

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. SP-13695, SUB 1
BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:

Orion Renewable Resources LLC

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REPLY IN SUPPORT OF VERIFIED
PETITION FOR RELIEF
BY ORION RENEWABLE
RESOURCES LLC

NOW COMES Orion Renewable Resources LLC (“Orion”), by and through the undersigned counsel and pursuant to sections 62-110.8 and 62-2(b) of the North Carolina General Statutes, and submits this Reply in support of its Verified Petition for Relief (the “Petition”), filed with this Commission on March 30, 2020.

Orion petitioned the Commission to challenge the disqualification of its Proposal 129-01 (the “Proposal”) for an 80-megawatt solar project (the “Project”) in Tranche 1 of the Competitive Procurement of Renewable Energy (“CPRE”) Program of Duke Energy Carolinas, LLC (“Duke”). Orion seeks relief on the grounds that the Independent Administrator, Accion Group LLC (“Accion” or the “IA”), disqualified the Proposal using an Evaluation Tool (“Evaluation Tool”) which was intended and authorized under the RFP to rank bids, but not to disqualify them from consideration. This relief is necessary and appropriate in this instance, where Duke did not meet its 600-megawatt procurement target for Tranche 1. Disqualification of Orion’s Proposal violated H.B. 589, this Commission’s CPRE rules, and the terms of the Tranche 1 RFP.

In its *Response To Verified Petition For Relief By Orion Renewable Resources LLC* (“Response”) filed on April 9, 2020, the IA acknowledges that even though Orion’s bid price met

the Commission’s avoided cost-based test for cost-effectiveness, the IA used a different and additional “Net Benefit” test to disqualify Orion’s otherwise qualified bid. The IA further acknowledges that the Tranche 1 RFP makes no mention of the use of a Net Benefit test to disqualify bids. The IA’s use of a proprietary “cost-effectiveness” test to disqualify bids is fundamentally at odds with the measure of cost-effectiveness for CPRE proposals prescribed by the General Assembly and this Commission – a measure which relies on the utility’s published avoided cost rates. G.S. § 62-110.8(b)(2); Rule R8-71(b)(2). While it may have been appropriate for the IA to use a Net Benefit analysis to rank CPRE proposals, it was not appropriate for the IA to use a Net Benefit analysis to disqualify a proposal that met this Commission’s cost-effectiveness test if, as in this case, the utility’s procurement target has not been met.

In its Response, the IA insinuates that Orion was somehow lax in failing to bring this challenge to the Commission earlier. But as discussed below, the timing of Orion’s filing was not the result of any lack of diligence on Orion’s part. To the contrary, Orion immediately sought an explanation for the disqualification of its bid in April 2019, but the IA refused to provide it until after Tranche 1 had concluded. This refusal was followed by Orion’s persistent but unsuccessful efforts to resolve this dispute informally with the assistance of the Public Staff. In any case, the timing of Orion’s Petition in no way prejudices the recipients of final PPA awards, or anyone else, and is not a basis for denying Orion relief.

1. The IA’s Response ignores the critical difference between ranking CPRE Proposals based on “Net Benefit” and disqualifying them.

In its Response, the IA claims that:

the core of this dispute can be reduced to a simple question: Should the value of CPRE Proposals . . . be based on the IA’s robust and detailed evaluation of the 8760 hourly impacts of each year of the 20-year analysis which determines the net benefit to customers, or on whether Proposals are at or below Duke’s levelized avoided energy and capacity rates utilizing the methodology most recently approved by the Commission?

Response at 2. The IA’s Response goes on to extensively discuss the virtues of its Evaluation Tool for ranking projects in CPRE: e.g., “The IA Evaluation Tool ... produced a ranking of Proposals from the most beneficial to customers to the least beneficial,” “Duke and the Public Staff agreed that the IA Evaluation Tool was a vital tool to rank Proposals relative to each other.” Response at 3, 4 (emph. added). But nowhere in the Response does the IA defend the use of its Evaluation Tool as a means of disqualifying bids.

Orion does not dispute that CPRE proposals should be ranked according to their benefits to customers, and does not take issue with the IA’s use of its Evaluation Tool in determining the Net Benefit of each proposal.¹ The core question here is not whether the IA may use the Net Benefit analysis to rank a proposal, but whether it can use the Net Benefit analysis to disqualify an otherwise qualified proposal when other, higher-ranked proposals are insufficient to meet the utility’s procurement target. Nothing in H.B. 589, the Commission’s Rules, or the Tranche 1 RFP suggests that a proposal may be disqualified from CPRE based on the IA’s Net Benefit analysis.

As discussed in the Petition, H.B. 589 requires that resources procured under the CPRE program be “cost-effective.” Both the General Assembly and this Commission specifically require that cost-effectiveness be judged solely by reference to the utility’s published “avoided cost” rate, not by positive benefit for the utility’s customers. *See* G.S. § 62-110.8(b)(2) (“To ensure the cost-effectiveness of procured new renewable energy resources, each public 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.”); NCUC Rule R8-71(b)(2) (“The electric public

¹ Because the IA’s evaluation criteria, including the calculations underlying its Net Benefit analysis, are proprietary and confidential, Orion cannot formulate an informed opinion on the merits of those criteria.

utility's avoided cost rates shall be used for purposes of determining the cost effectiveness of renewable energy resources procured through a CPRE RFP Solicitation.”) (emph. added).

The IA's Response, however, concedes that Accion used the Evaluation Tool to determine each proposal's Net Benefit as a means of measuring the proposal's "cost-effectiveness", completely separate from and in addition to the measure of cost-effectiveness dictated by this Commission: e.g., "The IA believe [sic] that N.C. Gen. Stat. 62-110.8(b)(2) requires the IA to determine 'the cost-effectiveness of procured new renewable energy resources' of Proposals, and believes that the IA has the latitude to identify which Proposals are found to be cost effective relative to the system as determined by the IA Tool. . . .The IA measures cost effectiveness as whether a Proposal would provide a positive benefit for Duke's customers." Response at 4-5 (emph. added).

Although the IA is correct that it "is given wide latitude to evaluate Proposals based on its CPRE Program Methodology" (Response at 3), that discretion does not allow the IA to ignore the plain language of the statute and the Rules. Nothing in the statute, rules, CPRE Program Order, or Tranche 1 RFP allows the Independent Administrator to add additional "cost-effectiveness" criteria to those which this Commission has determined to use. Instead, the Tranche 1 RFP specifically states that a "Net Benefit" analysis will be used only to rank proposals for purposes of selection. Petition at 8. The IA does not dispute this in its Response. Allowing bidders to be disqualified by a ranking tool is arbitrary and unfair, and undermines the Commission's goal of requiring utilities to procure all cost-effective resources necessary to meet the utility's procurement targets.

The decision of the General Assembly and this Commission to measure cost-effectiveness by reference to the utility's published avoided cost rates should be strictly adhered to, because it

promotes fairness and efficiency in the CPRE process. Unlike the Net Benefit analysis, which is proprietary to the IA and based on confidential information about Duke’s system costs to which Market Participants (“MPs”) do not have access, the Avoided Cost Cap is a clear, transparent, and objective metric. With this metric in mind, MPs know exactly how to submit bids which will be deemed “cost-effective”, and therefore eligible for consideration to meet the utility’s CPRE procurement target.

2. Duke has acknowledged its responsibility to contract with all cost-effective proposals to achieve its procurement target.

Had Duke met its procurement obligation, the difference between ranking and disqualification of proposals based on Net Benefit might not be meaningful, because lower-ranked proposals such as Orion’s might not have been awarded PPAs in any event due to the number of higher-ranked proposals available. But under Commission Rule R8-71(f)(3)(iii)-(iv), Duke is required to select CPRE proposals in the order ranked by the IA until its procurement target is satisfied. Duke fell short of its procurement obligation in Tranche 1, and in such a case even a lower-ranked bid is entitled to be offered a PPA award if its pricing is below the Avoided Cost Cap and it is therefore “cost-effective”.

The IA contends that “where the IA determines that a Proposal is not in the best interest of customers based on the IA’s CPRE Program Methodology, the IA and Duke are not required to select a Proposal simply because the Proposal is below the Avoided Cost Cap.” But the IA is wrong, for the reasons discussed in the Petition.² And, as the IA has acknowledged, Duke itself agrees that the IA is wrong. According to the IA’s own Memorandum published on February 28,

² Petition at 4-8, 14. Orion does not contend that CPRE Proposals cannot be disqualified based on non-economic factors disclosed in the RFP, such as lack of site control or inability to meet in-service deadlines.

2020 (Attachment E to the Petition), Duke accepts its responsibility to achieve the full procurement target established by this Commission for each tranche:

Duke evaluation personnel believe that [Duke] is required under the terms of N.C. Gen. Stat. 62-110.8(b)(2) to contract with Proposals that bid at or below the 20 year levelized Avoided Cost (in each pricing period) identified in the RFP, notwithstanding a determination of net benefit under the IA Evaluation Methodology, if doing so is necessary to achieve the procurement targets established for each tranche during the 45 month CPRE procurement period. The IA understands that [Duke] continues to support the IA Evaluation Methodology as the appropriate approach to ranking all proposals.

Tranche 2 Memo at 2.³ In fact, according to the Tranche 2 Memo, the IA has now agreed to change its approach to the elimination of bids, stating that “No Proposal will be eliminated from further consideration if the assigned upgrade costs do not exceed the maximum allowable T&D upgrade costs, even if it has a negative benefit in the IA evaluation.” Tranche 2 Memo at 1 (emphasis added). The IA provides no explanation in its Response as to why, if its Tranche 1 approach was justified, it is now willing in Tranche 2 to utilize the method urged by Petitioner, accepted by Duke, and required by the law.

3. Orion was not untimely and attempted in good faith to resolve this matter before filing the Petition.

The IA’s Response asks the Commission to “provide clarity and direction” concerning “Whether a challenge to the final determinations in a CPRE Tranche must be made before final PPAs are awarded, or whether the Commission will accept as timely challenges submitted eight months after the fact.” Response at 5. But as the IA knows, Orion could not have initiated this proceeding before final PPAs were awarded, because the IA refused to tell Orion why its Proposal was disqualified until August 2019, more than a month after Tranche 1 had been completed.

³ It is Orion’s understanding that the Public Staff intends to seek leave to file a memorandum regarding the Petition in this matter. Although the Public Staff can speak for itself, Counsel for the Public Staff have represented to Orion and its Counsel that they agree with Orion’s and Duke’s position on this question.

Moreover, no entity would in any way be prejudiced by the Commission's granting of the relief sought in the Petition.

In March 2019, the IA determined that Orion's Proposal was a competitive bid in Step 1 and required Orion to post \$1.5 million in security to enter Step 2.⁴ But in April 2019, the IA informed Orion that its Proposal had been eliminated, with no explanation why. Orion was left to assume that Duke had met its procurement target by signing PPAs with higher-ranked competitive bidders. Even so, Orion immediately requested a conference with the IA to understand why its bid had been eliminated. The IA refused to provide any information, stating that "The IA will conduct the conversation after Duke completes the contracting phase, which will be within 60 days." But, despite Orion's repeated follow-up requests, the IA did not conduct that conversation until August, more than a month after Duke had completed the contracting phase.

When the IA did finally explain to Orion that the Proposal's disqualification was based on the Net Benefit analysis, Orion promptly reached out to the Public Staff to facilitate a conversation with the IA in the hopes of persuading the IA that Orion's bid should not have been disqualified. But when the Public Staff contacted the IA, the IA offered an entirely different explanation for Orion's disqualification than it had previously given to Orion, stating that an analysis of the Project's likely interconnection costs had placed the cost of the Proposal above Duke's avoided cost rates. Petition ¶¶ 31-32. These inconsistent statements from the IA made it impossible for Orion to know why the IA had eliminated the Proposal, until February 15, 2020, when the IA finally communicated its current position directly to Orion.

In pursuing informal resolution before filing a complaint, Orion acted appropriately and in an attempt to conserve the parties' and the Commission's resources. Moreover, no entity is in any

⁴ A timeline of communications between Orion, the IA, and the Public Staff is set forth in the Petition, and shows Orion's diligence in filing the Petition. See Petition ¶¶ 17-34.

way prejudiced by the Commission's consideration of the Petition. The Petition does not challenge any of the final Tranche 1 PPA awards. It simply requests that there should be consideration of one additional PPA award, given the fact that Duke has not met its 600-megawatt procurement target for Tranche 1.

4. Relief Requested

Because Duke has not met its 600-megawatt procurement target for Tranche 1, Orion maintains that the Project should be awarded a Tranche 1 PPA if its pricing, inclusive of System Upgrade costs, is at or below the Avoided Cost Cap. Because Orion's Proposal was not included in the Step 2 T&D analysis (despite Orion being told it was selected for Step 2 and being required to post Proposal Security), further interconnection analysis is required to determine with certainty what System Upgrade costs would be.⁵ Orion submits that an appropriate path forward would be for Orion and Duke, with the assistance of the Public Staff, to obtain a Step 2 T&D analysis for the Project which is fair and non-discriminatory and respects the Project's Tranche 1 interconnection queue position.

Respectfully submitted this the 26th day of May, 2020.

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⁵ Orion's preliminary analyses strongly suggest that the Project would not have triggered System Upgrades sufficient to push the total cost of the Proposal over Duke's published Avoided Cost Rates.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **REPLY IN SUPPORT OF VERIFIED PETITION FOR RELIEF BY ORION RENEWABLE RESOURCES LLC** upon the following by electronic mail and/or first-class United States mail:

Accion Group, LLC
The Carriage House
244 North Main Street
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This the 26th day of May, 2020.



Benjamin L. Snowden