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	)	**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	)	

PETITION FOR RECONSIDERATION

Pursuant to N.C. Gen. Stat. § 62-80, Petitioner Stanly Solar LLC ("Stanly") hereby petitions the North Carolina Utilities Commission ("the Commission") to reconsider the *Order Denying Motion for Return of Proposal Security* (the "Order"), issued in this docket on October 20, 2020. Reconsideration is warranted because the Commission disregarded or misapprehended critical facts related to the disparate treatment of Stanly in comparison to Duke-sponsored Asset Acquisition Proposals in Tranche 1. Stanly also submits that the Commission misapprehended the terms of the Tranche 1 RFP that were published to Market Participants ("MPs") in Tranche 1 of the Competitive Procurement of Renewable Energy ("CPRE") Program. Accordingly, Stanly requests that the Commission reconsider its Order and require the return of Stanly's proposal security.

I. PROCEDURAL BACKGROUND

On January 14, 2020, Stanly filed a verified *Motion for Return of CPRE Proposal Security* ("Motion"), requesting that the Commission compel Duke Energy Progress, LLC ("DEP"), to return the $1 million surety bond provided by Stanly as Proposal Security for its bid in CPRE Tranche 1.

Stanly argued that under the terms of the Tranche 1 Request for Proposal ("RFP"), Stanly had the right to withdraw from CPRE without forfeiting its Proposal Security after Duke issued Stanly an Interconnection Agreement indicating that the Stanly project would not achieve interconnection by January 1, 2021, as required by the RFP.

Stanly also argued that it was inequitably disadvantaged by having to forfeit its Proposal Security compared to a Duke-sponsored Asset Acquisition project in Onslow County that was selected for a PPA but later cancelled for economic reasons and which was not required to post Proposal Security. Stanly further contended that for it to forfeit $1 million for withdrawing from Tranche 1 compared to a Duke-sponsored proposal being allowed to withdraw without financial penalty violates Commission Rule R8-71(d)(5)(ix) "that all proposals were treated equitably through the CPRE RFP Solicitation."

On February 20, 2020, the Independent Administrator of CPRE, Accion Group, LLC (the "IA"), filed a response to Stanly's motion ("Accion's First Response") in Docket Nos. E-2, Sub 1159 and E-7, Sub 1156. The IA did not respond substantively to Stanly's argument that it had been inequitably treated, asserting only that "the IA administered the RFP under the terms as accepted by the Commission,"[1] and that Stanly had not objected to the CPRE rules or to the RFP

[1] Stanly does not dispute that the IA followed the rules of the RFP as to withdrawn Asset Acquisition proposal. Stanly does disagree with any contention that the IA correctly applied the rules of the RFP to Stanly.

provisions regarding performance security when they were published to MPs. Accion's First Response at 9-10.

On February 24, 2020, DEP and Duke Energy Carolinas, LLC ("DEC"; together with DEP, "Duke"), filed a joint response to Stanly's motion ("Duke's Response"). In its unverified response, Duke acknowledged that the Asset Acquisition proposal that had withdrawn without penalty from Tranche 1 had increased its $/kW as-bid capital price after the Duke Proposal Team submitted its $/MWh PPA price, which resulted in Duke withdrawing its bid after being selected. Nonetheless, Duke claimed (without evidence or explanation) that Asset Acquisition bidders and third-party bidders like Stanly are situated in "dramatically different commercial contexts" because third-party bidders "have substantially more opportunity to mitigate" the risk that third party contractors or suppliers will increase their prices after the bid is submitted.

On March 13, 2020, Stanly filed a reply in support of its motion ("Reply"). In its Reply, Stanly reiterated its claim of inequitable treatment and rebutted Duke's claim that the commercial circumstances of the Asset Acquisition proposal were "dissimilar" to Stanly's proposal. Reply at 9-10.

On April 21, 2020, Accion filed a response to Stanly's reply ("Accion's Second Response") in the CPRE Dockets. The IA did not respond to Stanly's arguments regarding inequitable treatment, but reiterated the IA's claim that "the CPRE process is designed to have the Proposals selected for PPAs to be final to avoid the uncertainty of MPs backing out at the eleventh hour, and the potential for failing to meet Program goals." Accion's Second Response at 2-3.

On October 20, 2020, the Commission issued an *Order Denying Motion for Return of Proposal Security*. The Commission denied Stanly's request for return of its proposal security, based on the majority's conclusion that "the provisions of Sections II(F) and VI(A) of the Tranche

1 RFP providing for the return of Proposal Security upon withdrawal are inapplicable to Stanly because Stanly, as a Late Stage Proposal, was not specifically evaluated by the T&D Sub-Team during Step 2." Order at 9. The Commission held that Late Stage Proposals were implicitly excluded from Section VI(A) because they were to be "evaluated under Section VI(C) of the RFP, which has no similar provision for withdrawal." The majority further found that "Stanly assumed the risk inherent with opting to proceed to Step 2 and posting the Proposal Security despite having knowledge at the time that its project would likely not make the in-service deadline." *Id.* at 10.

Although the majority acknowledged Stanly's argument that it was inequitably treated, it did not discuss that argument or provide any rationale for why the majority implicitly rejected it. In dissent, however, Commissioner Duffley (joined by Commissioners Clodfelter and Hughes) noted that the majority "ignores the Independent Administrator's inequitable treatment of proposals" in Tranche 1. Commissioner Duffley concluded that Stanly had been treated inequitably in comparison to Duke's Asset Acquisition Proposal and reasoned that the appropriate remedy would be return of Stanly's Proposal Security. In a separate dissent, Commissioner Clodfelter also noted the unintentional "structural inequity" in Tranche 1 between utility-sponsored proposals and those of market participants such as Stanly Solar, which "played itself out" when Stanly Solar was required to forfeit its Proposal Security while a similarly situated utility-sponsored proposal was allowed to withdraw, without having had to post any type of security. The dissents noted that this inequity had been resolved in Tranche 2.

II. ARGUMENT

The majority opinion does not attempt to justify the inequitable result of requiring Stanly to forfeit its proposal security while allowing a similarly-situated Asset Acquisition proposal to withdraw without penalty. The Commission's Order was based on a "misapprehension or

disregard" of critical facts relating to the inequitable treatment of third-party PPA bidders like Stanly, in relation to Duke-sponsored asset acquisition proposals in the CPRE Tranche 1 process. The Commission should reconsider its decision and remedy this inequity by requiring the return of Stanly's proposal security.

A. Legal Standards

Pursuant to G.S. § 62-80, the Commission may, in its discretion, rescind, alter, or amend an order upon reconsideration. *State ex rel. Utilities Comm'n v. MCI Telecommunications Corp.*, 132 N.C. App. 625, 630, 514 S.E.2d 276, 280 (1999). Such action may not be taken arbitrarily or capriciously, but may be warranted by some change in circumstances or a misapprehension or disregard of a fact that provides a basis for the Commission to rescind, alter, or amend a prior order. *State ex rel. Utilities Comm'n v. North Carolina Gas Service*, 128 N.C. App. 288, 293-294, 494 S.E.2d 621, 626, *rev. denied*, 348 N.C. 78, 505 S.E.2d 886 (1998). Additional evidence or a change in circumstances may justify reconsideration or alteration of a Commission Order. *Id.*

Under Chapter 62 of the General Statutes, all final orders and decisions of the Commission "shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings," and shall include findings, conclusions, and a statement of reasons or basis on "all the material issues of fact, law, or discretion presented in the record[.]" G.S. § 62-79(a).

B. Requirements for equitable treatment under CPRE

H.B. 589 calls for the CPRE program to be administered by an independent third-party administrator, who is required to "develop and publish the methodology used to evaluate responses received pursuant to a competitive procurement solicitation ***and to ensure that all responses are treated equitably***." G.S. § 62-110.8(d) (emphasis added). It is blackletter law in North Carolina

that "[o]ordinarily, words of a statute will be given their natural, approved, and recognized meaning." *Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974). In determining the natural and recognized meaning of statutory language, North Carolina Courts use accepted definitions. *Id.* "Equitably" is readily defined as "dealing fairly and equally with all concerned."[2] In other words, H.B. 589 requires that each aspect of a bid be treated equally for all bidders.

The requirement for independent administration and equitable treatment is especially critical given that the statute (which limits the direct participation of a utility to no more than 30% of the procurement) allows Duke, without any limitation, to satisfy its procurement obligation via the purchase of renewable energy facilities selected through the competitive procurement and to earn revenue from those projects. G.S. § 62-110.8(b)(4), (g).

The requirements for equitable treatment of proposals are echoed in Commission rule R8-71, which requires the IA to ensure "that all responses to a CPRE RFP Solicitation are treated equitably," R8-71(b)(9); to "[d]evelop and publish the CPRE Program Methodology that shall ensure equitable review between an electric public utility's Self-developed Proposal(s) … and proposals offered by third-party market participants," R8-71(d)(5)(iv); and to certify to the Commission "that all proposals were treated equitably through the CPRE RFP Solicitation(s) during the reporting year," R8-71(h)(2)(ix).

C. Stanly's proposal was treated inequitably.

As noted, the majority opinion does not address Stanly's argument that it would be inequitable, and thus unlawful, to require Stanly to forfeit its proposal security as a result of its withdrawal, while a similarly-situated Duke-sponsored proposal was allowed to withdraw without

[2] "Equitable." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/equitable. Accessed 18 Nov. 2020.

penalty. It appears on this basis that the Commission disregarded, or at least misapprehended, the nature and extent of the "structural inequity" between third-party proposals and Duke-sponsored proposals that occurred in Tranche 1.

According to the IA, the main purpose of requiring Proposal Security is "discourage MPs from proffering Proposals they are unable to support, and thereby delaying the evaluation of serious Proposals and completion of the evaluation process." First Accion Response at 10. In other words, proposal security is intended to limit how aggressively CPRE participants can price their bids, lest they be unable to deliver on the price they have bid when it comes time to construct their project.

As noted in the *Final Report of the Independent Administrator* at the conclusion of Tranche 1 (Exhibit A) ("Tranche 1 Final Report"), the fact that Duke-sponsored Asset Acquisition proposals did not have to post Proposal Security meant that those proposals "had a free option to withdraw at any time," including in the event the project was not able to deliver on its bid price. Tranche 1 Final Report at 6. Having this "free option" meant that Asset Acquisition bidders could price their proposals more aggressively, without fear of losing their Proposal Security if they were not able to deliver.[3] Allowing Duke-sponsored proposals the ability to bid more aggressively gave them a significant competitive advantage in Tranche 1. Such a result is neither fair nor equal as to all bidders.[4]

[3] This does not just affect initial pricing. A proposal that is not required to post Proposal Security to advance to Step 2 can elect to remain in the CPRE process longer, hoping for a positive change in component pricing or other factors that drive construction costs.

[4] It is also worth noting that in preparing bids, bidders must consider both its costs and potential profit related to the proposed project. Requiring MP's to bear the cost of premiums for Proposal Security while allowing Duke-sponsored proposals to avoid this same cost, provides the latter with a an additional pricing advantage.

The IA's analysis of the cost ranking of Asset Acquisition proposals in the Tranche 1 Final Report clearly shows that Asset Acquisition proposals were able to bid more aggressively than third-party PPA proposals. In an "Acquisition Process Audit" conducted at the conclusion of Tranche 1, the IA compared the ranking of five Asset Acquisition proposals to third-party PPA proposals submitted for the same five projects. In every case, the Duke-sponsored Asset Acquisition Proposal was found to provide greater "Net Benefit" (and thus to be more competitively ranked) than the third-party PPA proposal submitted for the same project. Tranche 1 Final Report at 53. In four out of five cases, the performance characteristics of the proposals were the same, and IA concluded that the difference in ranking "was entirely explained by the lower prices offered in the Duke-sponsored Proposal." *Id*. at 58. In other words, all things being equal, Duke-sponsored asset acquisition proposals, which did not have to post proposal security, could be priced more aggressively than third-party PPA proposals for the same project.

This structural inequity was corrected in Tranche 2, in that the IA and Duke removed the "free option to withdraw" for Duke-sponsored proposals and required those projects to post Proposal Security.[5] The results of Tranche 2 suggest that this made a difference in the relative competitiveness of Asset Acquisition and third-party PPA proposals. Whereas five Duke-sponsored asset acquisition proposals were selected in DEC in Tranche 1 – approximately 40% of the total projects selected (including the one Duke-sponsored project that withdrew before signing a PPA) – in Tranche 2, not a *single* Duke-sponsored asset acquisition proposal was selected as a

[5] The fact that this was required in Tranche 2 without issue rebuts Duke's argument that the "dramatically different commercial contexts" of Asset Acquisition Proposals justify excusing the latter from posting Proposal Security. Although Duke argued in its Response that the PPA and the Asset Acquisition components of the CPRE process must be distinguished in their application. But if the General Assembly or the Commission had intended for these two components to be treated differently, they would have said so. Instead, H.B. 589 requires that "all responses are treated equitably" and R8-71(d)(ix) requires the IA to certify that "all proposals were treated equitably through the CPRE RFP Solicitation(s)."

finalist. Independent Administrator's Report – Conclusion of Tranche 2 Step 2 Evaluation and Selection of Proposals (Aug. 11, 2020) (Exhibit B) at 4 ("Tranche 2 Report"). This highlights the significance of the "structural inequity" between third-party proposals and Duke-sponsored proposals in Tranche 1, which Duke and the IA acknowledged needed to be corrected in Tranche 2.

Although the IA characterized Tranche 1 as a "'beta test' of the CPRE Program," these inequities had real consequences for Stanly and other third-party bidders. The majority disregarded or misapprehended critical facts regarding the inequitable treatment of Stanly relative to other projects, and its decision violated G.S. § 62-110.8(d) and the Commission's own rules.

The Commission is bound by H.B. 589 and its own rules, as is the IA. As set forth above, the IA violated the law and the Rules in its execution of the Tranche 1 program. Since the IA (or the Commission) cannot retroactively require Proposal Security from the Duke-sponsored offeror, the only means by which to bring the Tranche 1 program into compliance with the law and the Rules is to return Stanly's Proposal Security.

D. The Majority misapplied the rules of the Tranche 1 RFP.

As noted, it was the IA's duty to develop and publish an RFP CPRE Program that would ensure that all CPRE responses were treated equitably, and in particular that third-party MPs were treated equitably in relation to utility-sponsored proposals. G.S. § 62-110.8(d); R8-71(d)(5)(iv). The Commission must, to the extent possible, interpret the terms of the RFP in harmony with these requirements, and avoid interpretations of the RFP that result in disparate or inequitable treatment of different categories of projects.

The majority's denial of Stanly's request is premised on the conclusion that Section VI(A) of the RFP (which gives projects the right to withdraw without penalty if it is determined during

the Step 2 evaluation process that any required Interconnection Facilities or System Upgrades cannot be completed by January 1, 2021) does not apply to Late Stage Proposals such as Stanly. This interpretation is inconsistent with the text of the RFP and should be reconsidered in light of the IA's and the Commission's obligation to ensure that all Tranche 1 participants were treated fairly and equally.

As an initial matter, Section VI(A) does not, in its text, even hint that it does not apply to Late Stage Proposals. Similarly, Section VI(C), which sets forth the requirements specific to Late Stage Proposals, neither says nor suggests that Late Stage Proposals are not subject to Section VI(A). There is in fact no provision of the RFP that discusses Commercial Operation Dates specifically in reference to Late Stage Proposals. The only reasonable conclusion is that Section VI(A) sets the requirements for Late Stage Proposals just as it does for all other projects.

Nor is there any other textual basis for reading Sections VI(A) and VI(C) of the RFP to be mutually exclusive in their application, as the majority does. Section VI(C) is entitled "Late Stage Proposals," and it addresses three issues: (1) the determination of Network Upgrades for Late Stage Proposals based on their project-specific System Impact Studies; (2) the inclusion of the cost of such Upgrades in a Late-Stage Proposal's PPA price; and (3) a Late-Stage proposal's option (contingent on Commission approval of certain pending changes to the NCIP) to delay its in-service date and construction milestones past the CPRE selection and contracting period. RFP at 17. These are the sole consequences of Late Stage Status, as explained to MPs in the RFP. Section VI(C) does not discuss the January 1, 2021 in-service deadline for CPRE and it does not discuss withdrawal.

Section VI(A), headed "Facility Commercial Operation Date and PPA Term," solely addresses implementation of the January 1, 2021 completion deadline for Tranche 1 (and the

extension of that deadline to July 1, 2021 in certain instances). Section VI(A) does not address the calculation of upgrade costs, which is the sole issue affected by Late Stage status under the RFP.

There is simply no basis for concluding, based on the text or the logic of Sections VI(A) and VI(C), that a project must be analyzed under one provision or the other, but not both. Nor is the remainder of Part VI of the RFP –entitled "Additional Information" – consistent with the notion that two of its Sections are mutually exclusive. The other Sections of Part VI are entitled, respectively, "Transmission Grid Locational Guidance" (VI(B)), "Production Estimates" (VI(D)), "Storage" (VI(E)), and "Control Options" (VI(F)). These Sections are clearly not mutually exclusive and it is unreasonable to conclude that Sections VI(A) and VI(C) were intended to be so, either.

Furthermore, excluding Late Stage Proposals from Section VI(A), as the majority does, would result in another structural inequity, between Late Stage Projects and non-Late Stage Proposals. To be eligible for Tranche 1, a Late Stage Proposal not subject to Section VI(A) would have to achieve commercial operation by January 1, 2021. However, non-Late Stage Proposals (per Section VI(A)) can have their commercial operation deadline extended until July 1, 2021, meaning they have an additional six months to achieve commercial operation. And unlike other projects, a Late Stage Proposal that could not meet the January 1, 2021 deadline would not have the option to withdraw without penalty, but would lose its Proposal Security even if the delay in interconnection (which is entirely out of its control) was unforeseen and out of its control. Although the majority found that Stanly had "assumed the risk" that its project would not achieve timely interconnection, requiring all (and only) Late Stage Proposals to "assume the risk" that they will not meet the Commercial Operation Date (six months earlier than all other projects' deadline)

would be inequitable and contrary to H.B. 589 and the Commission's rules. Moreover, given that the RFP offered no hint that Late Stage Proposals were not covered by Section VI(A), the majority would have Stanly and all other Late Stage Proposals "assumed the risk" of late interconnection *without knowing* they had done so. Knowledge of this additional risk would have informed Stanly's (and potentially others') conduct in Tranche 1.[6]

III. CONCLUSION

In denying Stanly's motion, the majority disregarded or misapprehended critical facts regarding the inequitable treatment of Stanly in comparison to Duke-sponsored Asset Acquisition Proposals in Tranche 1. The Commission also misapprehended the terms of the Tranche 1 RFP. This violated G.S. § 62-110.8(d) and the Commission's rules. No other party would be harmed if Stanly were given the relief it requests. Accordingly, the Commission should reconsider its Order and require the return of Stanly's proposal security.

Respectfully submitted, this the 20th day of November 2020.

By: _____

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[6] Even if the Commission does not reconsider its interpretation of the Tranche 1 RFP, it was not unreasonable for Stanly to conclude, based on the text of the RFP, that it would have the ability to withdraw if Duke ultimately came to the conclusion that it would not be able to achieve interconnection by January 1, 2021. Under the circumstances, and given the lack of harm to any other party, it would be inequitable not to allow Stanly to exercise that right.

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 20th day of November, 2020.

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