STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1220

In the Matter of Williams Solar, LLC, Complainant, v. Duke Energy Progress, LLC Respondent.	)))))))	**COMPLAINANT'S REPLY TO RESPONDENT'S ANSWER AND MOTION TO DISMISS**

Pursuant to the Commission's Order Serving Answer and Motion to Dismiss issued December 2, 2019, Complainant Williams Solar, LLC ("Williams Solar" or "Complainant") provides this Reply to the Answer and Motion to Dismiss Complaint ("Answer" or "motion to dismiss") filed by Duke Energy Progress, LLC ("Respondent" or "DEP"). Williams Solar has reviewed the Answer and hereby advises the Commission that the Respondent's Answer is not acceptable. In particular, DEP offers vague generalities about its estimating methodologies that do not answer the allegations made by Williams Solar.

Given that DEP has repeatedly refused to provide any meaningful information justifying the upgrade cost estimates (including unilaterally imposed labor costs and overheads) or explaining the substantial deviation in the estimates provided, Williams Solar requests the opportunity to conduct discovery followed by hearing and the opportunity to present evidence in support of its Complaint. By separate filing, after consulting with DEP, Williams Solar will present the Commission with a proposed procedural schedule.

Furthermore, as shown below, DEP's motion to dismiss should be denied.

SUMMARY

The crux of Williams Solar's Complaint is that, within six months, DEP provided two wildly differing estimates of the cost of upgrades necessary to interconnect Williams Solar's project, and that, given the disparity between them, at least one of these estimates was not made in good faith. Williams Solar requests a number of forms of relief—which depend upon whether the first, second, or both estimates were not made in good faith—including (1) a refund of all charges incurred by Williams Solar in connection with the Facilities Study and an accounting order for all losses incurred in connection with DEP's breach of its duty of good faith; (2) a declaratory ruling that DEP is required to review and process interconnection requests in accordance with the Interconnection Procedures and in good faith, where good faith requires that any cost estimates be based on commercially reasonable actual cost data; (3) a requirement that DEP provide a revised cost estimate and executable interconnection agreement; (4) imposition of $1,000 per day penalty on DEP for non-compliance with the Interconnection Procedures; and (5) any other relief the Commission deems just and proper.

DEP seeks to dismiss the Complaint for failure to state a claim upon which relief can be granted, but its arguments lack merit.

BACKGROUND ON THE DISPUTE

Because of the structure of the power industry in North Carolina and the monopoly status of incumbents such as DEP, Williams Solar (and other solar developers like it) are at the mercy of DEP during the interconnection process. While DEP is required by federal and state law to allow interconnection and to purchase power from interconnected solar generation, DEP has a substantial incentive to delay interconnection and to make it as

expensive as possible for solar developers; DEP has no incentive to control the costs of upgrades paid by solar developers.

Even worse, with respect to its estimates of the cost of upgrades necessary to interconnect, DEP holds all the cards, and those seeking to interconnect are forced to rely on the good faith of DEP's estimates. DEP has refused repeated requests for documentation or substantiation of the cost estimates, leaving Williams Solar in the dark concerning the reasons for and basis of the skyrocketing costs and substantially varying estimates for the same work. It appears to be DEP's view that interconnecting parties should write DEP a "blank check" for costs—a position which is inconsistent with basic requirements of good faith and fair dealing.

DEP, a regulated entity, is required to provide justification for its costs for ratemaking purposes. That same principal applies here, where DEP has the legal obligation to interconnect with and purchase energy and capacity from QFs under PURPA and state law. DEP should be required to charge reasonable costs for upgrades and to document and prove that the costs are reasonable and fair where there are reasons, such as presented here, to question the reasonableness of such charges.

STATEMENT OF FACTS

The following facts are pleaded in the Complaint and must be taken as true in addressing DEP's motion:

On or about January 28, 2019, DEP notified Williams Solar that upgrades costing an estimated $774,000 would be required before Williams Solar's project could interconnect to the grid. Compl. ¶¶ 14-16. DEP was aware that Williams Solar would rely on this estimate to determine whether to proceed with the project and thereby incur additional costs.

Compl. ¶¶ 17-19. Based on the estimate, Williams Solar decided to proceed and did incur substantial additional costs. Compl. ¶ 20. By e-mail on July 30, 2019, DEP notified Williams Solar that the same upgrades previously identified would cost an estimated $1,388,374.26, an increase of approximately 80% over the prior estimate. Compl. ¶ 24. The increase in costs was not attributable to engineering changes relating to the required upgrades but rather other non-engineering factors that include changes in practices of estimating labor and/or overheads. Compl. ¶ 30. DEP asserts that it is not obligated to justify deviations among the cost estimates provided, Compl. ¶ 29, refusing to provide substantiation of the cost estimates, but contends the later estimate was "informed by DEP's extensive recent experience" and "a substantial amount of information concerning the actual cost of Upgrades." Compl. ¶ 32. Assuming it is accurate, the later estimate rendered the Williams Solar project uneconomical. Compl. ¶ 34. However, the factors supposedly leading to the increased estimate were known to DEP before it produced the initial cost estimate. Compl. ¶ 38. In light of the short period of time between the estimates provided and DEP's knowledge of the factors supposedly causing the increased estimate prior to issuing the initial estimate, one or both of the estimates were not made in good faith. Compl. ¶¶ 37-40.

ARGUMENT

DEP's motion to dismiss Williams Solar's allegations of a failure to act in good faith is contrary to North Carolina law and should be denied.

I. Standard of Review.

A motion under rule 12(b)(6),

> tests the legal sufficiency of the complaint. In ruling on the motion, the allegations of the complaint must be viewed as

> admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Lamb v. Styles, ___ N.C. App. ___, 824 S.E.2d 170, 174 (2019) (quotation omitted). "A motion to dismiss under Rule 12(b)(6) should not be granted "*unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Cube Yadkin Generation, LLC v. Duke Energy Progress, LLC*, No. COA18-1203, ___ N.C. App. ___, ___ S.E.2d. ___, ___, slip op. at 11-12 (Dec. 17, 2019) (appeal from Commission order dismissing complaint; quoting *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970) (emphasis in original); *accord Fagundes v. Ammons Dev. Grp., Inc.*, __ N.C. App. ___, 820 S.E.2d 350, 354 (2018). "[M]atters outside the complaint are not germane to a Rule 12(b)(6) motion." *Charlotte Motor Speedway, LLC v. Cnty. of Cabarrus*, 230 N.C. App. 1, 5, 748 S.E.2d 171, 175 (2013) (quotation omitted).

"[T]he question of 'good faith' is one of fact to be resolved by the [trier of fact] and cannot be resolved on a motion to dismiss." *Embree Const. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 499, 411 S.E.2d 916, 925 (1992) (emphasis added). Indeed, in an order dispositive of DEP's motion here, the Court of Appeals recently reversed a dismissal order of the Commission on the grounds, among other things, that complainant's allegation that DEP had not acted in good faith involved a "question of fact ill-suited [for resolution] at this stage of the proceeding." *See Cube Yadkin Generation, LLC*, slip op. at 17.[1] The Supreme Court has explained that "good faith" means "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of

[1] In *Cube Yadkin Generation, LLC*, the Court of Appeals squarely rejected DEP's apparent strategy of seeking early dismissal of Utilities Commission complaints through a Rule 12(b)(6) motion, even where such a motion is plainly without basis.

reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." *Bledsole v. Johnson*, 357 N.C. 133, 138, 579 S.E.2d 379, 382 (2003) (quotation omitted). The Court of Appeals has found sufficient to establish a breach of a duty of good faith allegations that (1) defendant knew the plaintiff was relying on the defendant, and (2) defendant failed to provide information it was required in good faith to provide. *Gant v. NCNB Nat'l Bank of N.C.*, 94 N.C. App. 198, 200, 379 S.E.2d 865, 867 (1989).

II. Williams Solar has stated a valid claim for relief.

Williams Solar has alleged sufficient facts to survive a motion under Rule 12(b)(6). In short, Williams Solar alleges that DEP, acting under a duty to provide a good faith estimate, and knowing Williams Solar would rely on its initial estimate in deciding to incur additional costs, provided an estimate DEP knew would be too low given DEP's knowledge of increased costs; or, alternatively, assuming DEP's first estimate was accurate, that DEP's second estimate was artificially high and not made in good faith. This is more than sufficient to sustain a claim that DEP breached a duty to act in good faith and is not an issue that can be resolved on a motion to dismiss. *See Embree*, 330 N.C. at 499, 411 S.E.2d at 925; *Gant*, 94 N.C. App. at 200, 379 S.E.2d at 867.

Perhaps more fundamentally, DEP's motion misunderstands the authority of the Commission and its powers to review and enforce compliance with the Interconnection Procedures. DEP cites only the procedures as amended by order of the Commission in July 2019 and repeatedly emphasizes and relies on language ("high level estimates") in the Interconnection Procedures that was added in July 2019—implying that its revised costs estimates were simply the product of a more rigorous examination required by the Facilities

Study. This is unpersuasive for at least three reasons. First, DEP's initial estimate was provided prior to the Commission's July 2019 order, so DEP cannot rely on language that was later added to the Interconnection Procedures. Second, in any event, the requirement to provide a "high level" estimate does not justify providing an estimate DEP knows is too low or otherwise is without sufficient basis. Finally, as this case proceeds, the evidence will show that DEP has sent at least six notices to projects under common development with Williams Solar providing notice of substantial, unexplained upgrade and interconnection cost increases for projects which had already been through the Facilities Study process. Given that DEP has sent multiple revised estimates, similar to the one in issue here, after the "more detailed" review, DEP's suggestion that the revised estimate is merely a byproduct of the more rigorous review required by the Facilities Study is simply not consistent with the facts.

Further, DEP's motion is framed as though the Commission can only hear a complaint that states a common law cause of action and suggests the matter before the Commission must be dismissed if the claim would not entitle Williams Solar to specified relief. This is incorrect, as illustrated by the *Cube Yadkin Generation, LLC* decision. Chapter 62 provides the Commission broad powers to oversee DEP, including, "after notice and hearing, upon complaint," to "ascertain and fix just and reasonable standards, classifications, regulations, [or] practices . . . to be furnished, imposed, observed or followed by any and all public utilities." N.C. Gen. Stat. § 62-43(a). This authority, coupled with the other remedial devices requested in the Complaint, provides the Commission ample authority to fashion appropriate relief in this proceeding.

Williams Solar alleges misconduct by DEP: manipulative—or, at a minimum, careless—estimates of costs contrary to DEP's duty to make such estimates in good faith, to the injury of an interconnection customer. This raises questions about DEP's practices potentially affecting hundreds of interconnection requests.

In response, DEP supplies its own unverified contentions to support an argument to the effect that there is "nothing to see here." DEP's Answer invokes the talisman of "good faith" no less than a dozen times, apparently in the belief that repeating the phrase will defeat the need for the Commission to consider whether DEP's estimates actually were made in good faith. The Commission can and should investigate the issues brought forward in Williams Solar's Complaint. In any event, whatever their veracity, the Commission cannot consider DEP's factual contentions in reviewing a motion under Rule 12(b)(6). *Charlotte Motor Speedway*, 230 N.C. App. at 5, 748 S.E.2d at 175.

In sum, Williams Solar's Complaint is more than sufficient to survive a motion to dismiss and to invoke the Commission's investigatory powers and hearing process.

III. DEP's arguments lack merit.

DEP makes several arguments in support of its motion, but none of these arguments have merit.

First, DEP's assertion that Williams Solar failed to allege facts that demonstrate a failure of DEP to comply with the Interconnection Procedures[2] is refuted by the allegations that DEP either knowingly provided an initial estimate of upgrade costs that was artificially

[2] DEP's contention that Williams Solar has failed to allege sufficient facts regarding DEP's failure to provide estimates in good faith is remarkable given DEP's stance that it is not required to justify its estimates or to provide any detail regarding how the estimates were developed.

much too low, or provided an estimate that is too high and not consistent with its obligation of good faith, as discussed above. In any event, DEP has steadfastly refused to provide any substantiation explaining the glaring discrepancy in its cost estimates that would support its unilaterally imposed labor costs or allocation of overheads—which were derived and applied using methods only known to DEP. DEP cannot, on the one hand refuse to provide information, and on the other hand claim that it is immune from inquiry because third parties have not pleaded facts uniquely in DEP's possession.

Second, DEP's claim that Williams Solar's request for a declaratory ruling that DEP is required to comply with the Interconnection Procedures and act in good faith is "unnecessary" because DEP is already required to comply with the Interconnection Procedures (1) fails to take the allegations of the Complaint as true, and (2) relies on factual contentions made by DEP in its Answer, both of which are prohibited on a motion under Rule 12(b)(6). DEP also ignores Williams Solar's request that the Commission explicitly recognize a duty of good faith that is already implicit in the Interconnection Procedures.

Similarly, DEP's contention that it should not be required to produce a cost estimate based on "commercially reasonably actual cost data," because that is "precisely what [DEP] has done," relies on matter not contained within the Complaint that cannot be considered on a motion under Rule 12(b)(6).

DEP is incorrect in its contention that no relief afforded by the Commission would be meaningful because Williams Solar would be responsible under an interconnection agreement for costs actually incurred. Williams Solar alleges, among other things, that DEP's initial cost estimate was not made in good faith, and that DEP made this estimate knowing that it could induce Williams Solar to incur additional costs (which costs include

payments to DEP for a facilities study). Assuming DEP's later estimate was accurate and that DEP could have provided an estimate "in the ballpark" of the later estimate—rather than an estimate DEP knew was too low—Williams Solar likely would not have proceeded with the project and would not have incurred additional costs. Williams Solar seeks an accounting of those costs. If, on the other hand, DEP's more detailed estimate is shown not to have been made in good faith, Williams Solar should be able to obtain a good faith estimate of upgrade costs—as required by the Interconnection Procedures—before deciding whether to proceed with project construction. Thus, Williams Solar seeks relief that is unrelated to its responsibility for the final costs of interconnecting its project.

Accordingly, DEP's arguments lack merit, and the motion to dismiss should be denied.

CONCLUSION

Williams Solar has pleaded sufficient facts to proceed with this case and DEP's motion to dismiss should be denied.

Respectfully submitted, this 19th day of December, 2019.

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Certificate of Service

I hereby certify that a copy of the foregoing *Reply to Respondent's Answer and Motion to Dismiss* has been served this day upon counsel of record by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid, addressed to:

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This the 19th day of December, 2019.

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By: \s\ Marcus Trathen