

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 )

**REPLY IN SUPPORT OF  
MOTION FOR RETURN OF  
CPRE PROPOSAL SECURITY**

REPLY IN SUPPORT OF 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 prepared by the Independent Administrator (“IA”) and provided to CPRE participants on July 10, 2018 (“RFP”),<sup>1</sup> Stanly Solar, LLC (“Stanly”) hereby files this Reply in support of its Motion for Return of CPRE Proposal Security (“Motion”), filed in these dockets on January 14, 2020. Stanly files makes this filing in response to *Accion Group, LLC’s, the CPRE Independent Administrator, Response to Motion for Return of CPRE Proposal Security*, filed on February 20, 2020 (“Accion Response”); and *Duke Energy Progress, LLC’s and*

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<sup>1</sup> Stanly’s Motion for Return of CPRE Proposal Security erroneously stated that the Tranche 1 RFP was filed in Docket No. E-2 Sub 1159 and E-7 Sub 1156 on July 10, 2018. The Tranche 1 RFP was published on Independent Administrator’s web site on that date, but was not filed with the Commission until August 24, 2018, in connection with the *Initial Comments of Duke Energy Carolinas, LLC and Duke Energy Progress LLC*, relating to then-proposed revisions to the North Carolina Interconnection Procedures (“NCIP”). A copy of the Tranche 1 RFP is included as Attachment A.

*Duke Energy Carolinas, LLC's Joint Response to Motion for Return of CPRE Proposal Security*, filed on February 24, 2020 (“Duke Response”).

Accion and Duke raise several arguments in their filings, none of which undermines the fundamental fact that Accion failed to follow the rules of the Tranche 1 RFP (rules that Accion and Duke drafted) and thereby deprived Stanly of the ability to withdraw from Tranche 1 without penalty pursuant to Section VI(A) of the RFP. The arguments raised by Accion and Duke include the following: (1) that the forum selection clause in the CPRE surety bond form deprives this Commission of jurisdiction to consider Stanly’s request; (2) that only the “firm” in-service date provided in an executed Interconnection Agreement could be used to determine whether a project could meet the Tranche 1 in-service deadline of January 1, 2021; (3) that Duke did not inform Accion, during the Step 2 selection process, that Stanly could not meet the in-service deadline; and (4) that Accion followed the rules of the Tranche 1 RFP in allowing a Duke-sponsored asset acquisition proposal, similarly situated to Stanly, to withdraw from Tranche 1 without penalty. Each of these issues will be discussed in turn.

**A. The Commission has jurisdiction over this matter.**

Accion claims, and Duke suggests, that the Commission does not have jurisdiction to consider Stanly’s motion because the Surety Bond form used for Proposal Security in Tranche 1 provides that “[a]ll disputes relating to the execution, interpretation, construction, performance, or enforcement of the Bond and the rights and obligations thereto will be ... resolved in the State and Federal courts in North Carolina.”<sup>2</sup> Accion Response at 2; Duke Response at 2-3. Accion also

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<sup>2</sup> The Surety Bond form is attached as Appendix D to the Tranche 1 RFP (Attachment A). It bears noting that the bond form, like the rest of the Tranche 1 RFP, was not submitted to the Commission for approval.

faults Stanly for not challenging the terms of the Surety Bond when they were proposed. Accion Response at 2.

But Stanly's Motion does not relate to "the execution, interpretation, construction, performance, or enforcement" of the Surety Bond. It arises instead from Accion's failure to follow the rules of the RFP. An order from the Commission directing Duke to release Stanly's bond, which Duke would otherwise be entitled to collect on, is simply the remedy Stanly seeks for this failure. The forum selection clause of the bond is therefore inapplicable. And the General Assembly has clearly vested this Commission with the authority to administer all aspects of the CPRE program, to supervise the Independent Administrator, and to hear complaints arising out of the acts or omissions of public utilities. G.S. §§ 62-110.8, 62-73. Accion's claim that including this standard forum selection clause in a bond form somehow divested the Commission of that jurisdiction is absurd.

**B. Accion did not follow the rules of the Tranche 1 RFP.**

The crux of this dispute is whether Accion correctly followed Section VI(A) of the Request for Proposals for the Competitive Procurement of Renewable Energy Program Tranche 1 ("Tranche 1 RFP"), which in addition to Rule R8-71 and the Commission's orders, provided the ground rules for Market Participants ("MPs") in Tranche 1. That Section, entitled "Facility Commercial Operation Date and PPA Term," states in its entirety:

**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. If the T&D Sub-Team determines that any required Interconnection Facilities or System Upgrade cannot be completed by July 1, 2021, the IA will remove the Proposal from further consideration. For the avoidance of**

doubt, the term of all PPAs shall be 20 years from the date of commercial operation as provided for in the PPA.

Tranche 1 RFP at 16 (emphasis added).

Accion and Duke each take the position that, for purposes of determining whether required Interconnection Facilities or System Upgrades for a given project cannot be completed by January 1, 2021, the in-service date in the project's Interconnection Agreement is the only date that matters. Accion Response at 4, 6; Duke Response at 3-4. Duke further argues that its T&D Sub-Team "did not have sufficient information to allow it to determine a specific in-service date for any CPRE project at the time of the Step 2 evaluation." Duke Response at 5 (emphasis added). These claims are either false or irrelevant, for several reasons.

First, Accion (presumably without objection from Duke) reported to the Commission in the Tranche 1 Final Report that Duke did determine in-service dates for Tranche 1 projects. The report plainly says 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 (emphasis added). The report goes on to state that for each Proposal in the Competitive Tier, Accion and Duke created a bid interconnection cost analysis that described the "estimated cost and construction time of network improvements," and that Accion and Duke met weekly during Step 2 to discuss the analysis results "Analysis Results for Each Proposal." *Id.* at 43-44. Because the projects being analyzed in Step 2 generally did not have Interconnection Agreements (as discussed below), Duke used a standard set of assumptions about construction timelines to determine how long it would take to construct the required upgrades for each project. IA Final Report at 42 ("The construction

timeline used for this determination [of in-service dates] was the normal completion times for the system components needed.”).

It would, in fact, have been impossible to use the in-service date provided in an Interconnection Agreement to conduct this “timeliness” analysis, because the vast majority of projects selected in CPRE Tranche 1 did not have Interconnection Agreements until well after the Section VI(A) analysis was completed. The Tranche 1 RFP provides that Section VI(A) analysis is performed during Step 2 of the Tranche 1 process. But CPRE projects included in the Step 2 Grouping Study<sup>3</sup> do not execute an Interconnection Agreement until after Step 2 has finished and winning projects have been selected. The only interconnection process milestone that occurs during Step 2 is the System Impact Grouping Study, which is used to determine the extent of upgrades likely to be triggered by each project. NCIP Sec. 4.3.4. Only projects that are selected for CPRE contracts at the conclusion of Step 2 move on to receive a Facilities Study and then an Interconnection Agreement, while non-selected proposals may elect to receive a subordinate queue position or wait for the next tranche of CPRE. NCIP Sec. 4.3.4, 1.7.3.

Accion’s claim that “the Commission-approved procedures” require that “identification of in-service date” occurs only in the Interconnection Agreement (Accion Response at 8) is also inconsistent with the realities of the interconnection process. Under the NCIP, as Duke administers them, potential in-service dates are determined at several points in the process, with (ideally) an increasing degree of precision. Per the NCIP, potential in-service dates are listed on the Interconnection Request form and are required to be provided at Construction Planning Meetings. NCIP Attachment 2 (Interconnection Request Application Form) at 6; NCIP § 5.1.4. In addition,

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<sup>3</sup> This means all projects other than Late Stage Projects, as defined in the Tranche 1 RFP and related Orders. The significance (or lack thereof) of Stanly’s status as a Late Stage Project is discussed further below.

for many projects (including Stanly) Duke's System Impact Study Report includes a construction schedule with estimated timelines starting from the date of the Interconnection Agreement. Duke's Facilities Studies also include an estimated In-Service Date.<sup>4</sup> The Interconnection Agreement may provide the most accurate estimate of a project's in-service date, but it is simply false to claim, as Accion and Duke do, that an in-service date cannot be estimated prior to issuance of an Interconnection Agreement.<sup>5</sup>

It also makes no sense to examine only projects with executed Interconnection Agreements when determining whether CPRE projects will meet the in-service deadline for Tranche 1. As stated, the vast majority of Tranche 1 Projects did not have interconnection agreements as of the time the Step 2 analysis was conducted. All things being equal, projects with interconnection agreements are the ones most likely to meet the in-service deadline. The converse is also true. So excluding less-advanced projects from the analysis of in-service dates would defeat the purpose of Section VI(A).

For similar reasons, Duke's claim that it lacked "sufficient information" to determine each project's in-service date during the Step 2 analysis (Duke Response at 5) is a non-sequitur. If Duke could not determine probable in-service dates during Step 2, then why was Section VI(A), which requires Duke to do exactly that, included in the Trance 1 RFP? Likely because, while it may be difficult to determine a precise in-service date for a project with no Interconnection Agreement, knowing a project's exact in-service date generally is not necessary to determine whether it will

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<sup>4</sup> Stanly's Facility Study, issued June 7, 2019, indicated that the In Service Date would be two years from the completed interconnection agreement date.

<sup>5</sup> Even the Interconnection Agreement doesn't provide a truly binding in-service date: unlike the Customer's payment deadlines, the utility's milestones in the Interconnection Agreement are effectively unenforceable.

be able to go in-service by a particular deadline. In any event, with respect to Stanly (as discussed below), Duke had ample information to determine during the Step 2 analysis that the project would not be interconnected by January 1, 2021.

**C. Duke's failure to inform Accion of issues with Stanly's in-service date does not excuse the failure to follow the terms of the Tranche 1 RFP.**

Accion argues that it did not violate the rules of the RFP, because "During the Step 2 evaluations the T&D Sub-Team did not determine a specific in-service date for Stanly and therefore had no basis to inform the IA regarding a specific interconnection timeline." Accion Response at 5. Stanly has no reason to dispute Accion's claim that Duke did not tell Accion that Stanly couldn't go into service by January 1, 2021, or to claim that Accion is somehow at fault for not receiving this information from Duke.

However, there is no question that Duke knew that Stanly would not achieve interconnection until after January 1, 2021, because it had informed Stanly on several occasions that this was likely. Stanly's System Impact Study Report, dated December 14, 2017, stated that the likely in-service date of the Project would be 24 months from the date of a completed interconnection agreement.<sup>6</sup> Stanly did not have an interconnection agreement when the Step 2 analysis was conducted in March-April 2019. Consequently, using the same assumptions about construction timelines that Duke applied to other projects in Step 2, it would have been apparent during Step 2 that Stanly would not achieve interconnection until at least March-April 2021.

This construction timeline was reaffirmed in the Facilities Study Report received by Stanly on June 7, 2019 (after Stanly had posted its \$1 million Proposal Security, but well before Stanly's

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<sup>6</sup> It is Stanly's understanding that this 24-month window represented the "normal completion time" for interconnection work that Duke employed in the Step 2 in-service date analysis for other projects. IA Final Report at 42.

deadline for signing a PPA). The Facilities Study Report again stated that it would likely take two years from the commencement of construction to complete interconnection work for the project. Under those timelines, it would be July 2021, at the earliest, before interconnection work could be completed. Duke provided a more precise estimate of the completion date at the June 21, 2019 construction planning call, but the revised date (April 2021) was still after January 1, 2021, and still would have triggered Section VI(A). The interconnection agreement Duke ultimately issued on July 11, 2019, specifies May 31, 2021 as the “Interconnection Facilities and Upgrade In-Service Date.” Duke repeatedly stated, in its System Impact Study Report, in its Facilities Study Report, at the construction planning meeting, and ultimately in Stanly’s Interconnection Agreement that the construction schedule would be approximately 24 months from signing the interconnection agreement. Had the T&D Team given the slightest consideration to Stanly’s in-service date during Step 2, it would have been apparent that Stanly could not make a January 1, 2021 in service date.

All of this information was provided to Stanly by Duke, and subsequently conveyed to Accion by Stanly. The utility’s failure to tell Accion about it during Step 2 may not have resulted from any lapse on the part of Accion, but it still meant that Stanly was deprived of its right to withdraw from Tranche 1, as set forth in the RFP.<sup>7</sup>

Duke’s Response hints at a reason why information about Stanly’s in-service date was not provided to Accion. Duke reports that because Stanly was a Late Stage Project under CPRE rules (because it had a completed facilities study agreement prior to Tranche 1 opening), Stanly was not included in the Step 2 Grouping Study and the Duke T&D Sub-Team did not “specifically evaluate” its in-service date. Duke Response at 5. Duke claims that because Stanly was a Late

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<sup>7</sup> Duke does not explain in its Response why it did not pass on the information about Stanly’s projected in-service date to the IA during Step 2.



Stage Project, “the provision[s] of Section VI(A) are inapplicable.” *Id.* But neither Section VI(A) of the Tranche 1 RFP nor Section VI(C), which describes the treatment of Late Stage Proposals, says that Late Stage Proposals are treated any differently for purposes of determining in-service dates. Nor is there any reason they should be. In any event, the fact that Stanly was not included in the Step 2 Grouping Study is irrelevant because Duke already knew (with as much certainty as it had for any non-Late Stage Project) that Stanly’s likely in-service date would be after January 1, 2021.

**D. Stanly does not object to Accion’s treatment of the withdrawn Asset Acquisition proposal.**

Accion takes issue with Stanly’s discussion of the discrimination that would result from Stanly forfeiting its Proposal Security, while a Duke-sponsored asset acquisition proposal was allowed to withdraw after being selected without penalty because it had not been required to post Proposal Security. Accion Response at 9-10 (citing Motion at 10.) Accion appears to claim that this discriminatory treatment is irrelevant, because Accion followed the rules of the RFP as to the Duke project, and that Stanly had never objected to the rules concerning third-party MPs.

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. Stanly only points out that Accion’s failure to follow the rules as to Stanly not only deviated from the Tranche 1 RFP, but also resulted in unintentional discrimination between the two projects. That discrimination can be remedied by directing Duke to return Stanly’s Proposal Security.<sup>8</sup>

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<sup>8</sup> Because Stanly is also bidding into Tranche 2, Stanly submits that it would also be appropriate for the Commission to Order that Stanly’s Proposal Security be carried over to Tranche 2, if Stanly is selected in Step 1 of the Tranche 2 process.

Duke also attempts to distinguish the circumstances of its asset acquisition proposal from Stanly, stating that its project was withdrawn because the third-party bidder increased its \$/kW as-bid capital price, after the DEC/DEP Proposal Team submitted their \$MWh PPA price, such that the Proposal Team could not maintain the as-bid PPA price. Duke Response at 5-6. Although the facts are inevitably somewhat different because a third-party bidder was involved, the commercial circumstances are not dissimilar.<sup>9</sup> The only difference is that Accion followed the rules of the RFP with respect to the Duke asset acquisition proposal (allowing it to withdraw without penalty), but failed to do so with respect to Stanly.

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

Respectfully submitted, this the 13th day of March, 2020.

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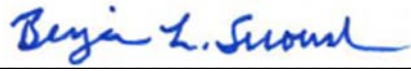
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<sup>9</sup> Stanly acknowledged in its Motion that a significant factor in its decision not to sign a Tranche 1 PPA was an increase in capital prices after January 2019. Motion at 5-6 and n. 3.

**CERTIFICATE OF SERVICE**

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

This the 13th day of March, 2020.



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Benjamin L. Snowden