i.e.*, adopt the Proposal). Asset Acquisition Proposals were bid by the third-party at a specific capital price ($/KW) and not an energy price.[10] If Duke elected to sponsor the Asset Acquisition Proposal, it was required to convert the Proposal to an energy-price ($/MWh).[11] Importantly, however, that energy price bid ($/MWh) was entirely dependent on the third-party's capital price ($/KW).

In the case of the Tranche 1 Duke bid in question, the third-party market participant submitted an Asset Acquisition Proposal at a specific $/KW capital price that Duke reviewed and vetted under the short timeline discussed above, before ultimately electing to sponsor the Asset Acquisition Proposal at a $/MWh price. However, after Duke elected to sponsor such Asset Acquisition Proposal, the third party unilaterally changed the as-bid capital price ($/KW) on which Duke had based its energy price bid ($/MWh). In such a circumstance, it would be unreasonable to hold Duke to its $/MWh bid price that was

[9] Tranche 1 RFP, Section II(A).

[10] *Id*., Section III(C).

[11] *Id*.

entirely dependent on the third party's as-bid CPRE price for a project regarding which Duke had no control and no involvement in development. And while changes in underlying prices impact all parties attempting to develop generating facilities, in the context of the sponsored Asset Acquisition Proposals in CPRE, Duke had neither sufficient time nor the RFP framework to mitigate such risk (*e.g.*, to contractually "lock-in" the third-party bidder to its bid price).

This distinction between a PPA Proposal and an Asset Acquisition Proposal is critical because it highlights that there were, in fact, fundamental differences between the two Proposal types that justified differing security requirements. Equitable treatment does not mean treatment that is identical in all respects. Nor does equity dictate that Proposals that are not the same should be treated in exactly the same way. If "equitable treatment" means treatment that is identical in all respects, then Duke's sponsored Asset Acquisition Proposals were treated inequitably. For example, Duke has a much smaller window of time in which to prepare its sponsored Asset Acquisition Proposals than do third-party market participants and Duke's sponsored Asset Acquisition Proposals are subject to an onerous and exhaustive Independent Administrator ("IA") audit process that is not applicable to third-party market participants. If "equitable treatment" requires completely identical treatment in all respects, then the IA should be required to audit the pricing and Proposal development for all third-party Proposals in the same manner that is done for Duke-sponsored Asset Acquisition Proposals. But that is an unreasonable and impractical interpretation. Instead, equitable treatment means treatment that is fair given the particular circumstances and context. And given the crucial differences between the PPA Proposals

and Duke-sponsored Asset Acquisition Proposals, the differential treatment with respect to security in Tranche 1 was reasonable and not inequitable.

d. <u>The nature of the change between Tranche 1 and Tranche 2 confirms Duke's position regarding the uniqueness of the Asset Acquisition Proposal structure.</u>

Stanly asserts that "[t]he fact that this was required in Tranche 2 without issue rebuts Duke's argument that the 'dramatically different commercial contexts' of Asset Acquisition Proposals justify excusing the latter from posting Proposal Security. Although Duke argued in its Response that the PPA and the Asset Acquisition components of the CPRE process must be distinguished in their application [sic]."[12] Duke acknowledges that a change was made in Tranche 2 with respect to Step 2 security for Asset Acquisition Proposals. But Duke further observes that Stanly very carefully avoids precisely describing the exact nature of the change—that is, Stanly does not fully describe what was actually changed in Tranche 2.

Under the terms of Tranche 2 RFP, the third-party Asset Acquisition bidder—not Duke—was required to post the security if a Duke-sponsored Asset Acquisition Proposal was moved into Step 2.[13] This is significant because, contrary to Stanly's assertion above, it affirms the unique risk profile discussed above—that it is the third-party's Asset Acquisition Proposal that is fundamental to Duke's bid and therefore, it is the third party that appropriately posts the security and bears the risk of a change in price (*i.e.*, that a Duke-

[12] Petition, Pg. 8, FN 5.

[13] Tranche 2 RFP, Section II(F)(2) ("In the case of Asset Acquisition Proposal sponsored by the DEC/DEP Proposal Team, Step 2 Proposal Security will be required from the Third-Party MP as further described in Section III(C)"); Section III(C) ("The Third-Party MP that submitted the Asset Acquisition Proposal will be required to provide Step 2 Proposal Security in accordance with the notification and timing requirements described in Section II(F)(1). For Asset Transfer plus EPC and BOT proposals, the Step 2 Proposal Security is $20/kWac.")

sponsored Asset Acquisition is, in fact, a "dramatically different commercial context."). Once again, this simply affirms that, under no circumstance would it be appropriate or equitable to require Duke to bear the risk in the Asset Acquisition Proposal scenario in which Duke is entirely dependent on the third-party market participant's Proposal.

e. Stanly failed to avail itself of the pre-solicitation comment period under Commission Rule R8-71(f) and a belated allegation of inequitable treatment should not serve as an excuse to its obligations.

Stanly's motion also completely ignores the greater context of the entire RFP process as contemplated by Commission Rule R8-71 ("CPRE Rule"). Under the CPRE Rule, the entirety of the RFP is made available for an extensive comment and refinement process overseen by the IA prior to initiation of the RFP and receipt of Proposals. Ample opportunity was provided to all market participants, including Stanly, to provide feedback, input, comments and recommended edits to the RFP either in writing or through stakeholder meetings (or both). The Step 2 security arrangement, including the differing treatment of Duke-sponsored Asset Acquisition Proposals was set forth clearly in the draft and final Tranche 1 RFP. The very purpose of the pre-solicitation comment period is to ensure that any "structural inequities" are identified and remedied *prior to* the final issuance of the RFP and solicitation and evaluation of Proposals, in part, in order to avoid these precise types of scenarios where an aggrieved party retroactively identifies infirmities in the structure simply to avoid the consequences of its own actions. Stanly had ample opportunity to identify this alleged structural inequity during the pre-solicitation comment period and failed to do so. In fact, to the best of the Companies' knowledge, no parties voiced any concerns regarding this aspect of the RFP until after the completion of Tranche 1.

The very purpose of the pre-solicitation comment period under Commission Rule R8-71(f) is to allow all parties to identify any alleged inequities in the RFP structure on the front end of the process. Stanly should not be permitted to leverage an allegation that should have been raised at an earlier point in the process for the sole purpose of escaping the clearly delineated outcome for withdrawals of winning Proposals. Stated differently, even if the arrangement was inequitable (which Duke does not concede), the remedy for this alleged inequity is a change in the security structure for future tranches and not a "free pass" to a party that willfully violated the terms of the RFP.

In fact, by failing to identify the alleged "structural inequity" during the pre-solicitation comment period under Commission Rule R8-71(f) but now seeking a unique exemption that was not made available to all other market participants, Stanly is itself imposing a "structural inequity" on Tranche 1. Whereas all other market participants made decisions in Tranche 1 with the understanding of the conditions under which Proposal security would be required and potentially forfeited, Stanly seeks an "exception" to those rules, which exception itself would create a "structural inequity" vis-à-vis the other market participants. If it were possible to retroactively conduct Tranche 1 for all third party market participants that were requested to post Proposal security (which it is not), many such market participants would likely make different decisions if they were given the opportunity for the "exception" that is now being sought by Stanly.

f. <u>There was no "violation" of N.C. Gen. Stat. § 62-110.8(d) or the CPRE Rule by either the Order or the actions of the IA.</u>

In various parts of the Petition, Stanly alleges that the Commission through its Order and the IA through its administration of the Tranche 1 RFP violated N.C. Gen. Stat. § 62-110.8(d) and the CPRE Rule because of the differing security requirements applicable

to third-party PPA Proposals and Duke-sponsored Asset Acquisition Proposals.[14] As an initial matter and as discussed above, Duke disagrees that the differing security requirement created a structural inequity in violation of applicable law.

It is also worth noting that there has been no allegation that the evaluation process itself (*i.e.*, Step 1 and Step 2 of the evaluation process as contemplated by Commission Rule R8-71(f)(3)) was *conducted* inequitably or in violation of the applicable law. Stanly alleges that the IA failed to follow the terms of the RFP (which allegation the Commission has rejected) and then alleges that RFP contained a structural inequity as it related to Proposal security requirements. But the latter allegation does not relate to the manner in which the IA administered the IA or evaluated Proposals[15]—only whether the RFP itself contained a "structural inequity." In fact, the IA has previously certified on multiple occasions pursuant to Commission Rule R8-71(h)(2)(ix) that all Tranche 1 proposals were treated equitably[16] and the Commission has previously concluded that Duke reasonably and prudently implemented CPRE Program requirements of N.C. Gen. Stat. § 62-110.8.[17]

What this highlights is the fundamental flaw in retroactive allegations concerning "structural inequities" in an RFP where Stanly (and other market participants) did not raise substantial concerns regarding the differing security requirements prior to the opening of

[14] *See e.g.*, Petition, at 9, 12.

[15] Stanly Reply, at 9 ("To be clear, Stanly does not claim that Accion erred in enforcing the rules as to the asset acquisition proposal that withdraw from Tranche 1").

[16] *See* IA Certifications included in 2019 CPRE Compliance Report filed in Docket No. E-7, Sub 1193 (DEC) and Docket No. E-2 Sub 1208 (DEP) and 2020 CPRE Compliance Report filed in Docket No. E-7 Sub 1231 (DEC) and Docket No. E-2 Sub 1254 (DEP).

[17] *Order Approving CPRE Rider and CPRE Program Compliance Report*, Docket No. E-7, 1231 ("the Commission concludes that the Company is in compliance with and has reasonably and prudently implemented the CPRE Program requirements of N.C.G.S. § 62-110.8"); *Order Approving CPRE Rider and CPRE Program Compliance Report*, Docket No. E-2, Sub 1254 ("the Commission concludes that the Company is in compliance with and has reasonably and prudently implemented the CPRE Program requirements of N.C.G.S. § 62-110.8."). .

CPRE Tranche 1, as was provided for by the pre-solicitation comment period under Commission Rule R8-71(f). The various references to equitable treatment of all proposals in both the statute and the Commission's CPRE Rule should most naturally be read to require administration of the RFP in accordance with the terms of the final RFP, including that all Proposals were evaluated equitably in Step One and Step Two of the evaluation process in accordance with the terms of the RFP. And once again, Stanly has not alleged that there was any inequitable treatment of Proposal as it relates to the actual evaluation of Proposals or, aside from the allegation concerning Section VI(A) (which the Commission rejected), that the IA somehow failed to implement the RFP in accordance with its terms. To suggest that the RFP can be fully developed in accordance with the Commission's CPRE Rule and the IA can implement the RFP strictly in accordance with its terms but then be retroactively found to have treated Proposals inequitably is contrary to the spirit and intent of the CPRE Rule. It is also difficult to reconcile a finding that that there was a structural inequity in the RFP with the fact that the Commission has already concluded that Duke has reasonably and prudently implemented the CPRE Program requirements of N.C. Gen. Stat. § 62-110.8.

g. <u>The change between Tranche 1 and Tranche 2 does not mean that the Tranche 1 approach was inequitable.</u>

Duke also notes that the fact that the RFP was changed between Tranche 1 and Tranche 2 does not mean that the Tranche 1 security requirements were *per se* inequitable. Given the complexity of an RFP, there are a range of approaches that can constitute an equitable framework. And it is entirely reasonable to expect that Duke and the IA and Market Participants will identify ways to improve and fine-tune the RFP over time.

However, the mere fact that lessons learned are implemented through changes from one RFP to the next does not by itself indicate that the prior RFP was inequitable in any respect.

h. <u>Stanly's additional allegation of "structural inequity" should be ignored</u>.

Stanly also attempts to identify a further alleged "structural inequity."[18] But this alleged inequity is similarly not grounded in reality or the actual terms of the RFP. Stanly asserts that a Late Stage Proposal "would have to achieve commercial operation by January 1, 2021" but does not cite to any provision of the RFP that so required. Presumably, Stanly is referring to Section 1 of the RFP, which, in part, requires that eligible projects must be "***capable of completing construction*** prior to January 1, 2021." (emphasis added). This requirement does not reference an obligation to achieve "commercial operation" since achieving commercial operation is, in fact, dependent on Duke's completion of interconnection. Instead, this requirement related to a prospective assessment (i.e., "capable of") of the ability of the market participant to complete construction of the generating facility prior January 1, 2021, which ability is not dependent on the completion of the interconnection by Duke. In any event, this argument is wholly hypothetical because Stanly has not been impacted whatsoever by the Section 1 requirement to be capable of completing construction by January 1, 2021. If Stanly (or a subsidiary or affiliate) believes that there is some further "structural inequity" that may have actual impact on projects in the future (as compared to a non-existent, hypothetical impact in this case), it is free to identify such inequity in a future pre-solicitation comment period under Commission Rule R8-71(f).

[18] Petition, at 11

i. The further baseless speculation in Stanly's Petition should be disregarded.

In its Petition, Stanly also engages in a series of speculative assertions that have no basis in fact or any evidence. First, Stanly cites to the IA's "Acquisition Process Audit" as evidence that the Step 2 security arrangement from Tranche 1 somehow was the determinative factor in the pricing. However, it is not reasonable nor is there any evidence to support the proposition that the single issue of the security requirement among the hundreds of other costs and complex financial factors that can influence the bid price is solely responsible for the observed price differential between the Duke-sponsored Asset Acquisition Proposals and the third-party PPA Proposals. This is pure speculation with no supporting evidence and should be ignored.

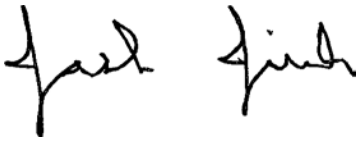
Second, and in a similar vein, Stanly posits that the change in security arrangement is responsible for the differing outcome in Tranche 2, in which no Duke-sponsored Asset Acquisition Proposals were identified as winners. Once again, this is also an almost comically simplistic attempt at speculation. There is no evidence to establish what may have caused the differing outcome in Tranche 2 or that the specific change was solely responsible for the differing outcome. In fact, at an even more basic level, there is actually no evidence to establish that any Asset Acquisition Proposals were even sponsored by Duke in Tranche 2, which potentially accounts for the observed differing outcome.[19] In sum, none of the Stanly's speculations constitute new evidence or evidence sufficient to establish a demonstration of inequity in Tranche 1.

III. Conclusion

[19] The IA's Final Tranche 2 Report will provide further details on this issue.

WHEREFORE, Duke respectfully requests that the Commission reject the Petition. To the extent that the Commission finds it necessary to more directly address Stanly's "inequitable treatment" argument, Duke requests that the Commission amend its Order to expressly find that no inequitable treatment occurred for the reasons explained herein.

Respectfully submitted, this 5th day of January, 2021.



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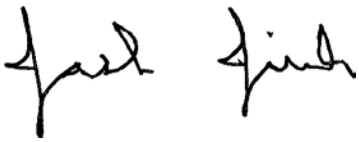
Counsel for Duke Energy Carolinas, LLC and Duke Energy Progress, LLC

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Joint Response to Petition for Reconsideration, in Docket Nos. SP-9590, Sub 0; E-7, Sub 1156 and E-2, Sub 1159, has been served by electronic mail, hand delivery or by depositing a copy in the United States mail, postage prepaid to parties of record.

This the 5th day of January, 2021.



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