

**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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**POST-HEARING BRIEF OF
ORION RENEWABLE
RESOURCES LLC**

NOW COMES Orion Renewable Resources LLC (“Orion”), by and through the undersigned counsel and pursuant to the *Notice of Due Date for Proposed Orders and/or Briefs* issued on November 24, 2020 and the *Order Granting Extension of Time to File Proposed Orders* issued on December 9, 2020, and submits this Post-Hearing Brief.

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” or “DEC”). Orion seeks relief on the grounds that the Independent Administrator, Accion Group LLC (“Accion”), disqualified the Proposal using an Evaluation Tool (“Evaluation Tool”) which was intended and authorized under the Tranche 1 RFP (“RFP”) to rank bids, but not to disqualify them from consideration. If Orion’s Proposal pricing was below DEC’s Avoided Cost and DEC did not meet its Tranche 1 procurement target, the utility was obliged to offer the Project a Tranche 1 PPA.¹

¹ The Commission has taken judicial notice of: (1) the Tranche 1 RFP, which was filed in Docket SP-9590, Sub 0 as Attachment A to a pleading filed March 13th, 2020 by Stanly Solar; (2) the Independent Administrator’s April 9, 2019 Conclusion Report on the Conclusion of the Step 2 Evaluation in Tranche

The evidence and testimony accepted into the record at the evidentiary hearing conducted on November 2, 2020 (the “Hearing”) confirm that Accion eliminated Orion’s Proposal from Tranche 1 based on its “Net Energy Benefit” (“Net Benefit”) analysis rather than on the Proposal’s compliance with the Avoided Cost cap established by Act 62. They also confirm that Orion’s Proposal was below the Avoided Cost cap, even after considering the cost of any required Transmission and Distribution System upgrades (“Upgrades”). Because DEC fell substantially short of its Tranche 1 procurement target, it was obliged to offer a Tranche 1 PPA to Orion’s Project. Although the Hearing also revealed that two other Tranche 1 proposals were improperly eliminated in Step 1 of Tranche 1 based on Accion’s Net Benefit analysis, even if those projects had not been eliminated DEC would still have been below its Tranche 1 procurement target and Orion’s Project would still have been entitled to a Tranche 1 PPA.

After elimination of the Project from Tranche 1, Orion’s Project was selected in CPRE Tranche 2 and has entered into a Tranche 2 PPA with DEC. Therefore, the appropriate remedy for its improper disqualification from Tranche 1 is to amend the Project’s Tranche 2 PPA to reflect the pricing of its Tranche 1 proposal.

I. Procedural Background

On March 9, 2020, Orion filed its Verified Petition for Relief (“Petition”) in Docket No. SP-13695, Sub 1. On April 9, 2020, Accion filed a response in opposition to Orion’s petition, and on May 26, 2020, Orion filed a reply in support of the petition (“Orion Reply”). On May 29, 2020, the Public Staff filed a Motion for Leave to File Comments and Comments (“Public Staff

1, filed in Docket E-7, Sub 1156 (“Step 2 Report”); and (3) the Independent Administrator’s Final Updated Report filed on July 23rd, 2019, on the results of Tranche 1 of the CPRE Program, also filed in Docket E-7, Sub 1156 (“Tranche 1 Final Report”). Hearing Tr. at 18-19.

Comments”), and on June 12, 2020, Accion filed an additional response to Orion’s reply comments.

On October 21, 2020, this Commission issued an *Order Scheduling Hearing* (“Hearing Order”) which scheduled a remote hearing on November 2, 2020. In the Hearing Order, the Commission also granted the Public Staff’s Motion for Leave to File Comment and found that Orion had been timely in bringing its petition before the Commission.

The Hearing was held on November 2, 2020, with Commissioner Clodfelter presiding. At the Hearing, Accion presented the testimony of witnesses Harold T. Judd, Phillip Layfield, Ralph Montsalvatge, David Ball and Garey Rozier; Duke presented the testimony of witness Orvane Piper; and Orion presented the testimony of witness Timothy Lasocki.

II. Argument

The evidence adduced at the Hearing shows that Accion disqualified Orion’s Proposal from CPRE Tranche 1 not because it was priced above Avoided Cost, but because Accion’s “Net Benefit” analysis for the Project was negative. DEC’s Transmission and Distribution Evaluation Team (“T&D Team”) analyzed the cost of Upgrades for the Project, and Accion’s analysis confirms that when the cost of these Upgrades is factored in, Orion’s Proposal was still below the Avoided Cost cap established by HB 589 and this Commission, and that Tranche 1 bidders like Orion relied on. Accordingly, Orion’s Proposal should have been awarded a Tranche 1 PPA. Evidence presented at the Hearing also showed that two other proposals were improperly eliminated from Tranche 1 for the same reason as Orion’s Proposal. But even if those proposals had been awarded PPAs, DEC’s capacity shortfall in Tranche 1 was such that Orion’s Proposal also would have been awarded a PPA.

A. Orion's Proposal was improperly eliminated from Tranche 1.

The evidence adduced at the Hearing clearly shows – and no party disputes – that Orion's Proposal was eliminated from CPRE Tranche 1 because Accion concluded that the "Net Benefit" of the Proposal was negative, and not because the Proposal pricing, inclusive of the cost of Upgrades, was above the Avoided Cost rate. Transcript of Nov. 2, 2020 Hearing ("Hearing Tr.") at 50:4-17, 54:7-13. As a result, disqualification of the Proposal was contrary to HB 589 and the Commission's Rules and Orders providing that a proposal may be eliminated on the basis of a lack of "cost-effectiveness" only if the proposal's pricing, inclusive of Upgrade costs, exceeds the utility's published Avoided Cost rate. *See* Petition at 4-6; Orion Reply at 3-6. The Public Staff takes the same view. Public Staff Comments at 7-9. As evidenced by the Memorandum published by Accion on February 28, 2020 for CPRE Tranche 2 (Hearing Tr. Att. E)² ("Tranche 2 Memorandum"), Duke has acknowledged that HB 589 and the Commission's rules require it to contract with proposals that (inclusive of the cost of Upgrades) bid at or below Avoided Cost rates set forth in the RFP, notwithstanding a determination of negative Net Benefit under Accion's Evaluation Methodology, if doing so is necessary to achieve the procurement targets established for each tranche during the 45-month CPRE procurement period. Tranche 2 Memorandum at 14.

At the Hearing, Accion's witness Mr. Judd testified that Accion considered "Net Benefit" to be synonymous with Avoided Cost, and even stated that he was not familiar with the meaning of "Avoided Cost" as that term was used in the Tranche 1 RFP (Hearing Tr. at 40:12-16, 41:12-18, 42:3-5, 52:9-14). But Accion's witnesses acknowledged at the Hearing that use of Net Benefit to disqualify proposals as "non-economic" was inconsistent with the guidance provided to MPs in

² The Tranche 2 Memorandum was Attachment E to Orion's Petition, which was accepted into the evidentiary record at the Hearing.

the Tranche 1 RFP. Hearing Tr. at 28:13-20 (“In the CPRE program we rank bids using the pricing and the hourly production profiles provided by the bidders, and then we compare that with the hourly avoided cost data that we received from Duke for every hour of every day for a 20-year period. *That was different than the guidance given in the RFP and on a bid form[.]*”), 76:1-14, 110:1-111:3. In this regard, it is worth noting that Article IV of the Tranche 1 RFP is titled “Avoided Cost Threshold And Proposal Pricing” and states: “All Proposals (including the cost of System Upgrades as described herein) must be at or below the applicable 20-year dollar per megawatt-hour (\$/MWh) avoided cost specified in the tables below.” Tranche 1 RFP at 11.³

B. Orion’s Proposal pricing was below the Avoided Cost cap.

Evidence presented at the Hearing confirmed that the pricing of Orion’s Proposal, plus the cost of Upgrades for the Project, was below the applicable Avoided Cost rate for Tranche 1. Witnesses from Accion and Duke testified that DEC’s T&D Team, which is responsible for calculating the Upgrade costs of CPRE projects, calculated that Upgrades for the Project would cost approximately \$450,000. Hearing Tr. at 83:7-19 (Mr. Ball), 124:9-23 (Mr. Piper). Duke’s witness Mr. Piper further testified that the T&D Team had determined that there were no interconnection interdependencies associated with the Project, meaning that interconnection of the Project would not affect the Upgrades required for any other project, and vice versa. Hearing Tr.

³ Elimination of projects from Tranche 1 based on Net Benefit is inconsistent with the guidance provided to participants in the Tranche 1 RFP. The Tranche 1 RFP required third-party Market Participants (“MPs”) to price their PPA proposals in the form of a single price decrement to the published avoided cost rates and indicated that compliance with the “avoided cost threshold” would be judged by reference to those same published rates. Tranche 1 RFP at 11-13; *see also* Public Staff Comments at 8. There was no ambiguity in the Tranche 1 RFP that compliance with the avoided cost cap would be based on proposal Pricing: “**For the avoidance of doubt**, for purposes of determining the satisfaction of the avoided cost threshold, the System Upgrade costs determined by the T&D Sub-Team shall be converted to 20-year \$/MWh pricing and incorporated *into the Proposal price*.” Tranche 1 RFP at 13.

at 119:1-14; see also Duke Energy Carolinas, LLC's Corrected Late-Filed Exhibit (Nov. 25, 2020) ("Late-Filed Ex.") at 2.⁴

Accion's witness Mr. Ball testified that based on Duke's analysis of Upgrade costs for the Project, the total cost of Orion's Proposal was below the applicable Avoided Cost rate for Tranche 1. Hearing Tr. at 84 (Commissioner Questions).⁵

C. Had the Independent Administrator not improperly eliminated Orion's Project from Tranche 1 based a Net Benefit analysis, the Project would have been awarded a Tranche 1 PPA.

As discussed above, DEC was required to offer PPAs to all Tranche 1 proposals whose bid pricing (inclusive of Upgrade costs) was at or below published Avoided Cost rates, to the extent necessary to meet its Tranche 1 procurement target of 600 MW. The total cost of Orion's Proposal was below Avoided Cost and Accion reported procurement of only 464.5 MW of DEC's 600 MW Tranche 1 goal (Petition at 10; Tranche 1 Final Report, Att. 1).⁶ Consequently, DEC was required by law and by the Tranche 1 RFP to offer a Tranche 1 PPA to the Misenheimer Project.

At the Hearing, Accion's and Duke's witnesses testified that two other Tranche 1 proposals were also disqualified by Accion in Step 1 based on a Net Benefit analysis, and that these proposals were more favorably ranked than Orion's. Hearing Tr. at 79-80. However, according to Accion,

⁴ According to DEC, the extent of Upgrades required for Orion's Project has not changed since its original analysis during Tranche 1. Late-Filed Ex. at 2.

⁵ "Q. After learning [the cost of Upgrades for the Orion Project], did you undertake the exercise of determining what would've happened if you had applied that additional cost factor to the Orion Tranche 1 bid and measured the result against the three levelized [avoided cost] price buckets? . . . A. . . . **Orion's bid would have passed that threshold.**"

⁶ DEC subsequently reduced that contracted total in Tranche 1 to 435 MW. See Duke Energy Carolinas & Duke Energy Progress Competitive Procurement of Renewable Energy (CPRE) Program Update, Docket No. E-100, Sub 165 (Sept. 1, 2020) ("CPRE Program Update") at 6. Although this reduction in DEC's contracted total is not critical to Petitioner's claims, to the extent that the Commission deems it relevant Orion requests that the Commission take judicial notice of this CPRE Program Update.

the total capacity of those two projects plus the Misenheimer Project was only 127 MW, meaning that even if all three projects had been awarded Tranche 1 PPAs, DEC would still have been below its 600 MW procurement goal for Tranche 1 and Orion's Project would have been entitled to a PPA. Step 2 Report at 5 (127 MW of Proposals found to be "Above avoided cost" in Step 1); Final Report at Attachment 1; CPRE Program Update at 6.

In its Late-Filed Exhibit, Duke also speculates that there might be Tranche 1 proposals that were eliminated in Step 2 because they were found to have a negative Net Benefit after consideration of their Upgrade costs but which might have been under the Avoided Cost threshold for Tranche 1. However, Duke does not identify any such projects and states that "extensive further analysis" would be required to determine if any actually exist.⁷ At the Hearing, Accion's witness Mr. Ball testified that only a "really narrow category" of projects could plausibly be "negative on net benefit" considering Upgrade costs, while still being below Avoided Cost. Hearing Tr. at 89:10-15. In short, while Duke theorizes that there *might* be additional, higher-ranked projects that were also improperly disqualified based a Net Benefit analysis but which would still have been below Avoided Cost, no such projects are known to exist and the only testimony offered at the Hearing tends to show that their existence is doubtful.⁸ This possibility does not undermine Orion's entitlement to relief.

⁷ It should be noted that unlike Orion's Project, for which Upgrade costs have not changed since Duke's original analysis during Tranche 1, the cost of Upgrades for other projects may have changed since Duke's original analysis. Moreover, even with "extensive further analysis," it is unclear how Upgrade costs for projects disqualified in Step 2 of Tranche 1 would be determined now that Tranche 2 PPAs have been awarded for different projects.

⁸ No testimony was given at the Hearing as to whether any of these other projects filed a petition with the Commission challenging their disqualification in Tranche 1, or whether any of them submitted proposals in the Tranche 2 RFP.

D. The appropriate remedy for Accion's improper disqualification of Orion's Proposal is amendment of the Project's Tranche 2 PPA using Tranche 1 Proposal pricing.

Had Orion's Proposal not been improperly disqualified from Tranche 1, Orion would have been awarded a CPRE PPA with pricing corresponding to its Tranche 1 proposal. It is therefore entitled to a PPA based on its Tranche 1 Proposal pricing.

Orion stated in its Petition that it intended to participate in CPRE Tranche 2, but argued that even if its Tranche 2 proposal were to be awarded a PPA, this would not make Orion whole for the improper disqualification of its Proposal from Tranche 1. Petition ¶ 35. After conclusion of briefing on the Petition, the Project was selected as a winner in CPRE Tranche 2. On October 15, 2020, the Project signed a PPA with DEC using the Tranche 2 pro forma PPA. The Project posted security as required by the Tranche 2 PPA and arranged for financing dependent on the terms and conditions of the Tranche 2 PPA. Under the circumstances, Orion submits that the appropriate remedy now would be to amend the rate schedule in the Project's Tranche 2 PPA to correspond to its Tranche 1 proposal pricing.⁹ This would be administratively simpler, less disruptive and fairer than rescinding the current Tranche 2 PPA and replacing it with a Tranche 1 pro forma PPA.

Such a remedy would be consistent with the rules and guidance for Tranche 1, and would give ratepayers the "deal" they would have gotten if Tranche 1 had been properly administered. It would also be consistent with the approach that Duke, the Public Staff, and the Independent Administrator have agreed is appropriate going forward – *i.e.*, that in each CPRE Tranche, the

⁹ For the reasons discussed in Orion's Petition and Reply, the award of a Tranche 2 PPA does not make Orion whole for the improper disqualification of its Proposal from Tranche 1. Petition at 13-14.

utility must offer PPAs to all proposals that are below Avoided Cost, until it has satisfied its procurement target for that tranche. *See* Tranche 2 Memorandum at 2.

1. Duke’s claim that awarding a Tranche 1 PPA to the Project “would be detrimental to customers” is unfounded.

In its Late-Filed Exhibit, Duke now claims that Orion’s Tranche 1 Proposal, as well as the other two proposals improperly eliminated from Tranche 1 based on Accion’s Net Benefit analysis, “would be detrimental to customers.” Late Filed Ex. at 1. This assertion is demonstrably incorrect.

As thoroughly discussed in the filings of Orion and the Public Staff, the General Assembly has established the standard by which the “the cost-effectiveness of procured new renewable energy resources” under CPRE must be measured – the utility’s Avoided Cost. G.S. § 62-110.8(b)(2). Duke itself agrees that it “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.” Tranche 2 Memorandum at 2. To now claim that compliance with this statutory directive is “detrimental to customers” is nonsensical.

2. Duke’s concern regarding over-procurement for CPRE is not relevant to Orion’s claim for relief.

Duke also discusses in its Late-filed Exhibit the potential impact of the other two projects eliminated from Step 1 based on a Net Benefit analysis on its overall CPRE procurement target. Duke claims that “under certain realistic scenarios, the Company (together with DEP) is already over-procured for CPRE based on Tranche 1 and Tranche 2 due to higher than projected amounts of Transition MWs,” and that procurement from these additional projects “would further increase

risk of over-procurement and, if any further procurements are deemed necessary, would reduce the size of such procurements.” Late-Filed Ex. at 6.

This concern is in no way relevant to Orion’s claim for relief. In the first place, no projects other than Orion’s are before the Commission, and no party has requested that any other project be granted a CPRE PPA.¹⁰ Furthermore, Orion’s Project has already been selected in CPRE Tranche 2, so amending the Project’s Tranche 2 PPA to incorporate its Tranche 1 bid pricing would have no effect whatsoever on DEC’s procurement targets. It must also be noted that Duke raises only a *possibility* that it is over-subscribed for CPRE “under certain realistic scenarios.” Such a speculative possibility should not impact the Commission’s award of a remedy in this proceeding.

3. Duke’s concern regarding reclassification of POI Switching Equipment as Upgrades can readily be addressed.

In its Late-Filed Exhibit, DEC also notes that after the conclusion of Tranche 1, it changed the classification of POI Switching Equipment from Interconnection Facilities (the costs of which are borne by CPRE participants) to Upgrades (the costs of which are borne by the utility). Late-Filed Ex. at 3. According to DEC, this change in classification has increased the cost of the “standard Upgrade package” by approximately \$1 million to \$1.25 million, although a portion of that increase is offset by a reduced estimate for the cost of relaying equipment.

DEC notes that as a Tranche 2 winner, the Project is currently being studied for the cost of Upgrades and DEC’s Interconnection Agreement with the Project will classify POI Switching Equipment as Upgrades, consistent with DEC’s revised policy. DEC claims that this change in

¹⁰ At most, the existence of these two other projects goes to the question of whether Orion’s Proposal would have been selected if Accion had not improperly disqualified them from Step 1 based on a negative Net Benefit analysis. As discussed above, the answer to this question is yes, because even if these other projects had been awarded PPAs along with Orion, DEC still would have been below its Tranche 1 procurement target.

equipment classification raises two issues: (1) whether Orion would receive a “windfall” if it were awarded a Tranche 1 PPA, since the Interconnection Agreement will use the revised equipment classification; and (2) whether a Tranche 1 bidder’s compliance with the Avoided Cost cap established for Tranche 1 should be assessed based on the equipment classification in effect at the time of the bid or under the current equipment classification policy. *Id.* at 3-4.

In the Petitioner’s view, these are not difficult questions. With respect to the second question, it would be inconsistent with CPRE Rules and the Tranche 1 RFP, not to mention grossly unfair, to assess Upgrade costs for a Tranche 1 project using a different set of interconnection facility cost assumptions than the ones MPs were given when formulating their bids. Had Orion known it would not be required to bear the cost of POI Switching Equipment, it would have calculated its Tranche 1 proposal pricing differently.

With respect to the first question, any potential “windfall” to Orion due to the change in DEC’s classification policy can easily be addressed. There are at least two ways of accomplishing this without treating Orion’s proposal unfairly.¹¹ First, the Project’s Interconnection Agreement could follow the Tranche 1 policy and classify POI Switching Equipment as Interconnection Facilities rather than Upgrades, so that the Project would bear this cost. Although DEC claims that it “is not permitted to retroactively issue Interconnection Agreements for Tranche 1 Proposals that classify POI Switching Equipment as Interconnection Facilities since FERC guidance has now rendered that improper,” it does not explain why more recent, unspecified guidance from FERC would prevent DEC from entering into the same Interconnection Agreement with this Project as

¹¹ There may be other ways to address this issue, but given Duke’s introduction of this issue for the first time in its Late-Filed Exhibit, and the fact that Duke did not disclose its change in policy either in its pre-hearing filings or in its testimony at the Hearing – Orion did not have the opportunity to cross-examine Duke’s witness or otherwise develop additional evidence on this issue.

all other Tranche 1 Interconnection Agreements, or why general FERC guidance should constrain this Commission’s ability either to administer its state-jurisdictional interconnection procedures or to fashion an appropriate remedy in this proceeding.¹² Especially in the absence of such an explanation, this Commission should not allow Duke’s concern regarding reclassification of POI Switching Equipment to prevent it from providing appropriate relief to Petitioner.

Alternatively, if the Commission determines that DEC should follow its new policy with regard to treatment of POI Switching Equipment in Interconnection Agreements, Orion could be awarded a PPA with Tranche 1 bid pricing reduced by an amount corresponding to the 20-year levelized cost of POI Switching Equipment treated as Upgrades. This would prevent any “windfall” to the Project or any negative impact to ratepayers from the reclassification.

Because this is fundamentally an accounting issue that will have no material impact on either Orion’s Project or ratepayers, either alternative would be acceptable to Petitioner.

III. Conclusion

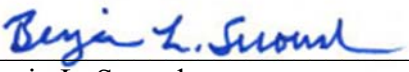
The evidence adduced at the Hearing, and the arguments set forth in Petitioner’s briefs and the Public Staff’s Comments, show that Orion’s Proposal was improperly eliminated from CPRE Tranche 1. Because Orion’s Proposal, including the cost of Upgrades, was below the Avoided Cost cap set by HB 589 and this Commission, Orion’s Project was entitled to a Tranche 1 PPA. Petitioner submits that the proper remedy for this violation of the applicable rules and the terms of the Tranche 1 RFP is to amend the Project’s CPRE PPA to reflect its Tranche 1 proposal pricing. Awarding this relief would support the integrity of the CPRE process, would be consistent with

¹² Orion is not aware of any other occasion on which Duke has taken the position that FERC guidance is binding with respect to the Commission’s administration of the North Carolina Interconnection Procedures.

the General Assembly's goal of ensuring the cost-effective procurement of renewable energy, and would be fair to both Orion and DEC's customers.

Respectfully submitted, this the 4th day of January 2021.

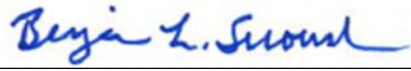
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **POST-HEARING BRIEF OF ORION RENEWABLE RESOURCES LLC** upon all parties of record by electronic mail and/or first-class United States mail.

This the 4th day of January 2021.



Benjamin L. Snowden