

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. SP-13695, SUB 1

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	ORDER POSTPONING
Orion Renewable Resources LLC	)	HEARING, GRANTING ORION'S
	)	MOTION TO COMPEL, AND
	)	PERMITTING ORION TO FILE
	)	LIMITED SUPPLEMENTAL
	)	TESTIMONY

BY THE PRESIDING COMMISSIONER: At the initial hearing in this matter on November 2, 2020, the Presiding Commissioner requested that the CPRE Program Independent Administrator, Accion (IA or Accion) and Duke Energy Carolinas, LLC (DEC) jointly prepare a Late-Filed Exhibit (LFE) disclosing information about proposals eliminated from the CPRE Tranche 1 evaluation process due to the IA's determination that they had negative net economic benefit.

On November 24, 2020, DEC filed the LFE, and on November 25, 2020, DEC filed a Corrected LFE.

On January 25, 2021, Orion filed a Motion to Strike or in the Alternative Reopen Hearing (Motion to Strike). Orion objected to the LFE, contending that Items 3, 4, 5, and 6 of the LFE, and the corresponding portions of DEC's post-hearing brief, introduce "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. DEC and the IA opposed Orion's Motion to Strike.

The North Carolina Supreme Court has held that, where the Commission permits a late-filed exhibit, opposing parties have the right to demand that the hearing be reopened to allow for (1) cross-examination of witnesses regarding the information presented by the late-filed exhibit and (2) presentation of rebuttal evidence. *State ex rel. Utilities Com. v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 269, 148 S.E.2d 100, 109-110 (1966).

On April 14, 2021, the Presiding Commissioner caused to be issued an Order denying the Motion to Strike, but reopening the record to accept into evidence the LFE and to receive supporting and rebuttal testimony related to the facts and circumstances underlying the LFE and the information contained therein.

On May 14, 2021, Orion filed a Motion to Compel Discovery and for Leave to Provide Supplemental Testimony (Motion). Orion seeks an order from the Commission requiring Accion to provide adequate responses to Orion's April 20, 2021 First Data Request to

Accion and also to Orion's May 6, 2021 Second Data Request. On May 28, 2021, Accion filed a Response to Orion's Motion to Compel. No other party has indicated that it intends to comment on this matter.

## **SUMMARY OF THE PARTIES' POSITIONS**

### **Orion's Motion to Compel Discovery and for Leave to Provide Supplemental Testimony**

Orion states that the LFE filed by DEC includes information provided by Accion concerning three proposals (including Orion's) that were eliminated during Step 1 of Tranche 1 based on Accion's net benefit analysis (Step 1 Eliminated Proposals). Orion also notes that the LFE included information regarding the calculation of the "Maximum Allowable T&D Upgrade Cost" for each of the Step 1 Eliminated Proposals. According to Orion's Motion to Compel, the Maximum Allowable T&D Upgrade Cost for a particular CPRE proposal represents the maximum amount (in dollars) of Upgrade costs the proposal could be assigned before it would exceed the Avoided Cost Cap for Tranche 1.

Per Orion, the LFE also references 15 proposals that were eliminated based on a net benefit analysis in Step 2 (the Step 2 Eliminated Proposals). Orion notes that the LFE claimed that "[e]xtensive further analysis would ... be needed to assess each such Proposal to determine whether the applicable T&D costs, in addition to causing the Proposals to have a negative Net Benefit, also would have exceeded the Maximum Allowable T&D Upgrade Cost." Orion also notes that in DEC's Post-Hearing Brief it argued that the existence of the Step 2 Eliminated Proposals means that "a finding that the IA did not have discretion to eliminate Proposals based on the Net Benefit Analysis [the central legal question in this matter] will set off a cascading series of questions and likely challenges that will take months to resolve, requiring the resolution of a series of complex conceptual questions concerning the retroactively assessed hypothetical outcome of Tranche 1." DEC Post-Hearing Br. at 3 (January 4, 2021).

Following the Presiding Commissioner's April 14, 2021 Order reopening the record to accept into evidence the LFE and to receive supporting and rebuttal testimony related to the facts and circumstances underlying the LFE and the information contained therein, Orion served its First Data Requests to Accion on April 20, 2021, seeking information comparable to that provided in the LFE for the Step 1 Eliminated Proposals for 15 Step 2 Eliminated Proposals. Particular to this motion, Orion's Data Request 1-1 (DR 1-1), which is provided with Exhibit A to Orion's Motion, stated:

#### DR 1-1:

With regard to each of the "15 projects [that] were also eliminated in Tranche 1 based on a determination of negative Net Benefits after the

application of T&D costs determined in Step 2,” as referenced on page 7 of the LFE, please provide the following information:<sup>1,2</sup>

- a. Generating Capacity;
- b. Proposal's bid decrement to the avoided costs shown in the Tranche 1 RFP;
- c. Step 1 – Net benefit without T&D upgrade costs, in dollars per MWh and total dollars;
- d. Duke T&D Evaluation Team - Step 2 system upgrade costs (in total \$);
- e. Step 2 - Net Benefit (\$/MWh) with T&D Costs;
- f. The Maximum Allowable T&D Upgrade Cost (in total \$), as that term is used in the LFE; and
- g. Whether the project corresponding to the Proposal was awarded a PPA in CPRE Tranche 2.

On May 3, 2021, Accion provided responses to Orion's First Data Requests. Orion notes that Accion did not object to any of Orion's data requests. Accion responded to DR 1-1 in the form of a table. Responses to DR 1-1(a) and (b) are redacted. In response to DR 1-1(e) and (f), the table states in a footnote that “[n]either Net Benefit nor “Maximum Allowable T&D Upgrade Cost” was calculated for these Proposals[.]”

On May 6, 2021, Orion served its Second Data Requests to Accion, which requested that Accion calculate the Maximum Allowable T&D Upgrade Cost for a subset of nine<sup>3</sup> of the 15 Step 2 Eliminated Proposals identified in the table Accion provided in response to Orion's First Data Requests, DR-1. Orion attached the contested question to its Motion to Compel as Exhibit C:

DR 2-1:

With regard to the table provided in Accion's Response to Item #1 (“CPRE Tranche 1 for DEC: Orion 4/20/2021 Data Request, Item #1”), please calculate the “Maximum Allowable T&D Upgrade Cost” for the Proposals corresponding to the following Step 1 Ranks: 10, 15, 16, 20, 28, 34, 38, 47, 48.

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<sup>1</sup> Orion's DR 1-1 provides the following footnote: “These are the same data fields provided for Orion's Proposal, “Bid A,” and “Bid B” in the LFE. With respect to those projects, Item (g) was detailed on page 1 of the LFE.

<sup>2</sup> Orion's DR 1-1 further provides the following: “For confidentiality purposes, this information may be provided on an anonymized basis and is assumed to be subject to the provisions of the Comprehensive Confidentiality Agreement entered into between Accion Group, LLC (“Accion”) and Orion Renewable Resources LLC, effective October 30, 2020.”

<sup>3</sup> Orion states that “[s]ix of the Step 2 Eliminated Proposals were, according to Accion, impacted by a transmission constraint and were not selected in Step 2 despite having a positive Net Benefit. To reduce the burden of complying with the Request, Orion omitted these proposals from its Second Request.”

On May 11, 2021, Accion sent Orion a letter declining to provide the requested information and stating that “[Orion’s] request requires the production of data that does not currently exist. It would be necessary to generate calculations to provide what you appear to be requesting. Should the Commission request or order that Accion perform the necessary calculations and provide the data, Accion will of course comply. Otherwise, Accion does not believe it would appropriate to provide the data you requested.” Orion’s Motion to Compel, Exhibit D.

Particularly, Orion requests that the Commission: (1) compel Accion to produce a calculation of the Maximum Allowable T&D Upgrade Cost for the Step 2 Eliminated Projects identified in Exhibit B to its Motion to Compel; and (2) authorize Orion to file supplemental testimony regarding the information produced by Accion within five business days after receipt of the requested information or in the alternative present such testimony from the stand at the June 3, 2021 hearing.

In support of its Motion, Orion states that the information sought is likely to lead to the discovery of admissible evidence and is needed to further assist Orion in responding to the factual matters raised in the LFE. Further, Orion states that it diligently sought this information on a timely basis. Orion also notes that Accion has not articulated any objection to Orion’s requests.

Further, Orion contends that Accion’s refusal to provide the requested information based on the fact that it would require Accion to perform a calculation, “has no legal basis.” Citing to N.C. R. Civ. P. 33, 26(b)(1), Orion argues that a litigant may request information “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Orion further opines that discovery requests seeking calculated values are not prohibited, and the Commission has granted motions to compel responses to requests that require the respondent to calculate values or otherwise create data. Particularly, Orion cites two orders in support of this argument: (1) Order to Compel, Docket No. P-19, Sub 277 (Dec. 28, 2004), and (2) Order Granting In Part and Denying In Part Public Staff Motion to Compel, Docket No. E-7, Sub 1214 (May 26, 2020).

Orion also notes that “Accion does not claim that performing this calculation would be unduly burdensome – indeed, Accion voluntarily calculated these values for the Step 1 Eliminated Proposals and included them in the LFE. Rather, Accion appears to claim that there is a *per se* bar on data requests that require the respondent to perform even simple calculations. There is no basis for this claim.”

Finally, Orion addresses confidentiality issues raised by Accion in the course of this discovery dispute and particularly in Accion’s May 11, 2021 letter to Orion, which was provided as Exhibit D to Orion’s Motion. Orion contends that there is no legal basis to refuse to provide the requested data based on Accion’s contention that Market Participants have an expectation that this information would not be shared with competitors. Orion states that under the Confidentiality Agreement, Orion is prohibited from using or disclosing the Maximum Allowable T&D upgrade Cost for any proposal. Further, Orion contends that such data has no commercial value now and cannot qualify as protected information under the

Trade Secrets Protection Act. Orion also argues that Accion's claim that Orion cannot be trusted to adhere to the terms of the Confidentiality Agreement is without merit because parties practicing before the Commission routinely obtain access to commercially sensitive information under the protection of nondisclosure agreements.

### **Accion's Response**

On May 28, 2021, Accion filed a Response to Orion's Motion to Compel. Accion contends that Orion's second data request repeats its DR 1-1(f). Accion also addresses Orion's statement that Accion failed to object to the data requests at issue, stating "[i]n fact, Accion responded to each Request indicating the information requested did not exist. As to the Request at issue, your IA clearly indicated its objections to providing the information."

Accion argues that the North Carolina Rules of Civil Procedure require only the production of existing documents or information and do "not require the performance of various tasks necessary for creation of data that is requested but does not currently exist." "North Carolina law does not require a party to perform research or provide original work in the context of discovery."

Accion also argues that the Confidentiality Agreement (Agreement) between Orion and Accion does not protect the data that Orion seeks because the Agreement specifically related to the November 2, 2020, hearing in the docket and is not open ended. Accion further contends that the Agreement is between Accion and Orion and does not authorize Accion to disclose bid information from Orion's competitors. Finally, Accion purports that there is no way to assure that the competitively sensitive information of a competitor will not be used by or useful to Orion in future competitive bids.

### **DISCUSSION AND CONCLUSIONS**

"It is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion." *Nationwide Mut. Fire Ins. Co. v. Bournon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005) (citation omitted). "To demonstrate an abuse of discretion, *the appellant* must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Wachovia Bank, N.A. v. Clean River Corp.*, 178 N.C. App. 528, 531, 631 S.E.2d 879, 882 (2006) (citation omitted).

As an initial matter, the Presiding Commissioner recognizes that the hearing of this matter is scheduled for this upcoming Tuesday, June 8, at 2 p.m. The Presiding Commissioner is of the opinion that Orion has diligently pursued this discovery dispute as expeditiously as possible.

The Presiding Commissioner also notes that, when deciding discovery disputes, the Commission generally follows the North Carolina Rules of Civil Procedure. In pertinent part, N.C. R. Civ. P. 33(a) states:

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. An objection to an interrogatory shall be made by stating the objection and the reason therefor either in the space following the interrogatory or following the restated interrogatory.

The North Carolina Court of Appeals has previously noted that “[i]t is inappropriate for a party to decide for himself that an interrogatory is improper. It is his responsibility either to answer the interrogatory or to object. In the absence of an extension of time, failure to object within the time fixed by the rule is a waiver of any objection.” *Golding v. Taylor*, 19 N.C. App. 245, 248, 198 S.E.2d 478, 480 (1973).

Further, pursuant to the Rules of Civil Procedure, Rule 26(b)(1), in pertinent part:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . The rule also establishes limits on discovery that is not reasonably calculated to lead to the discovery of admissible evidence, that is overbroad or that is unduly burdensome.

The issue of whether data requests requiring another party to create new documents or otherwise perform original work is beyond the scope of permissible discovery under the North Carolina Rules of Civil Procedure is not one of first impression for the Commission. For instance, in Docket No. E-2, Sub 1089, the Commission denied North Carolina Waste Awareness and Reduction Network’s (NC WARN) and The Climate Times’ (collectively with NCWARN, Movants) motion to compel, which sought to require Duke Energy Progress, LLC (DEP) to provide additional responses to Movants’ discovery requests regarding DEP’s application for a certificate of public convenience and necessity (CPCN) for DEP’s Western Carolinas Modernization Project. In pertinent part, DEP objected to a certain data request on the grounds that it was vague and sought to have DEP to prepare data and analysis that was not reasonably available or did not exist and therefore would have been unduly burdensome to create. In denying Movants’ motion to compel, the Chairman concluded that “DEP should not be required to conduct analysis and perform additional work in order to respond to this discovery request.” Order Denying Motion to Compel at 13, Docket No. E-2, Sub 1089 (February 4, 2016). However, on another occasion, in a generic docket addressing cost of service studies and rate cases, the Commission ordered utilities to generate original work under certain circumstances. Order Denying Rulemaking Petition at ¶ 2, Docket No. E-100, Sub 133 (Oct. 30, 2012) (ordering “That electric utilities shall promptly make alternative cost of service studies available as reasonably requested by intervenors in rate proceedings, or shall provide data to enable intervenors to perform their own cost of service studies.”) Addressing the Commission’s E-100, Sub 133 Order Denying Rulemaking Petition, Dominion Energy North Carolina stated:

Requesting another party to create new documents or otherwise perform original work is beyond the scope of permissible discovery under the [North

Carolina Rules of Civil Procedure] . . . However, the Company also recognizes that the Commission is not bound by the [North Carolina Rules of Civil Procedure] in this regard.

Response of Dominion North Carolina Power in Opposition to CIGFUR I's Motion to Compel at ¶ 15, Docket No. E-2, Sub 532 (June 29, 2016).<sup>4</sup>

The Presiding Commissioner is not persuaded by Accion's argument that Orion should not be entitled to the Maximum Allowable T&D Upgrade Cost for the nine Step 2 Eliminated Proposals on the basis of confidentiality. As noted by Orion, via the LFE, Accion has already provided to Orion the Maximum Allowable T&D Upgrade Cost for the other two Step 1 Eliminated Proposals.

Ultimately, the Presiding Commissioner gives weight to the following circumstances. First, the Presiding Commissioner finds that the information sought by Orion is relevant to the facts and circumstances underlying the LFE and the information contained therein, and that the information requested by Orion is likely to lead to the discovery of admissible evidence and is needed to further assist Orion in responding to the factual matters raised in the LFE. Second, the Presiding Commissioner opines that Orion will be unable to obtain a substantial equivalent of the material sought through other means. Finally, the Presiding Commissioner gives weight to the lack of an objection from Accion asserting that the information requested by Orion would require extensive or unduly burdensome original work as well as Accion's representation that "[s]hould the Commission request or order that Accion perform the necessary calculations and provide the data, Accion will of course comply." Orion's Motion to Compel, Exhibit D.

In light of the foregoing, the Presiding Commissioner finds good cause to grant Orion's Motion to Compel Discovery and for Leave to Provide Supplemental Testimony, subject to the following modifications:

1. That the evidentiary hearing currently scheduled for Tuesday, June 8, 2021, at 2 p.m., is hereby postponed, to be rescheduled by further order;
2. That within five business days of the date on which this order is issued, Accion shall file under seal a supplement to the table produced in response to Orion's DR 1-1 that fully responds to subparts (a), (b), (e), and (f) for any proposal not eliminated due to transmission constraints, which Orion shall receive subject to the comprehensive confidentiality agreement described in Ordering Paragraph No. 4, below. Further, Accion shall clarify its representation in the LFE that 15 proposals were eliminated from the Step 2 T&D analysis on the basis of having a negative net benefit versus its representation on the table produced in response to Orion's DR 1-1, that proposals 9, 14, 17, 21, 24, and

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<sup>4</sup> Dominion was responding to a Motion to Compel filed by CIGFUR I. Dominion had previously objected to CIGFUR I's data request based on an objection to being required to perform original work: "The Company objects to the foregoing request as extensive original work would be required for Dominion . . . ."

26, were impacted by a transmission constraint and therefore were not selected in Step 2 despite having a positive net benefit;

3. That within five business days of the date on which Accion files the information discussed in Ordering Paragraph No. 2, above, Orion shall be permitted to supplement its Supplemental Testimony of Timothy Lasocki, filed on May 12, 2021, limited to analysis of the new information contained in the confidential exhibit described in Ordering Paragraph No. 2, above; and

4. That the Parties are hereby directed to enter into a comprehensive confidentiality agreement for the totality of this proceeding so that the issue of confidentiality does not further impede progress toward a resolution.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 4th day of June, 2021.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in dark ink, reading "Kimberley A. Campbell". The signature is written in a cursive, flowing style.

Kimberley A. Campbell, Chief Clerk