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	)	**NOTICE OF APPEAL AND EXCEPTIONS 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	)	

Stanly Solar, LLC ("Stanly Solar" or "Movant"), acting through undersigned counsel and pursuant to N.C. Gen. Stat. § 62-90, Rule 18 of the North Carolina Rules of Appellate Procedure, and the *Order Granting Extension of Time to File Notice of Appeal and Exceptions*, hereby respectfully gives Notice of Appeal to the North Carolina Court of Appeals from the North Carolina Utilities Commission's ("Commission") *Order Denying Motion for Return of CPRE Proposal Security* ("Order"), issued in these dockets on October 20, 2020.

Stanly Solar participated in Tranche 1 of the Competitive Procurement of Renewable Energy ("CPRE") program, which was authorized by North Carolina H.B. 589, SL 2017-192 (codified at G.S. § 62-110.8). Stanly Solar was selected in CPRE Tranche 1 and offered a Power Purchase Agreement ("PPA") under the terms of the Tranche 1 Request for Proposal ("Tranche 1 RFP") published to CPRE participants by Duke Energy Progress, LLC ("DEP"), Duke Energy Carolinas, LLC ("DEC," and together with DEP, "Duke"), and the CPRE Independent Administrator, Accion Group LLC ("Accion" or "the Independent Administrator"). However,

Stanly Solar ultimately did not sign a PPA, but instead requested to withdraw from the Tranche 1 process.

Stanly filed the *Motion for Return of CPRE Proposal Security* ("Motion") that is the subject of the Commission's decision in order to compel the return of a one million dollar surety bond that had been posted to Duke by Stanly Solar as Proposal Security under the terms of the Tranche 1 RFP. Under the rules of the Tranche 1 RFP, Stanly was entitled to the return of its Proposal Security after withdrawal because the project could not meet the January 1, 2021 in-service deadline for Tranche 1 projects. The Independent Administrator wrongfully denied Stanly's request to direct Duke to return its Proposal Security, prompting Stanly Solar to seek relief from the Commission.

The Commission's Order denying Stanly's request is not only inconsistent with the published rules of the Tranche 1 RFP and the Commission's own regulations, but also results in inequitable treatment of Stanly relative to other participants in the Tranche 1 RFP, in violation of H.B. 589 and the Commission's own Rules.

Stanly respectfully submits that the Commission's Order incorrectly decides the issues raised by Stanly Solar's Motion. Consistent with the exceptions asserted below and pursuant to N.C. Gen. Stat. § 62-90(a), Stanly Solar respectfully submits that the Commission's Order should be reversed because it is unlawful, unjust, unreasonable and unwarranted as the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

BACKGROUND

Stanly Solar is developing a 50 MW solar project in Stanly County, North Carolina. Stanly Solar submitted a third-party PPA bid into CPRE Tranche 1. On December 6, 2018, Stanly

was notified that its bid was competitive and that it had been selected to move to "Step 2" of the Tranche 1 RFP process. Before proceeding to Step 2, Stanly was required to post a one million dollar surety bond as Proposal Security.

On April 10, 2019, Stanly was notified that it had been selected as a winning bid and would have to sign a PPA or withdraw from CPRE and forfeit its Proposal Security. However, Stanly had been informed by DEP's interconnection team that Stanly would likely not achieve interconnection until approximately April 2021, several months after the January 1, 2021 in-service deadline for CPRE Tranche 1 projects. This information was confirmed by Duke in a Facilities Study Report received by Stanly on June 7, 2019.

Stanly accordingly requested that the Independent Administrator allow it to withdraw its proposal and have its Proposal Security returned, pursuant to Section VI(A) of the Tranche 1 RFP. That provision of the Tranche 1 RFP provides that if the Independent Administrator determined that the interconnection work required for a particular project could not be completed by January 1, 2021, the bidder would have the option to withdraw from Tranche 1 without penalty. The Independent Administrator failed to respond to Stanly's request, and Stanly then made the same request to DEP, which held the Proposal Security. Duke refused to return the Proposal Security, and on January 14, 2020, Stanly filed its *Motion for Return of CPRE Proposal Security* with the Commission.

Stanly's Motion argued that return of its Proposal Security was justified because: (1) under Section VI(A) of the Tranche 1 RFP, Stanly should have been given the opportunity to withdraw from Tranche 1 without forfeiting its Proposal Security because DEP had determined that it would not be able to achieve interconnection until after the Tranche 1 in-service deadline of January 1, 2021; and (2) not ordering the return of Stanly's Proposal Security would result in severely

inequitable treatment of Stanly Solar as compared to a similarly-situated Duke-sponsored proposal in Tranche 1, which had been allowed to withdraw from Tranche 1 without any financial penalty.

A divided Commission denied Stanly's Motion in an Order issued on October 20th, 2020. The Commission premised its denial of Stanly's Motion on the conclusion that Section VI(A) of the Tranche 1 RFP was inapplicable because Stanly was a "Late Stage Proposal," as defined in the Tranche 1 RFP. According to the Commission, as a Late Stage proposal, Stanly "was not specifically evaluated by the T&D Sub-Team during Step 2" of the Tranche 1 RFP. The Commission concluded that Stanly's proposal was evaluated under Section VI(C) of the Tranche 1 RFP (which sets forth certain provisions relating to Late-Stage Proposals), *instead* of under Section VI(A). In its majority decision, the Commission noted Stanly's argument about the inequitable treatment of its proposal, but did not provide any factual or legal basis for rejecting that argument. Three Commissioners dissented from the majority's opinion, concluding that the inequitable treatment of Stanly's proposal contravened G.S. 62-110.8(d) and Commission Rule R8-71, and contending that Stanly's Motion should have been granted.

EXCEPTION NO. 1

The Commission erred in denying Stanly's Motion based on the conclusion that Section VI(A) of the Tranche 1 RFP did not confer on Stanly the right to withdraw from Tranche 1 without forfeiting its Proposal Security. This conclusion was unsupported by and inconsistent with the text and the logic of the Tranche 1 RFP.

Under the Tranche 1 RFP, the in-service deadline for winning projects was January 1, 2021. Section VI(A) of the Tranche 1 RFP provided that Duke and the Independent Administrator would determine during Step 2 which projects might not be able to achieve interconnection by that date, and that those projects would have the opportunity either to stay in the process (with the hope of

going into service by July 1, 2021) or to withdraw from Tranche 1 without forfeiting their Proposal Security. Because Duke determined that Stanly Solar could not achieve interconnection until after January 1, 2021, Stanly should have been afforded the opportunity to withdraw without penalty.

However, the Commission held that Section VI(A) of the Tranche 1 RFP was inapplicable because Stanly was a "Late-Stage Proposal" which was "evaluated under" Section IV(C) of the Tranche 1 RFP instead of under Section VI(A), and that the two Sections are, in effect, mutually exclusive. The Commission's conclusion was inconsistent with the text of the Tranche 1 RFP and Commission Rule R8-71, and was unsupported by either the Commission's Rules relating to the administration of CPRE or any interpretive materials provided to Tranche 1 bidders. To the extent that Duke failed in its Step 2 analysis to determine the date on which Stanly could likely achieve interconnection, this was inconsistent with the Tranche 1 RFP and the Commission's CPRE Rule.

As a result of this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 2

The Commission erred in rejecting, without any stated factual or legal basis, Stanly Solar's argument that, even if the Tranche 1 RFP did not authorize the return of Stanly's Proposal Security, the failure to direct the return of the Proposal Security would result in inequitable treatment of Stanly's proposal, in violation of Commission rules and the CPRE's authorizing statute.

N.C. Gen. Stat. § 62-110.8(d) requires that the CPRE program be designed and administered "to ensure that all responses are treated equitably." The Commission's rules also require the Independent Administrator to "ensur[e] that all responses to a CPRE RFP Solicitation are treated equitably," to "ensure equitable review between an electric public utility's Self-

developed Proposal(s) . . . and proposals offered by third-party market participants," and to certify that "all proposals were treated equitably through the CPRE RFP Solicitation(s)." NCUC Rule R8-71(b)(9), (d)(5)(iv), (d)(5)(ix).

Stanly Solar stated in its Motion that a Duke-sponsored asset acquisition proposal had been selected for a PPA in Tranche 1 but had withdrawn without signing a PPA, for reasons similar to Stanly's withdrawal. However, under the Tranche 1 RFP the Duke-sponsored proposal was not required to post Proposal Security, and was therefore allowed to withdraw without financial penalty. This inequitable treatment was called out in the Independent Administrator's Final Report on CPRE Tranche 1, which noted that "the DEP/DEC Team and the developer [of the asset acquisition proposal] had a free option to withdraw at any time, which the IA believes was an unanticipated result." This structural inequity was resolved in CPRE Tranche 2 by requiring asset acquisition proposals to post Proposal Security. Stanly argued in support of its Motion that, even if the Tranche 1 RFP did not authorize the return of Stanly's Proposal Security, the failure to direct the return of Stanly's Proposal Security would result in inequitable treatment, and that return of the Proposal Security was necessary to rectify this inequitable result.

The Commission denied Stanly's Motion without providing any factual or legal basis for rejecting Stanly Solar's contentions regarding inequitable treatment. Gen. Stat. § 62-79(a) requires that 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: (1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and (2) The appropriate rule, order, sanction, relief or statement of denial thereof."

The Commission acknowledged Petitioner's assertion of its argument regarding inequitable treatment in its Order, and three Commissioners signed dissenting opinions noting the "structural inequity . . . between utility-sponsored proposals and those of market participants such as Stanly Solar," and contending that the return of Stanly's Proposal Security was necessary to resolve this inequity. However, as noted by in the opinion of dissenting Commissioner Duffley, the majority's Order "ignores the Independent Administrator's inequitable treatment of proposals" and provides no basis for rejecting Stanly's argument. Consequently, the Order does not provide the reviewing court with sufficient information to allow it to determine the controverted questions presented in the proceedings, as required by the statute. *State ex rel. Utilities Commission v. Conservation Council of North Carolina*, 312 N.C. 59, 62, 320 S.E.2d 679, 682 (1984). Failure to include all necessary findings of fact is an error of law and a basis for remand under Gen. Stat. § 62-94(b)(4) because it frustrates appellate review. *State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 348 N.C. 452, 460, 500 S.E.2d 693, 700 (1998). As a result of this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 3

There was no factual or legal basis for the Commission's rejection of Stanly's arguments regarding inequitable treatment. As noted in Commissioner Duffley's dissent, no party disagreed that, under the Tranche 1 RFP rules, "a Third Party [such as Stanly] was required to provide Proposal Security after being selected as a competitive bid and an Asset Acquisition Proposal sponsored by the DEC/DEP Proposal Team was not required to provide a similar Proposal Security or any functional equivalent." Indeed, that inequity was called out by the Independent Administrator in the CPRE Tranche 1 Final Report, and the rules were changed in Tranche 2 to

correct it. Nor did Duke deny that this disparate treatment existed, or that asset acquisition proposals in Tranche 2 were required to post Proposal Security in order to rectify this structural inequity.

Consequently, even if the Commission had made a factual finding that Stanly Solar would not suffer inequitable treatment from the denial of its request for return of its Proposal Security, the record was lacking in competent, material, and substantial evidence to support such a conclusion. And neither the Commission nor any other party articulated any legal rationale for denying Stanly's claim of inequitable treatment in violation of G.S. § 62-110.8(d) and Commission Rule R8-71(b) and (d).

As a result, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious in contravention of G.S. § 62-90(a).

EXCEPTION NO. 4

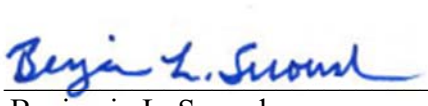
The Commission's Order reflects a post-hoc change to the terms of the Tranche 1 RFP without advance notice to CPRE participants, which resulted in unfair surprise, the loss of property without due process and taking of property in violation of the law of the land clause of the North Carolina Constitution. N.C. Const. art. 1, § 19 ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws[.]"). As a result, the Commission's Order is in excess of statutory authority, affected by errors of law, and is arbitrary and capricious in contravention of G.S. § 62-90(a).

CONCLUSION

For the reasons set forth above, the Commission's Order is arbitrary and capricious; is affected by errors of law; is unsupported by competent, material, and substantial evidence in light of the entire record; and is beyond the Commission's statutory power and jurisdiction. The Court of Appeals should, therefore, reverse that Order and remand the case to the Commission with instructions that Stanly Solar's Motion for Return of CPRE Proposal Security be granted.

Respectfully submitted, this 21st day of December, 2020.

KILPATRICK TOWNSEND & STOCKTON LLP

By: 

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Notice of Appeal and Exceptions by Stanly Solar, LLC on all parties of record in accordance with Commission Rule R1-39, by United States mail, postage prepaid, first class; by hand delivery; or by means of facsimile or electronic delivery upon agreement of the receiving party.

This the 21st day of December, 2020.

By: /s_____
Benjamin L. Snowden
Counsel for Stanly Solar LLC