

**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

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)	) ORDER APPROVING REQUEST FOR PROPOSALS AND PRO FORMA POWER PURCHASE AGREEMENT SUBJECT TO AMENDMENTS

BY THE COMMISSION: Session Law 2021-165 (S.L. 2021-165), also known as House Bill 951, enacted N.C. Gen. Stat. § 62-110.9<sup>1</sup> which directs the Commission to develop a Carbon Plan that takes reasonable steps to reduce carbon dioxide emissions in this State from electric generating facilities owned or operated by Duke Energy Progress, LLC (DEP), and Duke Energy Carolinas, LLC (DEC, together with DEP, Duke), by 70% from 2005 levels by 2030 and to achieve carbon neutrality by 2050. Section 2.(c) of S.L. 2021-165 further authorizes the Commission to direct Duke to conduct a procurement of solar energy resources in 2022 if the Commission determines that solar resources are required in order to meet the carbon emission reduction directives of N.C.G.S. § 62-110.9.

On March 11, 2022, the Commission established this docket for the purpose of considering whether a 2022 Solar Procurement is warranted consistent with the provisions of S.L. 2021-165, Section 2.(c).

On March 14, 2022, Duke filed a petition for Authorization of 2022 Solar Procurement Program, which seeks Commission authorization of a system-wide competitive procurement seeking a minimum of 700 megawatts (MW) of utility-owned and third-party solar energy resources sited in both North Carolina and South Carolina (Petition). The Petition includes a request for expedited review so as to enable Duke to launch the procurement to align with the 2022 Definitive Interconnection System Impact Study (DISIS) for the purpose of evaluating the interconnection costs associated with bids.

Through various orders, the Commission has recognized the interventions of the Carolina Industrial Group for Fair Utility Rates II (CIGFUR II) and the Carolina Industrial Group for Fair Utility Rates III (CIGFUR III, and together with CIGFUR II, CIGFUR); the North Carolina Sustainable Energy Association (NCSEA); the Carolina Utility Customers Association, Inc. (CUCA); Walmart Inc. (Walmart); the Clean Power Suppliers Association

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<sup>1</sup> Section 1 of S.L. 2021-165 has been codified as N.C.G.S. § 62-110.9 at the direction of the Revisor of Statutes.

(CPSA); the North Carolina Electric Membership Corporation (NCEMC); the Southern Alliance for Clean Energy (SACE), the Sierra Club, and the Natural Resources Defense Council (NRDC and collectively, SACE et al.); and the Carolinas Clean Energy Business Association (CCEBA). Further the interventions of the Public Staff and the Attorney General's Office are recognized by statute.

On March 28, 2022, the Commission received comments on Duke's Petition from CIGFUR, AGO, SACE et al., Walmart, NCSEA, CUCA, Public Staff, and, jointly, CPSA and CCEBA; and on April 6, 2022, Duke filed their reply comments in support of the Petition.

On April 25, 2022, the Commission issued an Order Requiring Answers to Commission Questions and Establishing Additional Procedural Deadlines (April 25, 2022 Order), and on April 29, 2022, Duke filed its Response to Commission Order Requesting Answers on 2022 SP Program Petition. Consistent with the Commission's April 25, 2022 Order, on May 6, 2022, CPSA, SACE et al., NCSEA, and CCEBA filed responsive comments.

On May 16, 2022, in Commission Docket No. E-100, Sub 179, Duke filed its proposed Carbon Plan.

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, which authorized Duke 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 Request for Proposals (RFP) and pro forma Power Purchase Agreement (PPA), and further allowed parties to file comments pertaining to the proposed RFP and pro forma PPA.

On June 1, 2022, the Commission issued an Order Requiring Answers to Commission Questions which sought additional information about the evaluation of System Upgrades during the 2022 Solar Procurement process.

Also 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.

Finally, on June 3, 2022, CPSA and CCEBA, jointly, Duke, and the Public Staff filed for the Commissioner's consideration comments on the proposed RFP and pro forma PPA and responses to the Commission's questions about the evaluation of System Upgrades during the 2022 Solar Procurement process.

## **APPROVAL OF RFP AND PRO FORMA PPA SUBJECT TO AMENDMENTS**

CPSA and CCEBA, commenting jointly, state that they are “generally supportive of the terms of the RFP,” and the Public Staff states that it is “generally supports the RFP and pro forma PPA as filed.” CPSA and CCEBA June 3, 2022 Comments at 2; Public Staff June 2, 2022 Comments at ¶ 7. No other parties filed comments responsive to the proposed RFP and pro forma PPA.

The IE’s Pre-Solicitation Report demonstrates that the IE thoroughly scrutinized the RFP design, participated in the stakeholder process, and reviewed Duke’s incorporation of stakeholder feedback. Based on this work, the IE concluded that:

- The proposed final RFP design and documentation are consistent with industry standards and precedent;
- The information contained in the final RFP package as presented is clear and the requirements noted are typical for similar RFPs it has overseen;
- The proposed evaluation process and the mechanism for scoring and evaluating bids is reasonable and does not provide any individual bidder an undue advantage for selection;
- The Stakeholder process was sufficient, and Duke’s evaluation of and response to Stakeholder feedback was fair and developed in a reasonable manner; and
- The proposed RFP adequately considers market uncertainty and includes tools to mitigate uncertainty.

The Public Staff states that the proposed procurement “strike[s] an appropriate balance between controlling ratepayer costs and progressing towards the interim 70% carbon reduction goal.” Public Staff June 3, 2022 Comments at ¶ 9.

The Commission gives substantial weight to the conclusions of the IE and the Public Staff, and therefore, finds good cause to approve the proposed RFP and pro forma PPA subject to the conditions elaborated herein. The Commission’s approval of the terms and conditions of the RFP and pro forma PPA is not precedential for subsequent competitive procurements.

## **BID REFRESH**

Commenting jointly, CPSA and CCEBA object to the “Bid Refresh” mechanism contained in Section VI.D. which requires that all Step 2 Controllable PPA Track proposals reprice “Part A Price,” the levelized dollar per megawatt-hour price, of their bids and may not exceed their initial bid price. Particularly, CPSA and CCEBA state that the United States Department of Commerce is currently investigating allegations that solar panel manufacturers are circumventing antidumping tariffs on Chinese solar cells and

panels by manufacturing these products in certain countries in Southeast Asia. “One possible outcome of that investigation would be the imposition of tariffs on solar modules imported from those countries, which could have a marked impact on solar development costs in the United States.” CPSA and CCEBA June 3, 2022 Joint Comments at 3. CPSA and CCEBA speculate that “[i]t is likely that the AD/CVD petition will be resolved by next April, when the bid refresh is slated to occur.” *Id.* They contend that “[i]f bidders are not afforded the opportunity to re-price their proposals upward in response to the imposition of tariffs or other impacts of the [investigation], then bidders must factor the risk that tariffs will be imposed into their [initial] proposals.” *Id.* CPSA and CCEBA argue that this will result in higher initial bids. The Public Staff also notes the “the risk that the ongoing U.S. Department of Commerce Antidumping and Countervailing Duties investigation of crystalline silicon photovoltaic cells from southeast Asia may result in tariffs which would significantly increase the cost of solar panels to all solar developers.” Public Staff June 3, 2022 Comments at 7. “Depending on the timing and outcome of this investigation, it may have significant impacts on the viability of the 2022 RFP, particularly if the repricing mechanism does not allow for price increases to reflect any tariffs imposed on imported solar panels.” *Id.* at 7-8.

On reply, Duke notes that on June 6, 2022, the Biden Administration issued a statement that it will impose a 24-month moratorium on certain tariffs on solar modules and cells from Cambodia, Malaysia, Thailand, and Vietnam in order to ensure that the U.S. has access to a sufficient supply of solar modules to meet electricity generation needs while domestic manufacturing scales up.<sup>2</sup>

The Commission is keenly aware of the impact that market pressures are having on solar developers, and the Commission is committed to fulfilling its statutory obligation to achieve the carbon emission reduction directives of S.L. 2021-165. Nonetheless, the Commission finds the Biden Administration’s announcement material in the determination of this matter. In light of this announcement, the Commission does not believe that an upward adjustment mechanism is necessary for the bid refresh and finds that the proposed, one-way downward adjustment mechanism appropriately addresses known market uncertainties which may impact the 2022 Solar Procurement.

## **RESPONSIBILITIES OF THE DUKE EVALUATION TEAM**

CPSA and CCEBA next object to the RFP requirement, also found in Section VI.D, that Utility Ownership Track bids reprice during the Bid Refresh process discussed above. More particularly, CPSA and CCEBA state that they do not conceptually object to Utility Ownership Track projects refreshing their bids, rather they assert that the process will give Duke an unfair opportunity to reprice its own Utility Ownership Track proposals after having reviewed competing Utility Ownership Track proposals during the Step 1 evaluation described in Section VI.C. CPSA and CCEBA assert that, because the same

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<sup>2</sup> Fact Sheet: President Biden Takes Bold Executive Action to Spur Domestic Clean Energy Manufacturing, The White House, Jun. 6, 2022, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/06/fact-sheet-president-biden-takes-bold-executive-action-to-spur-domestic-clean-energy-manufacturing/> (last visited Jun. 8, 2022).

personnel making up the Duke Evaluation Team are also responsible for preparing Duke's Utility Ownership Track proposals, "there is absolutely nothing to prevent the Companies from considering market information gleaned in the evaluation process in formulating its refreshed bids." CPSA and CCEBA June 3, 2022 Comments at 5-6. To remedy the perceived inequity, CPSA and CCEBA suggest that the Commission should either bar Duke from re-pricing its Utility Ownership Track proposals, or separate the personnel responsible for preparing Duke's UOT proposals from the Duke Evaluation Team." *Id.* at 6.

On reply, Duke argues that the dual responsibilities of its evaluation team will not create a conflict of interest:

While the Duke Energy evaluation team will have access to such information, Duke Energy does not believe these circumstances create the unfair competitive advantage that CPSA/CCEBA suggest. First, the Duke Energy Utility Ownership Team would only have an opportunity to offer a downward adjusted bid if its Proposal is competitive and is selected to proceed to Step 2. Second, all proposals ranked in Step 2 will have the same independent opportunity to improve their bid such that the pricing offered in Step 1 may no longer be meaningful and, in any case, any market participant can elect how aggressively to improve its bid. Third, the RFP also clearly provides in Section IV.D that the IE's role includes independently evaluating and ranking all UOT Proposals to provide transparency that any Utility Self-Developed Proposals were fairly evaluated compared to third party acquisition bids. Finally, contrary to CPSA/CCEBA's comments, all market participants will receive the same information in the form of the DISIS Cluster Phase 1 Report before proceeding to Step 2 so CPSA/CCEBA's assertion that Duke Energy will have an interconnection cost and interdependency information advantage is not correct.

Duke Letter Response to Public Staff and CPSA-CCEBA at 4.

Further, the IE states in the Pre-Solicitation Report that "the strict 55%/45% ownership allocation dictated by [S.L. 2021-165] significantly reduces the financial motivation for the Companies to favor the self-developed option given the earnings are the same whether the asset is self-developed or acquired." Pre-Solicitation Report at 11.

The Commission has carefully considered the arguments of CPSA and CCEBA, the IE's perspective, and the rebuttal of Duke. Principles of transparency and equity are paramount to establishing a successful competitive procurement where even the mere appearance of impropriety could chill the enthusiasm of market participants or lead to costly and time-consuming disputes. The Commission is well aware that the opportunities to procure solar that will be commercially operable by 2030 are limited. Allowing the 2022 Solar Procurement to be frustrated by potential or perceived inequities, when such

concerns are relatively easily mitigated, would be imprudent, impractical, and could potentially endanger Duke's ability to achieve the 2030 emission reduction target.

The Commission agrees with Duke that if Utility Ownership Track bids are allowed to lower their bids but self-developed projects are not, it reduces the competitiveness of the RFP and creates an opportunity where the projects selected are not actually the least-cost projects for customers. Therefore, the Commission finds that the most reasonable and prudent solution is to require Duke to separate the personnel responsible for preparing Duke's Utility Ownership Track proposals from the Duke Evaluation Team as recommended by CPSA and CCEBA. The Commission notes that such a requirement is consistent with the separation protocols employed during CPRE Program procurements.<sup>3</sup>

### **INDEPENDENT EVALUATOR FEES AND COSTS**

Duke's Petition proposes that the cost of the IE's services should be funded by market participants through proposal and winner's fees similar to the framework used in the Competitive Procurement of Renewable Energy Program (CPRE Program) pursuant to N.C.G.S. § 62-110.8; however, Duke acknowledges that ratepayers will be responsible for any Independent Evaluator's fees that exceed program fees collected from solar procurement bidders. DEC-DEP Response to Commission Order Requesting Answers on 2022 SP Program Petition, at 7 (April 29, 2022) (Duke April 29, 2022 Response to Commission Questions).

The Petition further states that Duke "will manage the contract terms with the IE and provide such contract to the Public Staff, once executed." Petition at 22-33. Duke also states that it "is working with Charles River Associates (the 2022 SP IE) to accurately forecast its service fees to arrive at reasonable bidder fees (paid by each bidder at the time it submits a bid) and winners fees (paid by each winning bid) that will offset those costs as much as possible." Duke April 29, 2022 Response to Commission Questions at 7.

The Commission notes that the CPRE Program fee collection process has repeatedly come under scrutiny for failing to cover adequately the cost of the CPRE Program's Independent Administrator (IA). Section VII of the 2022 Solar Procurement RFP, "Winners' Fee," states that the total amount of the Winners' Fees shall not exceed \$1 million. The Commission understands that, by capping the fees to be collected from Market Participants, Duke seeks to eliminate uncertainty and entice Market Participants to submit bids; nonetheless, the Commission finds that the potential for actual independent evaluation costs to exceed projected costs requires additional regulatory oversight. Therefore, the Commission finds that it is appropriate to apply a presumption

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<sup>3</sup> See Section I.D of Tranche 3 RFP (*accord* Section I.D of Tranche 1 and 2 RFPs): "All members of the Proposal Team(s) and the Evaluation Team have been separately identified in writing to the IA and physically segregated for purposes of all activities that are part of the Tranche 1 RFP solicitation process. All Proposal Team and Evaluation Team members have also been required to execute acknowledgements regarding compliance with the Separation Protocols." DEC and DEP's Amended CPRE Tranche 3 RFP, Attachment A, at 7, Docket Nos. E-2, Sub 1159 and E-7, Sub 1156 (January 21, 2022).

that any IE fees and costs that exceed program fees collected from Market Participants by 25% or more are unreasonable and unrecoverable. In a proceeding where a Duke utility seeks to recover such excess costs, the utility may rebut this presumption by competent, material, and substantial evidence.

The Commission also understands that some of the CPRE Program IA's excess fees have been attributed to unanticipated disputes. The Commission will require Duke to include a provision in the RFP and pro forma PPA that provides that in the event that the Commission is required to adjudicate any disputes related to the 2022 Solar Procurement and the IE's fees and costs exceed program fees collected from Market Participants, the non-prevailing party shall be responsible for all excess dispute-related fees and costs incurred by the IE.

### **RED ZONE TRANSMISSION EXPANSION PLAN PROJECTS IN THE DISIS BASELINE**

Duke notes in its June 3, 2022 response to Commission questions that Duke's Carbon Plan identifies Red Zone Transmission Expansion Plan (RZEP) projects that are "necessary to achieve public policy objectives." Duke further notes in its comments that "[i]f the NCTPC Oversight Steering Committee approves the RZEP projects for inclusion in the NCTPC's 2022 mid-year update (to the 2021 NCTPC Plan), those transmission projects would become part of the Companies' Local Transmission Plan and the cost of those projects would not be allocated to generators requesting interconnection in the 2022 DISIS." Duke June 3, 2022 Comments at 4.

CPSA and CCEBA assert in their joint comments filed on June 3, 2022, that Duke has "correctly" identified these projects as "necessary to achieve the goals of the Carbon Plan." CPSA and CCEBA June 3, 2022 Joint Comments at 8.

The Public Staff disagrees with the timing of this proposal and asserts that it is "premature to include these upgrades in the 2022 DISIS baseline and cannot support construction of these upgrades without completing further due diligence." Public Staff June 2, 2022 Comments at 19.

The Commission finds that no party has presented competent evidence that the RZEP projects are necessary to achieve the Carbon Plan, and the Commission therefore agrees with the Public Staff that it is premature to include these projects in the 2022 DISIS baseline. Duke's Carbon Plan was filed on May 16, 2022. The Commission has established a procedural schedule that anticipates the participation of multiple intervenors in order to inform the Commission's development of the Carbon Plan by the December 31, 2022 deadline of S.L. 2021-165. The Commission declines to agree with Duke's assertion that these projects are necessary to support a plan that has yet to be fully litigated and adopted by the Commission. Duke, and any intervenor supporting the inclusion of these projects in proactive transmission planning, is encouraged to provide substantial evidence supporting the necessity of the RZEP projects to achieve the goals of the Carbon Plan in that proceeding. The Commission determines that Duke's mere

assertion in this proceeding that the RZEP projects are necessary for the Carbon Plan is insufficient to support its proposal.

On preliminary analysis of Duke's Carbon Plan, the Commission is persuaded that a procurement of solar energy facilities in 2022 is reasonably supported. However, the procurement process must evaluate bids in a manner that takes into account all costs for the proposed facilities, including Network Upgrades. Duke has noted that including the RZEP projects in the 2022 DISIS baseline means facilities contingent on the RZEP projects would not be allocated the costs of Network Upgrades, and therefore those costs would not be used to evaluate the bids of those facilities. Duke is directed not to include the RZEP projects in the 2022 DISIS baseline.

### **FURTHER PROCEDURES TO BE ESTABLISHED BY FUTURE ORDER**

Section II of the RFP states that the "RFP Target Volume" – which is "based on the volume of new solar resources that Duke Energy's Carolinas Carbon Plan economically selected as need[ed] in 2026 to be interconnected and placed into service before the beginning of 2027" – is subject to final approval by the NCUC. RFP at 2-3. Section II further states that "[i]n approving the RFP Target Volume, the NCUC may also order allocation targets or minimums between DEC and DEP." *Id.* at 3. The Commission intends to establish further procedures in this docket, including opportunities for parties to comment on the RFP Target Volume and allocation targets or minimums between DEC and DEP, by future order.

IT IS THEREFORE, ORDERED as follows:

1. That Duke shall make the following amendments to the proposed RFP and pro forma PPA to provide for:

a. Separation of the personnel responsible for preparing Duke's Utility Ownership Track proposals from the Duke Evaluation Team;

b. In the event that the Commission is required to adjudicate any disputes related to the 2022 Solar Procurement and the IE's fees and costs exceed program fees collected from Market Participants, the non-prevailing party shall be responsible for all excess dispute-related fees and costs incurred by the IE;

2. That the RFP and pro forma PPA are hereby approved subject to the above-stated amendments;

3. That Duke is authorized to issue the amended RFP and pro forma PPA at its easiest convenience and shall file the final documents with the Commission; and



4. That Duke is directed not to include RZEP projects in the 2022 DISIS baseline.

ISSUED BY ORDER OF THE COMMISSION.

This the 10th day of June, 2022.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink that reads "Erica N. Green". The signature is written in a cursive style with a large, stylized initial "E".

Erica N. Green, Deputy Clerk

Commissioner Jeffrey A. Hughes dissents.

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**Commissioner Jeffrey A. Hughes, dissenting:**

I dissent because of my concern regarding Duke's proposal providing a clear path to include a number of critical transmission upgrade projects (RZEP projects) in the baseline for the 2022 DISIS even though the projects have not been fully vetted or approved at the time of order issuance and possibly not even by the time market participants must make a decision to enter the DISIS process. I believe this proposal creates market uncertainty during critical proposal preparation and DISIS time periods. I further believe that after Duke's proposal has created the expectation that these upgrades may be included in the baseline, the majority's order which definitively excludes these projects from the 2022 DISIS baseline may actually limit the success of the 2022 Procurement given that some market participants may have already begun planning projects and bids under a set of inaccurate transmission upgrade assumptions. If not for the need to include the 2022 Procurement in DISIS, I would have preferred to delay the implementation of this solicitation until after the RZEP projects had been properly vetted.

My dissent should not be interpreted as a rejection or lack of confidence for the RFP and PPA that this order also approves. On the contrary, I think there is clear evidence that shows that the process that went into crafting the RFP and PPA was well thought out, transparent, deftly implemented, and highly participatory. I am hopeful that the quality of the RFP and the strength of the process behind it will lead to a successful procurement, but my forementioned concerns prevent me from approving this order in its entirety.