STATE OF NORTH CAROLINA UTILITIES COMMISSION
RALEIGH

DOCKET NO. SP-9590, Sub 0
DOCKET NO. E-2, Sub 1159
DOCKET NO. E-7 Sub 1156

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

Application for CPCN and Registration Statement for 50MW Facility Located at 20217 Old Aquadale Road Albemarle, NC 28001 Stanly County	)	**REPLY IN SUPPORT OF PETITION FOR RECONSIDERATION BY STANLY SOLAR LLC**
In the Matter of Joint Petition of Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC, for Approval of Competitive Procurement of Renewable Energy Program	)	

Pursuant to N.C. Gen. Stat. § 62-80 and the Commission's December 14, 2020, *Order Establishing Deadlines for Filings Responsive to Petition For Reconsideration by Stanly Solar*, Petitioner Stanly Solar LLC ("Stanly") hereby files this Reply in Support of its Petition for Reconsideration ("Petition") of the *Order Denying Motion for Return of Proposal Security* ("Order"), issued in this docket on October 20, 2020. The opposition briefs of Duke and the Independent Administrator do nothing to undermine the basic points that: (1) the Commission's Order fails to address the fact that Stanly's proposal was treated inequitably, as compared to a similarly-situated asset acquisition proposal; (2) this structural inequity gave asset acquisition proposals a competitive advantage in Tranche 1; (3) the Commission's Order incorrectly interprets Section VI(A) of the Tranche 1 RFP; and (4) returning Stanly's proposal security would not cause harm to any party. Nor did Stanly "willfully violate" the rules of the RFP, as Duke and the

Independent Administrator claim: to the contrary, throughout the Tranche 1 process Stanly sought to comply with the rules of the RFP as it understood them. Under the unique circumstances presented here, Stanly submits that the only appropriate way to resolve this inequitable treatment is to return Stanly's proposal security.

1. Stanly's proposal was treated inequitably.

Accion and Duke both mischaracterize Stanly as claiming that the "equitable treatment" required by HB 589 and the Commission's rules demands treatment that is "identical in each and every respect." Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Joint Response to Petition for Reconsideration ("Duke Resp.") at 5-8; Accion Group, LLC's, the CPRE Independent Administrator, Response to the Petition for Reconsideration by Stanly Solar LLC ("Accion Resp.") at 3-4. That is not Stanly's position. Rather, Stanly maintains that similarly-situated proposals must be afforded equal treatment in all meaningful respects, unless there is a compelling reason for disparate treatment. So where, as here, two projects (Stanly and the Duke-sponsored asset acquisition proposal) bid into Tranche 1, both were advanced to Step 2, and both withdrew before signing a PPA because of changes in capital costs,[1] it would be inequitable for one project to forfeit one million dollars while another is allowed to withdraw without penalty. This inequitable treatment can be resolved now only by returning Stanly's proposal security.

Duke claims that such disparate treatment is justified because it would be unreasonable to require the utility to post proposal security for asset acquisition proposals, given the short turnaround time for its proposal team. Duke Resp. at 5-6. Duke misses the point. Whether it would be unreasonable to require Duke to post proposal security for Asset Acquisition proposals, it would not have been unreasonable to require Asset Acquisition bidders (*i.e.*, the project

[1] See Duke Br. at 6-7.

developers) to post proposal security. This would have resolved the inequity, and is in fact exactly what was required in Tranche 2 to correct the problem identified by the Independent Administrator at the conclusion of Tranche 1. *See* Duke Resp. at 8 Ex. A to Petition for Reconsideration, *Final Report of the Independent Administrator – CPRE Tranche 1* (July 18, 2019) ("Tranche 1 Final Report"), at 5-6.[2] This shows that there was no need for this disparate treatment in Tranche 1.

Accion and Duke both fault Stanly for failing to identify this inequity during the Tranche 1 stakeholder process, arguing that Stanly's failure to challenge it then means that Stanly should be afforded no relief. Accion Resp. at 2-3; Duke Resp. at 9. This argument finds no support in the Commission's rules regarding outreach to CPRE stakeholders and publication of the draft RFP. *See* R8-71(f)(ii), (iv)-(vi). Nor would it be fair: nothing in the Tranche 1 RFP or the pre-RFP stakeholder process called attention to the fact that asset acquisition bidders were not required to post proposal security, and no one (Stanly included) appears to have noted the issue. The Independent Administrator itself characterized this as an "unanticipated result" that only arose during the final stages of Tranche 1. Tranche 1 Final Report at 6. To penalize Stanly for not identifying a latent structural issue that no one else (Accion included) noticed would be unreasonable and unfair.[3]

---

[2] While Duke and the IA now argue that the disparate Proposal Security requirements did not constitute inequitable treatment, in the Tranche 1 Final Report Accion prefaced its discussion of the proposal security requirements by citing the Commission's rules on equitable treatment and noting that "an important part of the IA's role is to ensure equitable treatment of all Proposals, including both third party Proposals and utility self-developed Proposals." Trance 1 Final Report at 5.

[3] Duke also claims that the Commission did not disregard the facts concerning inequitable treatment because it "acknowledges" Stanly's argument and Duke's response in the Order. But G.S. § 62-79 requires that the Commission do more than simply "acknowledge" the parties' arguments – it must set forth "findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record."

2. The inequitable Proposal Security requirement gave Asset Acquisition proposals a competitive advantage in Tranche 1.

In its Petition, Stanly highlighted two facts demonstrating that the lack of a proposal security requirement for asset acquisition proposals in Tranche 1 gave them a competitive advantage: (1) according to Accion, asset acquisition proposals in Tranche 1 were priced more aggressively than the PPA proposals for the exact same projects; and (2) the proportion of winning asset acquisition bids fell from 40% in Tranche 1 (when asset acquisition proposals had a "free option to withdraw" in Step 2) to 0% in Tranche 2 (when they did not). Petition at 8-9. Duke dismisses this as "baseless speculation" but provides no alternative explanation for these striking disparities. Duke Resp. at 14. Of course Stanly is not privy to non-public information about other participants' bidding strategies, but it is entirely reasonable for the Commission to infer from these undisputed facts that asset acquisition proposals enjoyed a competitive advantage in Tranche 1 that they did not in Tranche 2. Stanly's Petition explains how a "free option to withdraw" would result in such a competitive advantage, and neither Duke nor Accion disputes this account.[4] Petition at 7-9.

Duke also intimates that no asset acquisition proposals were selected in Tranche 2 because the utility did not elect to sponsor any such proposals. Duke Resp. at 14 and n.19.[5] If true, this would further support the inference that asset acquisition bidders in Tranche 2 priced their proposals more conservatively because they would no longer have the option to withdraw during Step 2 without penalty.

---

[4] Again, the Independent Administrator specifically identified this as an instance of inequitable treatment in the Tranche 1 Final Report. Tranche 1 Final Report at 5-6.

[5] Duke's brief says that "there is actually no evidence" that Duke sponsored asset acquisition proposals in Tranche 2, and that the IA's Final Tranche 2 Report "will provide further details on this issue."

3. Duke incorrectly interprets Section VI(A) of the RFP.

Duke argues that Section VI(A) of the Tranche 1 RFP does not apply to Stanly's proposal because (1) that provision "described a potential scenario that … could only arise 'during the Step 2 evaluation process,'" and (2) Stanly was not part of the Step 2 process because it was a Late-Stage Proposal. Duke Resp. at 3-4. Duke is right on the first point but wrong on the second.

Under the Commission rules and the Tranche 1 RFP, three major tasks were accomplished in Step 2: (1) determining approximate Upgrade costs associated with the projects advanced to Step 2; (2) assessing the timeline for interconnection of such projects; and (3) re-ranking proposals as necessary based on Upgrade costs, and formulating the final ranked list of CPRE proposals for delivery to the utility. Tranche 1 RFP Sec. VI(A); R8-71(f)(3)(iii). Stanly's Late-Stage status meant that it would not be assigned additional Upgrade costs during Step 2 because those costs had already been determined, and were factored into its bid price. But the RFP does <u>not</u> say that the <u>timing</u> of Stanly's interconnection work would not be assessed in Step 2. And it is unquestionably true that Stanly's overall cost ranking was determined during the Step 2 process. Stanly reasonably read (and still interprets) Section VI(A) to provide that its interconnection schedule would be assessed and it would be ranked with other proposals in Step 2, even if its Upgrade costs had been determined elsewhere.

4. Returning Stanly's Proposal Security will not result in harm to any party.

Both Accion and Duke accuse Stanly (in so many words) of acting in bad faith, "willfully violating the terms of the RFP" (Duke Resp. at 10), seeking to "eliminate the Proposal Security requirement" for CPRE, and gaining "market intelligence" allowing it to successfully participate in Tranche 2 (Accion Resp. at 6-7). That is an unreasonable and unfair characterization.

Throughout the CPRE process Stanly was clear and candid with Duke and the Independent Administrator, and has sought to comply with the rules of the RFP as it understood them.[6]

Stanly's choice to proceed to Step 2 and its subsequent withdrawal had no impact whatsoever on Duke, its customers, the Independent Administrator, or any other CPRE participant. Had Stanly instead elected not to proceed to Step 2, every other party would have been left in exactly the same situation. And although Accion seems to fault Stanly for having successfully participated in Tranche 2 (Accion Resp. at 5-6), the fact that Stanly's project will ultimately deliver energy and capacity to Duke's customers only underscores the fact that returning Stanly's proposal security would not result in harm to anyone.

Nor would returning Stanly's security undermine the "viability of competitive solicitations in North Carolina," as the Independent Administrator warns (Accion Resp. at 6-7). This dispute arose from a unique and unforeseen combination of factors – the provisions for Late-Stage

---

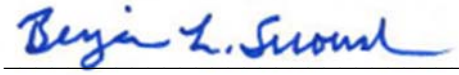
[6] Accion misleadingly claims that Stanly "repeatedly failed" to provide proposal security but was granted special accommodations by the IA and Duke. Accion Resp. at 5-6. Here is what actually happened: Stanly was notified on December 6, 2018 of its selection for Step 2 and was told it had to provide Proposal Security within seven days. At that time Stanly was engaged in a dispute with Duke relating to its treatment as a Late-Stage Project, arising from its transfer from Duke's FERC-jurisdictional interconnection queue to the utility's state-jurisdictional queue. Stanly, Duke, and the Public Staff attended a dispute resolution meeting in December 2018, at which the parties agreed that it would be appropriate to extend the proposal security deadline in order to facilitate resolution of the dispute. The parties agreed to an extension until January 4, 2019, and the Independent Administrator accepted this agreement.

Stanly posted its bond on January 4, *using the bond form published with the Tranche 1 RFP*. On January 5, Duke confirmed receipt, stating that "The bond is being reviewed by Duke for acceptability. At this point the MP need do nothing further." Stanly heard nothing further until January 22, when Duke again responded, stating that it had completed its review of the bond and had "identified two matters to be modified." First, Stanly had incorrectly listed May 11, 2018 instead of July 10, 2018 as the CPRE issuance date in the first "whereas" clause on the bond form. (The date had been left blank in the bond form published with the RFP, and a prior version of the RFP had been issued on May 11). Second, Duke requested the removal of brackets enclosing the "Surety Bond Effective Date" on the first page of the form. Stanly provided a revised bond form in accordance with these instructions on February 5. Stanly confirmed with its surety that these changes had no impact on the enforceability of the bond, which was effective and available to Duke from the date it was originally posted.

proposals, the optionality provided for projects that could not achieve interconnection by January 1, 2021, and the disparate treatment between PPA proposals and asset acquisition proposals with respect to proposal security. These circumstances will not arise in future solicitations, because the relevant provisions of the RFP have all been changed or eliminated.

The return of Stanly's proposal security would resolve the inequitable treatment of its proposal in Tranche 1 and would not result in harm either the CPRE program or any party. Stanly also maintains that it is consistent with the text of the Tranche 1 RFP. Accordingly, Stanly submits that it would be equitable and appropriate for the Commission to reconsider its Order and require the return of Stanly's proposal security.

Respectfully submitted, this the 26th day of January 2021.

By: 

Benjamin L. Snowden
Kilpatrick Townsend & Stockton LLP
4208 Six Forks Road, Suite 1400
Raleigh, NC 27609
Email: BSnowden@KilpatrickTownsend.com

Attorney for Petitioner Stanly Solar LLC

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing has been served this day upon each party of record in this proceeding or their attorney by electronic mail or by depositing a copy thereof in the United States mail, postage prepaid.

This the 26th day of January, 2021.

/s_____
Benjamin L. Snowden
Kilpatrick Townsend & Stockton LLP
4208 Six Forks Road, Suite 1400
Raleigh, NC 27609
Email: BSnowden@KilpatrickTownsend.com