

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. SP-13695, SUB 1

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Petition for Relief of Orion Renewable Resources LLC) ORDER GRANTING PETITION
FOR RELIEF

HEARD: Monday, November 2, 2020, at 2:00 p.m., held via video conference
Wednesday, June 30, 2021, at 9 a.m., held via video conference

BEFORE: Commissioner Daniel G. Clodfelter, Presiding; and Commissioners Lyons Gray and Kimberly W. Duffley

APPEARANCES:

For Orion Renewable Resources, LLC:

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For Accion Group, LLC:

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For the Using and Consuming Public:

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BY THE COMMISSION: Pursuant to N.C. Gen. Stat. § 62-110.8 the Commission is tasked with oversight of the Competitive Procurement of Renewable Energy (CPRE) Program designed and implemented by Duke Energy Progress, LLC (DEP), and Duke Energy Carolinas, LLC (DEC, and, collectively with DEP, Duke), for the competitive procurement and development of an aggregate amount of 2,260 MW of renewable energy facilities in North Carolina over a period of 45 months. These new renewable energy facilities are to add to Duke's generation portfolio in a manner that allows the State's electric public utilities to continue to serve customers' future energy needs reliably and cost-effectively.

Pursuant to N.C.G.S. § 62-110.8(d) the CPRE program is to be independently administered by a third-party entity. By order dated January 9, 2018, in Docket No. E-100, Sub 151, the Commission selected Accion Group, LLC (Accion), as the Independent Administrator (IA) of the CPRE Program. Part of Accion's responsibility as the CPRE Program IA has been to develop and publish the methodology used to evaluate CPRE proposals and to ensure that all proposals are treated equitably. See N.C.G.S. § 62-110.8(d); see *also* Commission Rule R8-71(b)(9) and (d).

On March 9, 2020, Orion Renewable Resources, LLC (Orion), filed a Verified Petition for Relief in Docket No. SP-13695, Sub 1 (Verified Petition) seeking the Commission's review of Accion's disqualification of Orion's Proposal 129-01 for a 74.4-megawatt (MW) solar project in Tranche 1 of DEC's CPRE Program procurement.

On April 9, 2020, Accion filed a response in opposition to Orion's Verified Petition (Accion's Response). Thereafter, on May 26, 2020, Orion filed a reply in support of the Verified Petition (Orion's Reply), and on May 29, 2020, the Public Staff filed a Motion for Leave to File Comments and Comments. Subsequently, on June 12, 2020, Accion filed an additional response to Orion's Reply (Accion's Additional Response).

On October 21, 2020, the Commission issued an Order Scheduling Hearing setting this matter for remote hearing November 2, 2020, for the purpose of receiving expert witness testimony regarding the facts and circumstances of the evaluation of Orion's bid following the time it was submitted by the IA for Step 2 evaluation, further granting the Public Staff's Motion for Leave to File Comment and accepting its comments, finding that the Petition was timely made, and ordering joinder of DEC as party to the docket. All parties consented to the conduct of the hearing by means of videoconference technology.

This matter came for hearing as scheduled on November 2, 2020. At the hearing Orion presented witness Lasocki; Accion presented witnesses Judd, Ball, Layfield, Monsalvatge, and Rozier; and DEC presented witness Piper. In addition to the witness testimony at the hearing and without objection from the parties the Commission took judicial notice of the following items: (1) the Request for Proposals for Tranche 1 of the CPRE Program, which was filed as Attachment A to the March 13, 2020 Reply in Support of Motion for Return of CPRE Performance Security of Stanley Solar in Commission Docket SP-9590, Sub 0 (Tranche 1 RFP); (2) the CPRE Program IA's Report on the Conclusion of the Step 2 Evaluation and Selection of Proposals for Tranche 1, which was

filed on April 9, 2019, in Commission Docket No. E-7, Sub 1156 (IA's Step 2 Report); and (3) the Updated CPRE Tranche 1 Final Independent Administrator Report, which was filed on July 23, 2019, in Commission Docket No. E-7, Sub 1156 (IA's Final Tranche 1 Report). Also during the hearing, the Commission accepted into evidence the following documentary exhibits: Accion's Response (Accion Exhibit 1); Accion's Additional Response (Accion Exhibit 2); Accion's Redirect Exhibit, including confidential portions, filed in the docket on October 28, 2020 (Accion Exhibit 3); Orion's Verified Petition and Orion's Reply, including Exhibits A through E to the Verified Petition; and, finally, Orion Accion Cross Examination Exhibit Number 1.

During the hearing the Commission received testimony about other proposals that had been eliminated from consideration as part of the Tranche 1 process and in response requested a Late-Filed Exhibit addressing certain Commission questions about two other proposals that were eliminated from consideration during Tranche 1. Nov. 2. Tr., 80-82. The Commission requested that the IA collaborate with DEC to prepare the Late-Filed Exhibit, since certain information needed for the exhibit would be in the possession of DEC or would require further analysis by DEC. *Id.* at 91-92. The Commission held the record open for the purpose of receiving the Late-Filed Exhibit into evidence.

On November 24, 2020, DEC filed the requested Late-Filed Exhibit, and on November 25, 2020, DEC filed a Corrected Late-Filed Exhibit. The Late-Filed Exhibit is comprised of a seven-page narrative as well as a table that includes confidential and public information about three particular bids, including Orion's, eliminated during Step 1 of the Tranche 1 procurement process and also general information about other bids eliminated in Tranche 1.

On January 4, 2021, Orion filed its proposed order and post-hearing brief, and DEC and Accion also filed post-hearing briefs. Shortly thereafter, on January 25, 2021, Orion filed a Motion to Strike or in the Alternative Reopen Hearing (Motion to Strike). Orion objected to the Late-Filed Exhibit, contending that Items 3, 4, 5, and 6 of the Late-Filed Exhibit, and the corresponding portions of DEC's post-hearing brief, introduced "factual considerations never raised in this docket, without providing sufficient detail to allow Orion to respond or the Commission to make an informed decision." Motion to Strike at 5.

On February 15, 2021, DEC and Accion each filed responses in opposition to Orion's Motion, and on February 22, 2021, Orion filed a reply in support of its Motion to Strike.

On April 14, 2021, the Commission issued an order denying Orion's Motion to Strike but allowing Orion's Motion to Reopen Hearing (April 14, 2021 Order). The April 14, 2021 Order also established a schedule for filing testimony and exhibits pertaining to facts and matters contained in the Late-Filed Exhibit and scheduled a second hearing to receive expert witness testimony regarding the facts and circumstances underlying the Late-Filed Exhibit and the information contained therein.

On April 28, 2021, consistent with the Commission's April 14, 2021 Order, Accion and DEC separately filed written testimony pertaining to the facts and matters contained

in the Late-Filed Exhibit. Accion filed the testimony of witnesses Ball, Judd, Layfield, Monsalvatge, and Rozier, and DEC filed the testimony of witnesses Cathcart and Piper. On May 12, 2021, Orion filed the testimony of witness Lasocki.

On May 14, 2021, Orion filed a Motion to Compel Discovery and for Leave to Provide Supplemental Testimony (Motion to Compel). Orion's Motion to Compel sought additional information from Accion regarding 15 proposals that were identified on the Late-Filed Exhibit as having been eliminated from Step 2 of the Tranche 1 procurement process. The Commission granted Orion's Motion to Compel by Order dated June 4, 2021, which delayed the second hearing in order to provide time for Accion to produce the subject information and allowed Accion to file limited supplemental testimony pertinent to the 15 proposals.

On June 16, 2021, Accion filed under seal a table containing the additional information required by the Commission's Order granting the Motion to Compel, and on June 21, 2021, Orion filed the additional testimony of witness Lasocki.

On June 30, 2021, this matter came for a second remote hearing. Orion presented witness Lasocki; Accion presented a panel of witnesses consisting of Judd, Ball, Layfield, Monsalvatge, and Rozier; and DEC presented a panel of witnesses consisting of Cathcart and Piper. The prefiled testimony and exhibits of these witnesses were all received into the record.

On July 30, 2021, the parties filed supplemental post-hearing briefs.

Based upon the pleadings, testimony, matters judicially noticed, and exhibits received into evidence and considering the record as a whole, the Commission makes the following

FINDINGS OF FACT

1. On or about July 10, 2018, DEC and DEP collectively issued the CPRE Tranche 1 Request for Proposals (RFP). The Tranche 1 RFP requested proposals for 600 MW to be located in DEC's service territory.

2. The Tranche 1 RFP required that all proposals be bid, "at or below the applicable 20-year dollar per megawatt-hour (\$/MWh) avoided cost[,]" which was specified in tables appearing on page 11 of the RFP. The rates appearing on page 11 of the RFP were consistent with the then-applicable, Commission-approved avoided cost rates established pursuant to N.C.G.S. § 110.8(b)(2) and Commission Rule R8 71(b)(2) (Avoided Cost Rates), and the Avoided Cost Rates set the upper limit on Tranche 1 CPRE bids (Avoided Cost Cap).

3. On October 9, 2018, Orion submitted a bid for its Misenheimer Solar project, a proposed 74.4 MW solar photovoltaic generating facility to be located in Stanly County, North Carolina, and sought a third-party power purchase agreement (PPA) with DEC. The

Misenheimer Solar project received a Certificate of Public Convenience and Necessity from the Commission on January 24, 2020, in Docket No. SP-13695, Sub 0. The project as proposed would interconnect with DEC's transmission grid in a nonconstrained area. Not including any necessary network system upgrade costs, Orion's bid was priced at a \$1.00 decrement to the published Avoided Cost Cap.

4. During the CPRE evaluation process Accion ranked Orion's proposal lowest among all proposals received for the DEC portion of the Tranche 1 procurement that were not otherwise disqualified as duplicative, withdrawn, or ineligible due to noneconomic considerations. Accion intended to release Orion from the bidding process. In deciding to release the Orion proposal, Accion did not consider whether Orion's bid price, when combined with any necessary network system upgrade costs, would exceed the published Avoided Cost Cap. Instead, Orion's bid was eliminated based upon Accion's application of a review methodology developed by Accion which it called the Net Benefit test. Despite this termination, however, Accion mistakenly requested that Orion post proposal security and informed the Duke T&D Subteam that it had requested Proposal Security from Orion. Subsequently, the Duke T&D Subteam evaluated Orion's proposal to determine any necessary network system upgrade costs. Inclusive of the network system upgrade costs determined by the Duke T&D Subteam, Orion's proposal was still priced below the Avoided Cost Cap, and no additional interconnection study was required for Orion's proposal.

5. The Net Benefit test was developed by Accion as a method for reviewing and for ranking CPRE proposals. It is distinct from the published Avoided Cost Cap that is established using a Commission-approved methodology. The Tranche 1 RFP and associated presubmission materials provided to bidders explained the Net Benefit calculation methodology and advised that it would be used to evaluate and to rank bids. However, the fact that the Net Benefit test would also be used to disqualify bids altogether was not clearly stated in the Tranche 1 RFP or other associated prebid materials available to bidders.

6. At the conclusion of Step 2 of the evaluation process, Accion recommended 12 winning proposals to DEC, which totaled 514.5 MW. On July 8, 2019, the CPRE Tranche 1 contracting process concluded, but one of the 12 winning proposals for DEC, which had a capacity of 50 MW, elected to withdraw and did not execute a PPA. As a result of this withdrawal DEC contracted with 11 winning bidders for total of 465.5 MW, a shortfall of 134.5 MW below the 600 MW goal stated in the RFP.

7. In addition to Orion's proposal Accion eliminated from consideration two other proposals (hereinafter identified as Bid A and Bid B) for failing the Net Benefit test, each of which were ranked higher by Accion than Orion's proposal. Like Orion, inclusive of network system upgrade costs determined by the Duke T&D Subteam, Bid B's proposal was below the Avoided Cost Cap. Further, no additional interconnection study was determined to be necessary for Bid B's proposal. Bid A was not fully evaluated by the Duke T&D Subteam and would require additional interconnection study to determine whether it was below the Avoided Cost Cap inclusive of necessary network system upgrade costs.

8. In Tranche 2 of the CPRE Program, Orion again placed a bid for the Misenheimer Solar project. This bid was successful and was awarded a PPA on October 15, 2020. Orion's Tranche 2 bid price was lower than its Tranche 1 bid price; however, both bids were priced below the Avoided Cost Cap applicable to its respective tranche.

9. Because Orion was awarded a Tranche 2 PPA, its capacity is already factored into the CPRE Program procurement totals for DEC. Further, the aggregate capacity of Bid A and Bid B is 52.6 MW, which does not exceed the current estimated CPRE Program procurement shortfall provided by Duke in its 2021 CPRE Program Plan Update filed in Docket No. E-100, Sub 165 on September 1, 2021.

10. Pursuant to the terms of the Tranche 1 RFP, Orion and Bid B are eligible for PPAs based on their Tranche 1 bid pricing and terms. It is appropriate and equitable for DEC to revise Orion's Tranche 2 PPA to provide Orion with pricing based on its Tranche 1 bid price. It is also appropriate and equitable for DEC to offer a PPA to Bid B based on its Tranche 1 bid price. It is further appropriate for DEC to determine the cost of any necessary network system upgrades for Bid A, and if Bid A's proposal remains below the Tranche 1 Avoided Cost Cap inclusive of network system upgrade costs, for DEC to offer a PPA to Bid A based on its Tranche 1 bid price.

11. After the conclusion of Tranche 1 of the CPRE Program, Duke changed the classification of point of interconnection (POI) switching equipment from interconnection facilities (the costs of which were to be assigned to and borne by CPRE participants during Tranche 1) to system upgrades (the costs of which were to be assigned to and borne by the utility, and ultimately ratepayers, during Tranche 2). To avoid any windfall to Orion at the expense of DEC's ratepayers, it is appropriate for Orion to bear the cost of the POI switching equipment on the same basis as if it had been declared a successful bidder in Tranche 1. With regard to Bid A and Bid B, the Commission finds it reasonable to permit DEC and the applicable market participants to determine the most appropriate manner to resolve the POI switching equipment classification, based on the unique circumstances of those proposals, provided that ratepayers are not negatively affected and that Bid A and Bid B are not treated more favorably than other successful Tranche 1 bidders.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

This finding of fact is essentially informational in nature and is uncontroverted.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

The evidence for this finding of fact is contained in the Tranche 1 RFP, Orion's Verified Petition, and Accion Exhibit 1.

Section 210 of the Public Utility Regulatory Policies Act (PURPA) and the regulations promulgated thereto by the Federal Energy Regulatory Commission (FERC)

prescribe the responsibilities of the FERC and of state regulatory authorities, such as this Commission, relating to the development of cogeneration and small power production. Section 210 of PURPA requires the FERC to adopt such rules as it determines necessary to encourage cogeneration and small power production, including rules requiring electric utilities to purchase electric power from, and to sell electric power to, cogeneration and small power production facilities.

Each electric utility is required under Section 210 of PURPA to offer to purchase available electric energy from cogeneration and small power production facilities that obtain QF status. For such purchases, electric utilities are required to pay rates which are just and reasonable to the ratepayers of the utility, are in the public interest, and do not discriminate against cogenerators or small power producers. FERC regulations require that the rates electric utilities pay to purchase electric energy and capacity from qualifying cogenerators and small power producers reflect the cost that the purchasing utility can avoid as a result of obtaining energy and capacity from these sources, rather than generating an equivalent amount of energy itself or purchasing the energy or capacity from other suppliers.

With respect to electric utilities subject to state regulation the FERC delegated implementation of these rules to state regulatory authorities. State commissions may implement these rules by the issuance of regulations, on a case-by-case basis, or by any other means reasonably designed to give effect to the FERC's rules. This Commission implements Section 210 of PURPA and the related FERC regulations by holding biennial proceedings as required by N.C.G.S. § 62-156, which proceedings establish Commission-approved Avoided Cost Rates to be used for purchases of capacity and energy from PURPA qualified facilities.

In 2017 the General Assembly enacted legislation establishing a program for the competitive procurement of renewable energy resources by the State's regulated public utilities. That legislation has been codified at N.C.G.S. § 62-156 and the competitive procurement programs established pursuant thereto are referred to herein as the "CPRE Program." To "ensure the cost-effectiveness of energy resources procured under the CPRE Program" N.C.G.S. § 62-156 provides that each utility's procurement obligation is "capped by the public utility's current forecast of its avoided cost calculated over the term of the power purchase agreement." Verified Petition at 4, *citing* N.C.G.S. § 110.8(b)(2). The statute further requires that the utility's current forecast of its avoided cost for these purposes "shall be consistent with the Commission-approved avoided cost methodology." *Id.*

Orion relies on the Commission's CPRE Program rule (Commission Rule R8-71), summarizing that compliance with the statutory Avoided Cost Cap is to be determined by comparing a proposal's total bid price, to which are added any necessary network system upgrade costs, to the utility's calculation of its long-term, levelized Avoided Cost Rates for energy and capacity. *Id.* at 4-5, *citing* Commission Rule R8-71(b)(2). Commission Rule R8-71(f)(1)(ii) requires the utility to publish the Avoided Cost Rates against which CPRE Program bids will be evaluated. *Id.* at 5.

Orion argues that, for the purpose of the Tranche 1 RFP, the Avoided Cost Cap was defined as “the applicable 20-year dollar per megawatt-hour (\$/MWh) avoided cost specified in the tables provided in the Tranche 1 RFP, after consideration of the cost of System Upgrades required for proposed projects.” *Id.* at 6 (internal citation omitted). Orion also notes that bidders were required to provide bid pricing “in the form of a single price decrement to DEC’s published Avoided Cost Rates.” *Id.*

Accion’s Response states that “[i]n accordance with N.C. Gen. Stat. § 62-110.8(b)(2), the Tranche 1 RFP did, in fact, identify the maximum bid price based on the then current Commission-approved avoided cost methodology . . . and all bidders were required to bid a decrement to such Avoided Cost Cap.” Accion Exhibit 1 at 2.

No party to this proceeding has disputed that the rates appearing on page 11 of the RFP were consistent with the then-applicable, Commission-approved Avoided Cost Rates pursuant to N.C.G.S. § 110.8(b)(2) and Commission Rule R8-71(b)(2), and accordingly, established the upper limit for cost-effectiveness of Tranche 1 CPRE bids, *i.e.* the Avoided Cost Cap.

Based upon the preceding, the Commission concludes that rates appearing on page 11 of the RFP were consistent with the then-applicable, Commission-approved Avoided Cost Rates and accordingly established the Avoided Cost Cap for Tranche 1.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

The evidence for this finding of fact is contained in Orion’s Verified Petition, Exhibit B to Verified Petition, Accion’s Response, and the testimony of witness Lasocki, as well as the confidential portion of the Late-Filed Exhibit.¹

Orion’s states that it submitted a bid for its Misenheimer Solar project, a proposed 74.4 MW solar photovoltaic generating facility to be located in Stanly County, North Carolina, seeking a third-party PPA with DEC. Verified Petition at 8; Exhibit B to Verified Petition. The Misenheimer Solar project received a Certificate of Public Convenience and Necessity from the Commission on January 24, 2020, in Docket No. SP-13695, Sub 0. It was proposed to be interconnected to DEC’s transmission grid in a nonconstrained area. *Id.* at 8. No other party disputes these allegations.

Orion’s Verified Petition further asserts that Orion’s bid price was below Avoided Cost Rates. *Id.* During the June 30, 2021 evidentiary hearing, Orion witness Lasocki testified that Orion’s bid was submitted into Tranche 1 at a decrement of \$1.00 to the Avoided Cost Cap established in the RFP. Jun. 30 Tr., 38. Finally, Accion’s Response to Orion’s Verified Petition likewise confirms that Orion’s proposal was bid at a decrement

¹ While the exact decrement to the Avoided Cost Cap of Orion’s bid was initially treated as confidential, Orion witness Lasocki disclosed the amount of the decrement during the June 30, 2021 evidentiary hearing.

to the Avoided Cost Cap and the Late-Filed Exhibit is consistent in this regard. Accion Exhibit 1 at 5; Late-Filed Exhibit.

Based upon the foregoing, the Commission concludes that Orion's bid was at a price below the Avoided Cost Cap provided in the Tranche 1 RFP.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4

The evidence for this finding of fact is contained in the Tranche 1 RFP, the IA's Step 2 Report, the IA's Final Tranche 1 Report, Orion's Verified Petition, Accion's Response, Accion Exhibit 3, the Late-Filed Exhibit, and the testimony of Accion's panel of witnesses, DEC's witness Piper's testimony, and Orion's witness Lasocki's testimony.

The Tranche 1 evaluation process consisted of two steps. IA's Final Tranche 1 Report at Section VIII.A. In Step 1 Accion ranked proposals based on the net energy and capacity benefits exclusive of network system upgrade costs. *Id.* In Step 2 DEC's T&D Subteam calculated the network system upgrade costs for each bid advanced by the IA. After this calculation Accion then reranked the proposals based on the original bid price plus the calculated network system upgrade costs. *Id.* Prior to being advanced from Step 1 to Step 2, bidders were required to post proposal security. Tranche 1 RFP at Section II.F.

During Step 1 Accion divided proposals into three tiers: the Primary Competitive Tier, the Competitive Tier Reserve, and the release list, ranked in order based upon Accion's Net Benefit methodology. Proposals in a lower ranked tier were eligible to be advanced to a higher tier if and as proposals in a higher tier either withdrew or otherwise were disqualified. IA's Final Tranche 1 Report at Section X.A. Under this methodology the IA compared the cost of each bid for each hour of the 20-year contract term with Duke's hourly avoided cost over the same term, using nonpublic data concerning hourly avoided costs provided by Duke. Accion's Response at 3; Nov. 1 Tr., 42-43. This methodology was developed by Accion and Accion refers to it as the "Net Benefit" test or analysis. *Id.*

The IA completed its initial Step 1 ranking on December 6, 2018. IA's Final Tranche 1 Report at X.A. At that time the DEC Primary Competitive Tier contained 24 Proposals totaling 1270.22 MW. However, many of the proposals declined to provide proposal security and were accordingly eliminated. *Id.* at X.B.1, X.C.2. The DEC initial release list contained 23 proposals, which were all ultimately advanced to the Competitive Tier Reserve, as other initially higher-ranked proposals were eliminated. *Id.* at X.B.3.

During the Step 1 evaluation Accion ranked Orion's proposal lowest among all other conforming proposals received for DEC, based on application of the Net Benefit test. Accion Exhibit 1 at 5. Notwithstanding that ranking, Accion requested that Orion post proposal security, which Orion did on March 1, 2019, tendering proposal security of \$1,488,000. Verified Petition at 9. During the hearing on November 2, 2020, Accion's

witness testified that Orion was asked to submit proposal security in error. Nov. 2 Tr., 45.² Instead, the record demonstrates that Accion intended to release Orion's proposal at the conclusion of Step 1 and that it ultimately did so, based upon its determination that Orion's bid had failed the Net Benefit test. Accion Exhibit 1 at 5; Accion Exhibit 3. The record further shows that in deciding to eliminate Orion's proposal, Accion did not consider whether Orion's bid price, including network system upgrade costs, would exceed the Avoided Cost Cap provided in the RFP. Nov. 2. Tr., 54.

During the November 2, 2020 hearing Accion's witnesses testified that when proposal security was requested, Accion would informally notify Duke's T&D Subteam. Nov. 2. Tr., 45-46. DEC's witness Piper further testified that, due to the pressure of the time required to do the analysis of potential network system upgrade costs, even though Orion's proposal was not formally submitted for T&D Subteam review by the IA, the Duke T&D Subteam nonetheless performed an analysis of the network system upgrade costs for Orion's bid. *Id.* at 116-117. Accion's panel of witnesses and DEC witness Piper further concurred that during the Tranche 1 process, the Duke T&D Subteam's analysis of network system upgrade costs for Orion's bid were not conveyed to Accion, because Accion had never formally submitted Orion's proposal to the Duke T&D Subteam. *Id.* at 45-46, 116-117.

As a result of the analysis performed by the Duke T&D Subteam, it was determined that Orion did not require network system upgrades beyond the standard transmission system upgrade package of \$450,000. Late-Filed Exhibit. Because the network system upgrade estimate for Orion was less than Accion's estimate of the maximum allowable network system upgrade costs, it can be inferred that Orion's bid, inclusive of network system upgrade costs was below the Avoided Cost Cap. *Id.* at 1. Further, no additional interconnection studies were required for the Orion proposal. *Id.* at 2.

As discussed in more detail hereafter, reconstructing the sequence of events just recited was made more difficult because of inconsistencies and conflicts in the various versions and explanations provided at different times by Accion, both to Orion itself and then later to the Public Staff before this proceeding was commenced, and then afterward during the initial course of this proceeding. Nonetheless, the evidentiary hearings, witness testimony, and documentary exhibits presented to the Commission have satisfactorily resolved these matters of fact. Further, no party has disputed the sequence of events set out above in their submissions following the June 30, 2021 evidentiary hearing. Therefore the Commission finds that the circumstances pertaining to the ranking of Orion's proposal by the IA, the IA's mistaken advancement of Orion's proposal to the Duke T&D Subteam, the Duke T&D Subteam's analysis of Orion's proposal, and the IA's decision to eliminate

² Accion has provided inconsistent statements to the Commission as to whether, in fact, Orion was advanced to Step 2; however, it appears reasonably clear that this was contrary to Accion's intent and was done by mistake. For instance, in Accion Exhibit 3, the IA contends that "Orion was inadvertently moved into Step 2[.]" then during the hearing on November 2, 2020, Accion's witness agreed that Orion was erroneously advanced to Step 2 before clarifying that Orion was "asked to submit proposal security . . . and that was the error. We should not have been [sic] asked for the proposal security. [Orion was] not advanced to Step 2." Nov. 2 Tr., 44-45.

Orion's proposal based upon the Net Benefit analysis as provided herein are well-founded upon competent and reliable witness testimony and supporting documentary exhibits.

The Commission notes its serious concerns pertaining to Accion's handling of its mistaken request for proposal security from Orion and the resulting advancement of Orion's proposal to the Duke T&D Subteam. The Commission observes that following the release of Orion's bid on April 9, 2019, Orion requested clarification from Accion and specifically asked Accion to confirm the accuracy of the network system upgrade costs assigned to its project. Accion provided a vague and uninformative response which failed to provide Orion with the specific reason why its proposal was eliminated, failed to explain that proposal security had been erroneously requested from Orion, and further failed to disclose that the project was never formally advanced to Step 2. Verified Petition at 9, and Attachment A to the Verified Petition. Later, when Accion advised Orion that its proposal was eliminated for having failed the Net Benefit test, Accion again omitted these details from its explanation. Verified Petition at 10-11. Both Accion's Response and Accion's Additional Response, filed with the Commission, likewise fail to mention Accion's errors. Accion Exhibit 1, and Accion Exhibit 2. Based on the total record, it does not appear that Accion disclosed these mistakes until just prior to the November 2, 2020 hearing in this proceeding. Accion's failure to address its errors candidly, transparently, and in a timely manner has resulted in undue confusion and unnecessary delay of the adjudication of Orion's Petition and an increased burden on this Commission as it has worked to discern the true course of events leading to the release of Orion's bid. The Commission finally notes that as IA, Accion bears responsibility for ensuring that the CPRE Program is administered in a manner that treats all proposals equitably.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

The evidence for this finding of fact is contained in the Tranche 1 RFP, Orion's Verified Petition, Accion's Response, the testimony of Accion's panel of witnesses, and Orion witness Lasocki.

As discussed above, for the purposes of the CPRE Program, Avoided Cost Rates refer to Commission-approved Avoided Cost Rates established pursuant to N.C.G.S. § 62-156. Also discussed above, Accion's Net Benefit analysis compares the cost of each proposal hour-by-hour for each hour of the 20-year contract term with Duke's actual avoided cost over the same term. The methodology, using hourly calculation, required access to nonpublic data provided to the IA by Duke.

In its Verified Petition Orion distinguishes between the Avoided Cost Rates, which are clearly stated in the Tranche 1 RFP and Accion's Net Benefit test:

Unlike compliance with the avoided cost cap, which is based only on the utility's published, levelized Avoided Cost Rates, the Net Benefit analysis in Step 1 compares the proposal's bid price against the utility's ability to defer future generating unit capacity and its projected cost of energy that would have been supplied, for each hour over the entire 20-year term of the CPRE

PPA. The Net Benefit calculation differs significantly from published Avoided Cost Rates, and a proposal that complies with the avoided cost cap may nonetheless have a Net Benefit less than zero.

Id. at 7.

Section IV of the Tranche 1 RFP, entitled “Avoided Cost Threshold and Proposal Pricing,” identifies the maximum bid price based on the then current Commission-approved Avoided Cost Rates. In contrast, the term Net Benefit is used only in Section V of the Tranche 1 RFP, in Section V, titled “Proposal Evaluation,” where it is stated:

Each Proposal will be evaluated on its benefit to the DEC/DEP system over the twenty year analysis period on a \$/MWh basis (accumulated net present value). . . . In order to assess a Proposal’s net benefit, the evaluation must determine both the Proposal’s cost and the Proposal’s benefit to the DEC/DEP system. The cost of the Proposal is determined by taking the [market participant] submitted \$/MWh rate and applying the rate to the Facility’s projected output (8760 hours x 20 years). The benefit to the DEC/DEP system is determined using two metrics: (1) the Proposal’s output contributes toward the ability to defer future DEC/DEP generating unit capacity and (2) the Proposal’s energy output replaces energy that would have been supplied at DEC/DEP system cost for that particular hour.

Id. at 7. While the RFP thus discloses that the Net Benefit test will be used by the IA to evaluate and score proposals, it does not disclose that proposals may be entirely disqualified or eliminated from consideration based on any particular outcome of the Net Benefit analysis.

Further, as Orion, asserts in its Verified Petition:

The IA has not disclosed the details of its methodology for calculating Net Benefit, nor DEC’s projections of its system costs, and has consistently treated that information as proprietary and confidential, so bidders in Tranche 1 were unable to predict what the Net Benefit of their proposals would be, or to ensure that their Net Benefit would be positive.

Id.

In Accion’s Response it, too, recognizes the distinction between Commission-approved Avoid Cost Rates and its Net Benefit analysis:

The core of this dispute can be reduced to a simple question: Should the value of CPRE Proposals, and in turn the eligibility for a Power Purchase Agreement (“PPA”), 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?

N.C. Gen. Stat. § 62-110.8(b)(2) caps the price at which Duke procures CPRE resources at the current forecast of its avoided cost calculated over the term of the PPA "consistent with the Commission-approved avoided cost." Commission Rule R8-71(b)(2) defines "Avoided cost rate" as the long-term, levelized avoided energy and capacity costs utilizing the methodology most recently approved by the Commission.

Accion Exhibit 2 at 2.

During the November 2, 2020 hearing Accion's panel of witnesses provided at times confusing and contradictory testimony regarding the IA's understanding of Commission-approved Avoided Cost Rates and the role of these rates in the assessment of CPRE Tranche 1 proposals. For instance, describing the Net Benefit test, witness Judd stated "[t]hat was different that the guidance given in the RFP and on the bid form[,]" although later, one of his colleagues corrected and asserted that the IA's assessment process was consistent with the terms of the RFP. Nov. 2 Tr., 28, 75. Witness Judd later testified that "net benefit is synonymous with avoided cost." *Id.* at 30.

Despite Accion's testimony during the November 2 hearing, the Commission finds persuasive the earlier statements made in Accion's Response regarding the difference between Avoided Cost Rates and Net Benefit, as well as the arguments of Orion, that Commission-approved Avoided Cost Rates established pursuant to N.C.G.S. § 62-156, which establish the Avoided Cost Cap for CPRE bids, and Accion's Net Benefit Test are distinct and are not interchangeable.

Accion asserts that Commission Rule R8-71(f)(iii) gives the IA authority to consider both "economic and non-economic factors" in its evaluation of proposals and that Rule R8-71 generally gives the IA "wide latitude to evaluate Proposals based on its CPRE Program Methodology." This assertion is certainly correct. The Commission is not deciding here that the IA lacks or lacked authority under Rule R8-71 to employ the Net Benefit test as a gating tool to eliminate proposals from consideration prior to Step 2 and under circumstances where the full target for procurement was not and would not be reached. Instead, the Commission finds and concludes on the record presented that such use of the Net Benefit test was not plainly and unequivocally set forth in the Tranche 1 RFP and that it would be inconsistent with Commission Rule R8-71(d)(5)(ix) for the Net Benefit analysis to be so applied under the facts of this case.³ Bidders under the CPRE

³ The risk of confusion to bidders in these circumstances is compounded by the fact that pursuant to Rule R8-71(f)(iii) the evaluation and reranking of proposals is to continue on an iterative basis until the total procurement target for the tranche has been met in the most cost-effective manner. Bidders were entitled to assume that unless their bids were disqualified for reasons clearly disclosed in the RFP and communicated to them by the IA as a result of the evaluation process, they would be eligible for consideration until the tranche had been fully subscribed.

Program are entitled to a clear and complete explanation of how the CPRE Program methodology works, how it will be applied, and the consequences of its use. That did not occur in this case. Moreover, the Commission notes that Rule R8-71(f)(ii) requires that the IA document the reasons for elimination of a proposal during the Step 1 evaluation process. In the case of Orion's proposal, that did not happen. To the contrary, Orion was required to post proposal security, indicating that its proposal was being advanced for review in Step 2. Only quite long after the fact did the IA disclose what had actually happened in the Step 1 evaluation of the Orion proposal. The Commission is mindful of the overriding requirement that the CPRE Program process be conducted in a manner that is equitable to participants, and on the facts of this case that simply did not occur as to the Orion proposal.

Therefore, based upon the record evidence, the Commission finds that the IA eliminated Orion's proposal from consideration in a manner inconsistent with the terms of the Tranche 1 RFP.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

The evidence for this finding of fact is primarily contained in the IA's Final Tranche 1 Report. The conclusions contained in Finding of Fact No. 6 are uncontroverted by any party; therefore, the Commission concludes that it is appropriate to find that at the conclusion of Step 2, Accion recommended 12 winning proposals to DEC, which totaled 514.5 MW. On July 8, 2019, the CPRE Tranche 1 contracting process concluded, but one of the 12 winning proposals for DEC, which had a capacity of 50 MW, elected to withdraw and did not execute a PPA. As a result of this withdrawal, DEC contracted for total of 465.5 MW, a deficit of 134.5 MW below the procurement target of 600 MW stated in the Tranche 1 RFP.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

The evidence for this finding of fact is found in the Late-Filed Exhibit and the testimony of Accion's panel of witnesses.

This Finding of Fact and those that follow speak to matters of remedy. Having determined that Orion's proposal was improperly eliminated during the Step 1 review process, the Commission is required to consider the appropriate remedy. The remedy must be one that preserves the results of the Tranche 1 process and preserves the rights of all successful bidders who were awarded contracts. It must also do so without resulting in inequitable treatment of Orion's proposal relative to other proposals that were identically or relevantly similarly situated to the Orion proposal. This is due to the fact that DEC did not secure its full procurement target in Tranche 1 and, therefore, bidders who were disqualified due to application of the Net Benefit test were then and are now potentially still eligible for offer of contracts. The Commission is not, however, required to address the treatment of Tranche 1 proposals that were withdrawn by the bidder, that failed to post the required proposal security, that were determined after Step 2 to exceed

the Avoided Cost Cap, or that were otherwise eliminated for reasons other than application of the Net Benefit test.

During the November 2, 2020 evidentiary hearing, Accion's witness panel testified that during the Step 1 analysis, two proposals were also eliminated due to a determination that they would have negative net benefit. Nov. 2 Tr., 79. The proposals were then identified in the Late-Filed Exhibit as Bid A and Bid B.⁴ Pursuant to the Late-Filed Exhibit, both Bid A and Bid B were ranked higher than Orion's proposal.

As shown in the Late-Filed Exhibit Bid B was assessed by the Duke T&D Subteam, just as was Orion's proposal. Studies indicated that Bid B did not create any thermal issues for DEC's transmission grid, and therefore Bid B did not require network system upgrades beyond the Tranche 1 standard transmission system upgrade package of \$450,000. Late-Filed Exhibit at 1-2. Because the network system upgrade estimate for Bid B was less than Accion's estimate of the maximum allowable network system upgrade costs for Bid B, it can be inferred that Bid B's pricing, inclusive of network system upgrade costs, was also below the Avoided Cost Cap. Further, no additional interconnection studies are required for Orion and Bid B. *Id.* at 2.

On the other hand, Bid A was not assessed by the Duke T&D Subteam. *Id.* at 1-2. Therefore, a study would need to be conducted in order to determine whether any network system upgrades in excess of the standard network system upgrade package would be needed for Bid A. *Id.* at 2.

During the November 2, 2020 hearing, the Commission also probed the issue of whether any other proposals (in addition to Bid A and Bid B) may have been higher ranked than Orion's, and therefore eligible for offer of a PPA ahead of Orion's proposal toward the objective of fulfilling the Tranche 1 procurement target. Although a statement contained in the Late-Filed Exhibit raised the question of whether any of 15 proposals eliminated during Step 2 of the Tranche 1 process should take precedence over Orion's bid, this issue was resolved in Orion's favor when it was shown that these 15 proposals were eliminated by the Duke T&D Subteam for having imputed network system upgrade costs that would put the bids over Avoided Cost Cap. Jun. 30 Tr., 66, 83-84, 85, 93.

Based upon the foregoing and the entire record herein, it is reasonable for the Commission to conclude that the only Tranche 1 proposals potentially eligible to fulfill the 134.5 MW shortfall of DEC's total 600 MW procurement goal are Bid A, Bid B, and Orion's bid.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

The evidence for this finding of fact is found in Orion's Verified Petition, Accion Exhibit 3, the Late-Filed Exhibit, and the testimony of Orion's witness Lasocki.

⁴ The confidential portions of the Late-Filed Exhibit clearly identify Bid A and Bid B.

It is undisputed that DEC awarded Orion a Tranche 2 PPA on October 15, 2020; however, Orion asserts that receiving a Tranche 2 PPA is not a satisfactory remedy for having its proposal improperly eliminated in Tranche 1. Primary among the reasons for this cited by Orion is that the Tranche 2 Avoided Cost Rates are lower than they were in Tranche 1, and Orion's bid price in Tranche 2, accordingly, was required to be lower in order to remain below the Avoided Cost Cap. Verified Petition at 13.

In Accion's Exhibit 3 it asserts that if the Commission were to grant Orion rates based on its Tranche 1 bid, "the cost to ratepayers would be significantly higher[.]" The Late-Filed Exhibit characterizes Orion's Tranche 1 proposal, along with Bids A and B, as "detrimental to customers." *Id.* at 1. In response Orion notes that it has shown that its proposal meets the cost-effectiveness bar for the CPRE Program, that is, Orion's proposal is below the Avoided Cost Cap. Jun. 30 Tr., 29. The same is true of Bid B and may also be true for Bid A.

The Commission acknowledges that Orion's Tranche 2 bid pricing provides greater savings to ratepayers than the pricing it proposed in Tranche 1. However, although the Tranche 1 pricing is less beneficial to ratepayers than the Tranche 2 PPA, the Commission disagrees that Orion's Tranche 1 pricing is detrimental to ratepayers. It remains below the statutory Avoided Cost Cap which governs cost-effectiveness. Further, the Commission is persuaded that Orion's Tranche 1 bid (as well as Bid B), which has been demonstrated to be below the Avoided Cost Cap, will result in savings to ratepayers. Thus, the Commission concludes that its obligation to uphold the integrity of the CPRE Program should not be outweighed by the difference in pricing between Tranche 1 and Tranche 2.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

The evidence for this finding of fact is found in the Late-Filed Exhibit.

In the Late-Filed Exhibit, DEC asserts that "under certain realistic scenarios, [Duke] is already over-procured for CPRE based on Tranche 1 and Tranche 2 due to higher than projected amounts of Transition MWs." *Id.* at 6. As is discussed herein, Orion has executed a Tranche 2 PPA; therefore, Orion's generating capacity is taken into consideration when Duke estimates its CPRE Program capacity shortfall. *Id.* However, DEC states that "such assessment does not assume the retroactive procurement of two additional projects from Tranche 1 [referring to Bid A and Bid B], which would further increase risk of over-procurement and, if any further procurements are deemed necessary, would reduce the size of such procurements." *Id.*

The Commission notes that on September 1, 2021, some ten months after the date of the Late-Filed Exhibit filed on November 24, 2020, Duke filed its 2021 CPRE Program Plan Update (CPRE Update) in Docket No. E-100, Sub 165. Duke's CPRE Update estimates that at the end of the initial CPRE Program procurement period, which will expire on November 21, 2021, Duke will still need to procure approximately 300 MW to meet its statutory procurement obligation pursuant to N.C.G.S. § 110.8(a).

Orion witness Lasocki testified that the total capacity of Bid A, Bid B, and Orion's proposal is 127 MW. Jun. 30 Tr., 24. No party objected to or disputed Orion's representation of the total capacity of Bid A, Bid B, and Orion's proposal. Further, as previously stated, the capacity of Orion's project is 74.4 MW. Exhibit B to Verified Petition. Accordingly, it may be concluded that the aggregate capacity of Bid A and Bid B is 52.6 MW.

Therefore, the Commission finds good cause to determine that the relief afforded herein is unlikely to result in the CPRE Program exceeding the statutory target.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

The evidence for this finding of fact is found in the Tranche 1 RFP, Orion's Verified Petition, the testimony of Orion witness Lasocki, and the testimony of the Accion panel of witnesses.

Based on its finding herein that Accion eliminated Orion's proposal from consideration, as well as Bid A and Bid B which were similarly situated to Orion's proposal, in a manner inconsistent with the terms of the Tranche 1 RFP, an appropriate remedy, in light of the issues raised by Orion in its Verified Petition,⁵ is to order DEC offer these three market participants contracts on the same terms and conditions as were offered to other winning bidders in Tranche 1. This finding is limited by the caveat that, with regard to Bid A, it is appropriate for the Duke T&D Subteam to assess the network system upgrade costs for Bid A and that only if Bid A remains below Avoided Cost Cap following such assessment, to offer a contract to Bid A based on its Tranche 1 bid.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

The evidence for this finding of fact is found in the Late-Filed Exhibit, the testimony of DEC's witness Cathcart, and in the testimony of Orion witness Lasocki.

DEC explains that, between Tranches 1 and 2, it changed the classification of POI switching equipment. Late-Filed Exhibit at 2-3. During the Tranche 1 process "POI Switching Equipment was the responsibility of the bidder as Interconnection Facilities and would therefore be accounted for in developing their PPA price and the cost of POI Switching Equipment was therefore not assessed to Proposals as part of the Step 2 T&D evaluation." *Id.* at 3. In contrast, during Tranche 2:

⁵ Orion's Verified Petition states: "Proposals for CPRE Tranche 2 are due on March 9, 2020. Orion (or an affiliated entity) intends to submit a proposal for the Project into Tranche 2. However, even if Orion's Proposal were to be selected in Tranche 2 (which is by no means certain), this would not remedy the improper denial of Orion's opportunity to obtain a Tranche 1 PPA. This is true for several reasons, including but not limited to: (1) the lower avoided cost cap for Tranche 2; (2) imposition of a Solar Integration Services Charge on Tranche 2 projects; (3) potentially higher System Upgrade costs based on the later interconnection queue positions of Tranche 2 projects; and (4) the significant delay in commercial benefits which would result from implementation of the Project in Tranche 2." *Id.* at 13-14.

POI Switching Equipment was not the responsibility of the bidder and therefore did not need to be included in the PPA price (given that it was now classified as Upgrades) and the cost of POI Switching Equipment was assessed to Proposals as part of the Step 2 T&D evaluation (though bidders would not be responsible for paying for the POI Switching Equipment under the CPRE cost recovery construct).

Id. DEC further explains:

[B]ecause Tranche 1 did not classify the POI Switching Equipment as an Upgrade, the standard Upgrade package (which also includes relay/communication modifications as discussed below) in Tranche 1 did not include POI Switching Equipment at all. In contrast, the standard Upgrade package in Tranche 2 did include POI Switching Equipment, which increased the cost of the standard Upgrade package by approximately \$1 M - \$1.25M (though a portion of that increase was offset[.]

Id. DEC contends that this change between Tranche 1 and Tranche 2⁶ creates “a potential for a windfall for the Tranche 1 bidders if they are issued an Interconnection Agreement using existing classifications but are awarded a PPA based on a bid price that assumed the older classifications[.]” *Id.* at 4. DEC also noted that this issue extends to Bid A and Bid B.

Orion’s witness Lasocki testified that there were three possible solutions to prevent a windfall under the circumstances:

First, 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. Second, 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. Finally, Orion could voluntarily assume the cost of the POI Switching Equipment, regardless of how it is classified under the Interconnection Agreement. Orion would have no objection to bearing those costs if its request for relief were granted, as they were factored into its Tranche 1 Proposal.

⁶ DEC states 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.” Late-Filed Exhibit at 3.

Jun. 30 Tr., 28. In its supplemental post-hearing brief, Orion noted that “Orion has no inherent preference among these alternatives, although re-pricing its bid . . . would likely be the most complex approach.”

Based upon the foregoing, the Commission finds that it is appropriate for Orion to bear the cost of the POI switching equipment. With regard to Bid B and to Bid A, if it is determined to be under the Avoided Cost Cap following assessment by the Duke T&D Subteam, the Commission finds it reasonable to permit DEC and the applicable market participants to determine the most appropriate manner to resolve the POI switching equipment classification based on the unique circumstances of these proposals, provided that in any such resolution ratepayers are not negatively affected and Bid A and Bid B are treated equitably with other Tranche 1 PPA winners.

IT IS, THEREFORE, ORDERED, as follows:

1. That DEC shall revise the rate schedule in Orion’s existing Tranche 2 CPRE PPA to reflect the proposal pricing provided in Orion’s Tranche 1 Proposal (Proposal DEC_129-01);

2. That Orion shall bear the cost of the POI switching equipment;

3. That DEC shall offer a CPRE Tranche 1 PPA to Bid B, as is identified in the confidential portion of the Late-Filed Exhibit, based on its Tranche 1 bid and additional conditions pertaining to POI switching equipment described herein;

4. That Duke shall assess the network system upgrade costs for Bid A, as is identified in the confidential portion of the Late-Filed Exhibit, and if Bid A remains below the Avoided Cost Cap after adding to the bid price the cost of any necessary network system upgrades, DEC shall offer a CPRE Tranche 1 PPA to Bid A based on its Tranche 1 bid and additional conditions pertaining to POI switching equipment described herein; and

5. That nothing herein shall be construed to supersede the procurement target prescribed by N.C.G.S. § 62-110.8.

ISSUED BY ORDER OF THE COMMISSION.

This the 2nd day of November, 2021.

NORTH CAROLINA UTILITIES COMMISSION



Joann R. Snyder, Deputy Clerk