

**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

DOCKET NO. SP-9590, SUB 0)	
)	
In the Matter of)	
Application of Stanly Solar, LLC, for a)	
Certificate of Public Convenience and)	
Necessity to Construct a 50-MW Solar Facility)	
in Stanly County, North Carolina)	
)	
DOCKET NO. E-2, SUB 1159)	ORDER DENYING MOTION FOR
DOCKET NO. E-7, SUB 1156)	RETURN OF CPRE PROPOSAL
)	SECURITY
)	
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)	

BY THE COMMISSION: On January 14, 2020, Stanly Solar, LLC (Stanly), filed a Motion for Return of CPRE Proposal Security in the above-captioned dockets (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 Tranche 1 of the Competitive Procurement of Renewable Energy (CPRE) Program authorized by House Bill 589 (S.L. 2017-192).

On February 20, 2020, Accion Group, LLC, the Independent Administrator for the CPRE Program (hereinafter IA or Accion), filed a response to Stanly's motion (Accion's First Response) in Docket Nos. E-2, Sub 1159 and E-7, Sub 1156 (CPRE Dockets).

On February 24, 2020, DEP and Duke Energy Carolinas, LLC (DEC; together with DEP, the Companies or Duke), filed a joint response to Stanly's motion (Duke's Response) in the CPRE Dockets.

On March 13, 2020, Stanly filed a reply in support of its motion (Reply).

Finally, on April 21, 2020, Accion filed a response to Stanly's reply (Accion's Second Response) in the CPRE Dockets.

SUMMARY OF THE PLEADINGS

Stanly's Motion

Stanly states that it owns a 50-MW solar project under development in Stanly County, North Carolina, that it submitted as a proposal for a CPRE Tranche 1 Power Purchase Agreement (PPA). Pursuant to a system impact study from December 2017, Stanly notes that it was designated as a late-stage project,¹ meaning that it was not included in the Tranche 1 grouping study and would be required to bear the cost of its own network upgrades. Also, Stanly explains that the Commission-approved Tranche 1 CPRE Program Guidelines require that a Market Participant's (MP) facility must be in service prior to January 1, 2021.

On December 6, 2018, the IA notified Stanly that it was selected to proceed to Step 1 of the CPRE selection process. The Tranche 1 RFP required third-party MPs, including Stanly, to "provide Proposal Security in the amount of \$20/kW in order to proceed to Step 2 of the evaluation process." Motion at 3. Around that time, Stanly recalls that

based on the rough interconnection timelines set out in Stanly's System Impact Study as well as correspondence with Duke's interconnection team, it appeared that the project probably would not be able to achieve interconnection by the January 1, 2021 in-service deadline, depending on how quickly Duke was able to issue the Interconnection Agreement and complete construction under the agreement. In addition to potentially impacting Stanly's eligibility for Tranche 1, a late interconnection could negatively impact the economics of the project due to increased carrying costs, expiration of project agreements, and increased exposure to changes in available financing.

Id. at 4-5. However, Section VI(A) of the CPRE Tranche 1 RFP provides that in the event that during the Step 2 evaluation process the T&D Sub-Team determines that "any required Interconnection Facilities or System Upgrades cannot be completed by January 1, 2021, but can be completed by July 1, 2021," the IA must notify the MP, and the MP has the election to either remain in the RFP or withdraw. *Id.* at 3. In addition, Stanly notes that Accion's responses to Frequently Asked Questions by MPs states:

Section VI(A) "provides the MP with the opportunity to withdraw a proposal in the event that the projected completion date for Interconnection Facilities and System Upgrades cannot be completed by January 1, 2021, but can be

¹ Pursuant to the Tranche 1 Request for Proposals (RFP), a project that executed a state-jurisdictional Facilities Study Agreement and committed to fund any Network Upgrades identified in its System Impact Study would be designated a "Late Stage Proposal." Proposals designated as "Late Stage" were not to be evaluated as part of the System Impact Grouping Study. Instead, Late Stage Proposals were studied under the default interconnection study process and had to bear the cost of their own Network Upgrades.

completed by July 1, 2021. *In such a case, if the MP decides to withdraw the Proposal, the Proposal Security would be released.*

Id.

Stanly asserts that “in reliance on the RFP’s assurance that Stanly would be allowed to withdraw from CPRE without penalty if it was ultimately determined that the project could not be interconnected by January 1, 2021, Stanly opted to proceed to Step 2.” *Id.* at 5. Stanly states that it posted a \$1 million surety bond as Proposal Security on January 4, 2019, which was rejected by Duke due to form. Stanly states that it posted a revised surety bond on February 5, 2019.

Stanly recalls that after posting the Proposal Security in January of 2019, it received additional information tending to indicate that the project would not be in service by the Tranche 1 deadline of January 1, 2021; however, Stanly asserts that it “did not receive any notification from the IA during Step 2 that its interconnection date might be later than January 1, 2021, and it was not provided the option to withdraw in Step 2 of the selection process.” *Id.*

Stanly states that the IA notified it on April 10, 2019, that its bid had been selected to participate in the CPRE Program and that it would forfeit its Proposal Security if it did not execute a PPA.

Stanly states that it informed the IA on May 6, 2019, that “because of significant changes in project economics due to an increase in solar panel prices after Stanly posted its Proposal Security in January 2019, its construction costs had increased and Stanly likely would not be able to post PPA security at the completion of Stage 2.” *Id.* at 5 n.3. At that time, Stanly requested permission to withdraw from Tranche 1 without forfeiting its Proposal Security, but the IA denied the request. Stanly asserts that other MPs were not required to post Proposal Security until March or April 2019, at which time the panel price increase had already occurred. Further, Stanly speculates that “[a] significant proportion of those projects opted not to post Proposal Security and proceed to Step 2, and it appears that the price increase was a significant factor in those MPs’ decisions to withdraw.” *Id.* Stanly argues:

This created an unintended but nonetheless unfair advantage for the later selected MPs, as they had more current market knowledge at the time they were asked to post their Proposal Security. If Stanly had been given the same opportunity to post in March/April, with knowledge of the increase in module prices, it would have elected not to do so.

Id.

Stanly asserts that it informed the IA on June 26, 2019, that “based on the most recent information received from Duke,” the project would be unable to make the in-service deadline of January 1, 2021. *Id.* at 5. Accordingly, pursuant to Section VI(A) of

the RFP, Stanly states that it again requested to withdraw its proposal and have its Proposal Security returned, but that on July 5, 2019, the IA again denied Stanly's request. Stanly further alleges that the IA justified its denial as follows:

(1) The IA has not informed the MP that interconnection cannot be completed by January 1, 2021; (2) Duke Transmission has yet to establish a date for completion of associated system upgrades, and, ergo, there has not been a determination that the system upgrades will not be completed until at least July 2021; and (3) Should Duke Transmission fail to complete its responsibilities necessary for the MP to interconnect by the established COD, that would be a contract dispute pursuant to the terms of the PPA and not something to be adjudicated before the fact.

Id. at 6 (internal quotations removed).

Stanly explains that it contacted the IA on July 8, 2019, to clarify that Duke's Transmission Group had consistently told Stanly that "the project's interconnection facilities and upgrades would not be completed until at least April 2021," and to deny that a delay in interconnection until after the in-service deadline would give rise to a contract dispute. *Id.* at 6-7.

Stanly states that it received a final Interconnection Agreement from Duke on July 11, 2019, confirming that "the projected in-service for the project would not occur until May 31, 2021." *Id.* at 7.

When the IA did not respond to Stanly's July 8, 2019 communication, on July 16, 2019, Stanly contacted Duke and asserted that it had "improperly been denied the opportunity to withdraw during Step 2 based on its projected in-service date being after January 1, 2021," and requested return of its Proposal Security. *Id.* Stanly asserts that Duke has failed to provide a substantive response to its July 16, 2019 request, and that on November 25, 2019, without notice, Stanly's surety received a demand from Duke for payment on the surety bond within ten days. Stanly further alleges that "[t]o this day, Duke has not provided any rationale for refusing Stanly's request to return the Proposal Security, and the IA has not explained why the information Stanly provided in its July 8, 2019 correspondence does not justify return of Stanly's Proposal Security." *Id.*

In support of its Motion, Stanly argues:

By the time the Step 2 analysis was performed, Duke's T&D Team knew the extent of Stanly's required upgrades [and] knew that Stanly could not be interconnected by January 1, 2021. Whether the IA was not informed of this fact or simply ignored it, the IA did not give Stanly the option to withdraw during Step 2 as required by the RFP. Thus the procedures set forth in the Tranche 1 RFP were not followed, and as a result Stanly was denied the opportunity to withdraw during Step 2. Given the changes in project

economics after Stanly was required to post Proposal Security, Stanly would have taken the opportunity to withdraw if it had been available.

Id. at 8-9. Stanly contends that “[t]o remedy the IA’s failure to follow the procedures set forth in the Tranche 1 RFP — procedures upon which Stanly and other MPs relied — the Commission should require the release of Stanly’s Proposal Security.” *Id.* at 10.

Stanly next alleges that it is inequitably disadvantaged by having to pay the 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 notes that the IA’s final Tranche 1 report “noted this disparity” by stating “in effect, 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.” *Id.* (citing to Final Report at 6). Stanly further contends 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.”

Finally, Stanly contends that if the Commission orders Duke to refund its Proposal Security, such an action would not cause harm to any party. Stanly further states that “[i]f Duke were to retain Stanly’s Performance Security it would simply be a one million dollar windfall for the company.” *Id.* at 11. As such, Stanly requests that the Commission direct Duke to release and return its Tranche 1 Proposal Security.

Accion’s First Response

As a preliminary matter Accion “notes that the terms of the Surety Bond expressly identified that all disputes were to be ‘resolved in the State and Federal courts in North Carolina’” and that Stanly agreed to the forum selection clause of the bond. Accion’s First Response at 2.

Accion opposes Stanly’s motion on two primary bases. First, Accion contends that Stanly’s reason for not executing the CPRE PPA offer was economic (due to the increased price of solar PV modules) and not related to a projected in-service date past the January 1, 2021 deadline.

Second, Accion argues that Stanly misstates Section VI(A) of the CPRE Tranche 1 RFP. As background, Accion notes:

RFP Section VI(A) was intended to provide the opportunity to permit a Proposal to move forward if the Duke T&D Evaluation Team determined and informed the IA that necessary system upgrades for a Project could be completed within a few months of January 1, 2021, rather than having a

'bright line' that would eliminate a viable Proposal based on a strict enforcement of the January 1, 2021 COD.

Id. at 5. Accion denies that pursuant to Section VI(A), the Duke T&D Team and the IA were required to determine whether necessary system upgrades might not be completed by the January 1, 2021 in-service deadline but could be made by July 1, 2021. Rather, Accion contends:

During the Step 2 evaluations the T&D Sub-Team did not determine a specific in-service date for Stanly and therefore had no basis to inform the IA regarding a specific interconnection timeline. In fact, the IA first learned of this claim when Stanly posted a message in the IA Website on June 26, 2019, a full 78 days after completion of the Step 2 evaluations and after Stanly was informed on April 9, 2019[,] that their Proposal was selected as a winner. Accordingly, Stanly's assertion that the IA failed to comply with the terms of the RFP is erroneous.

Id. Accion further denies that Step 2 of the CPRE process includes an estimate of "a firm in-service date." *Id.* at 6. Rather, Accion contends that the CPRE Tranche 1 required each MP to prove the ability to complete their Project by the January 1, 2021 in service date. Per Accion, "a specific in-service date is only established at the time the Interconnection Agreement is executed." *Id.* at 6.

In conclusion, Accion requests that the Commission "require MPs to stand by Proposals, as set forth in the approved RFP," and asserts that "[t]he Proposal Security is a way to make sure that the MP will stand by their Proposal, if selected as a winner, and not withdraw for business reasons at the eleventh hour." *Id.* at 11.

Duke's Response

Like Accion, as a preliminary matter Duke questions whether the Commission is the appropriate forum for settling the dispute over the return of Stanly's Proposal Security. Duke cites to Paragraph 12 of the surety bond, which states:

All disputes relating to the execution, interpretation, construction, performance, or enforcement of the Bond and the rights and obligations thereto will be governed by the laws of, and resolved in the State and Federal courts in North Carolina. The rights and remedies of Duke Energy herein are cumulative and in addition to any and all rights and remedies that may be provided by law or equity.

Duke Response at 2.

Duke opposes Stanly's motion, primarily asserting that Tranche 1 was conducted in compliance with the RFP terms, including Section VI(A). Duke clarifies that "the Step 2 evaluation process is not intended nor can it identify a specific interconnection date."

Id. at 3. Rather, Duke states that “a winning CPRE project cannot be provided a firm in-service date until completion of the interconnection process because that is the point in time at which the fully-scoped work is identified and the number of non-CPRE transmission-connected projects with executed Interconnection Agreements is definitively known.” *Id.* at 3-4. Specifically, regarding Stanly, Duke first notes that because Stanly was not dependent on any major transmission upgrades, it was “not notified pursuant to Section VI(A) of the RFP.” *Id.* at 4. Second, Duke states that because Stanly was a Late Stage Proposal, it was not included in the Step 2 grouping study, not specifically evaluated by the T&D Sub-Team, and “therefore the provision of Section VI(A) are inapplicable” to Stanly. *Id.*

Duke also addresses Stanly’s allegation regarding the Duke-sponsored Asset Acquisition project in Onslow County, distinguishing the Asset Acquisition component of CPRE, which allows third parties to bid in assets for acquisition by Duke, from the PPA bid process in which Stanly submitted a proposal, and noting that “Stanly is not alleging that any violation of the RFP occurred with respect to the DEC/DEP Proposal Team withdrawal.” *Id.* at 6.

Next, Duke states that it has worked with the IA and stakeholders, consistent with the Commission’s direction, to implement lessons learned into Tranche 2. Duke notes that such improvements include revising the RFP to clarify that no firm in-service date will be provided during the Step 2 evaluation and modifying the Asset Acquisition process to require third-party Asset Acquisition bidders to post security when the bid is made.

Finally, Duke rebuts Stanly’s allegations regarding the purpose and function of the security bond. Duke clarifies that “the intent of the Step 2 surety bond is not to cover study costs. Instead, the surety bond is intended to protect integrity of the RFP process by ensuring that projects that are moved into the Step 2 evaluation actually move forward to PPA if selected as a winning project.” *Id.* at 7. Also, Duke disagrees with Stanly’s assertion that if Duke draws on the bond it will be a windfall for Duke. Rather, Duke notes that “the amounts would be credited to customers, including to North Carolina retail customers through the CPRE tariff.” *Id.*

Duke concludes that “in light of the totality of the circumstances, it was appropriate to draw on the Stanly surety bond.” *Id.* at 8.

Stanly’s Reply

In its reply Stanly first denies that its motion relates to “‘the execution, interpretation, construction, performance, or enforcement’ of the Surety Bond” and contends that its Motion is therefore not subject to the forum selection clause of the bond. Reply at 3. Instead, Stanly contends that its Motion arises from the failure of Accion to follow the RFP rules. Stanly argues that the dispute is within the Commission’s purview, citing to N.C.G.S. §§ 62-110.8 and -73, which authorize the Commission to “administer all aspects of the CPRE Program, to supervise the Independent Administrator, and to hear complaints arising out of the acts or omissions of public utilities.” *Id.* at 3.

Next, Stanly disagrees with Duke's assertion that the Step 2 date was not intended to determine a firm in-service date. Stanly also contends that even if it is "difficult to determine a precise in-service date for a project with no Interconnection Agreement, knowing a project's exact in-service date generally is not necessary to determine whether it will be able to go in-service by a particular deadline." *Id.* at 6-7.

Stanly again asserts that Accion failed to follow Section VI(A) of the RFP and opposes Duke's position that Section VI(A) of the RFP was inapplicable to Stanly because as a Late Stage Proposal it was not included in the Step 2 Grouping Study. Stanly notes that "neither Section VI(A) of the Tranche 1 RFP nor Section VI(C), which describes the treatment of Late Stage Proposals, says that Late Stage Proposals are treated any differently for purposes of determining in-service dates." *Id.* at 9. Stanly further alleges that during Step 2 Duke had "ample information" to determine that Stanly's project would not make the in-service deadline of January 1, 2021. *Id.* at 7. Building on this assumption, Stanly contends that because Duke knew during Step 2 that Stanly's project could not make the January 1, 2021 in-service date and Stanly conveyed this information to Accion, Section VI(A) was violated and "Stanly was deprived of its right to withdraw from Tranche 1, as set forth in the RFP." *Id.* at 8.

Accion's Second Response

In filing its second response Accion seeks leave to "submit additional observations and to seek guidance of the [Commission] on issues that could have significant impact on CPRE Tranche 2 and Tranche 3." Accion's Second Response at 1. Particularly, Accion seeks the Commission's review of the following issues: (1) Whether an established proforma Surety Bond is subject to review after the conclusion of a CPRE Tranche, and (2) at what point a CPRE Tranche is final and no longer subject to challenge.

With regard to the first issue, Accion objects to what it characterizes as Stanly's request to revise the terms of the Surety Bond, which it states "were fully vetted with stakeholders and subject to the comment process required by the Commission." *Id.* at 2 [pages unnumbered]. Accion contends that "[t]his approach would neuter the ability to hold MPs responsible for their bids and open the door for MPs to withdraw at any point up until the execution of a PPA." *Id.*

On the second issue, Accion states that "the Commission's guidance on when each CPRE Tranche is final and no longer subject to challenge will assist the IA in the administration of the Program." *Id.* Accion further states that the "establishment of a firm deadline" is needed "to bring certainty to the decision-making by the IA and Duke." *Id.* at 3. Accion notes that "in some jurisdictions the finality of PPAs is established as of when the period for challenges and appeals has tolled." *Id.*

DISCUSSION AND CONCLUSIONS

As a preliminary matter, the Commission is tasked with implementation of the CPRE program pursuant to N.C.G.S. § 62-110.8. Stanly's Motion concerns implementation of the

CPRE Program — particularly whether Accion reasonably implemented Section VI(A) of the Tranche 1 RFP — not enforcement of the Proposal Security, and, therefore, is properly before the Commission.

The Commission has carefully considered all of the pleadings filed in this matter and is persuaded 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.

As Stanly states in its Motion, Section II(F) of the Tranche 1 RFP requires that Proposal Security be posted by third-party MPs upon notification by the IA that its proposal has been selected to move into Step 2 of the evaluation process. Section II(F) of the RFP further provides that this Proposal Security will be released “if the MP elects to withdraw the Proposal *pursuant to Section VI(A)*,” (emphasis added), and Section VI(A) allows an MP to withdraw from the RFP under specific limited circumstances:

In the event that the T&D Sub-Team determines during the Step 2 evaluation process that any required Interconnection Facilities or System Upgrades cannot be completed by January 1, 2021, but can be completed by July 1, 2021, the IA will notify the MP of the projected completion date of the Interconnection Facilities and System Upgrades and the MP will have the option to elect to either allow the Proposal to remain in the RFP or withdraw the Proposal from the RFP. If the T&D Sub-Team determines that any required Interconnection Facilities or System Upgrade cannot be completed by July 1, 2021, the IA will remove the Proposal from further consideration.

RFP at VI(A) (emphasis added). Stanly argues that Section VI(A) applies because *it* notified the IA that based on the latest information received from Duke *by Stanly* that the project would be unable to make the in-service deadline of January 1, 2021, and therefore it was electing to withdraw pursuant to Section VI(A) and have its Proposal Security released pursuant to Section II(F). However, the right to withdraw provided in Section VI(A) is only available to projects that have undergone the Step 2 evaluation by the T&D Sub-Team. As a Late Stage Proposal, Stanly’s proposal was not included in the Step 2 grouping study and not evaluated by the T&D Sub-Team but evaluated in the normal course of the interconnection application process. Thus, an essential element of Section VI(A) — that the MP find out during the Step 2 evaluation that necessary upgrades required for its project cannot be completed before the in-service deadline — is not present in this case.

Stanly complains that it did not receive notification from the IA during Step 2 that its interconnection date might be later than January 1, 2021, and that it was not provided the option to withdraw in Step 2 of the selection process. However, Stanly’s proposal was evaluated under Section VI(C) of the RFP, which has no similar provision for withdrawal. Further, Stanly admits in its Motion that it knew at the time Accion notified Stanly that it had

been selected to proceed to Step 2 that “based on the rough interconnection timelines set out in Stanly’s System Impact Study as well as correspondence with Duke’s interconnection team, it appeared that the project probably would not be able to achieve interconnection by the January 1, 2021 in-service deadline” Motion at 4. Thus, the Commission finds 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. The provisions of Section VI(A) of the RFP allowing certain MPs to withdraw “[i]n the event that the T&D Sub-Team determines during the Step 2 evaluation process that any required Interconnection Facilities or System Upgrades cannot be completed by January 1, 2021, but can be completed by July 1, 2021,” did not apply to the evaluation of Stanly’s proposal as a Late State Proposal under Section VI(C).²

Second, Section II(F) of the RFP provides that the Proposal Security will be released “if the Proposal is eliminated by the IA due to failure to meet any required RFP criteria or action.” In this case, however, the fact that the project’s in-service date was projected to be after the Tranche 1 in-service deadline of January 1, 2021, did not preclude Stanly from being selected as a winning bid. Only projects for which upgrades were not expected to be complete by July 1, 2021, were removed from further consideration. Stanly states that Duke informed it that its upgrades would likely be completed in April 2021, *id.* at 7, and Stanly was notified by the IA that its proposal had been selected as a winning bid. *Id.* at 5. Thus, Stanly’s proposal was not eliminated by the IA for failure to meet any required RFP criteria or action — rather, Stanly requested to withdraw — and this provision of the RFP potentially allowing the release of Stanly’s Proposal Security is similarly unavailable.

The facts asserted in Stanly’s Motion reveal that it was motivated to withdraw from CPRE Tranche 1 by a change in project economics rather than the project’s in-service date, which, as stated above, Stanly knew would likely be after the Tranche 1 in-service deadline prior to posting the Step 2 Proposal Security. Stanly states that it informed Accion that “because of significant changes in project economics due to an increase in solar panel prices after Stanly posted its Proposal Security in January 2019, its construction costs had increased and Stanly likely would not be able to post PPA security at the completion of Stage 2.” *Id.* at 5 n.3. Stanly again explicitly states in its Motion that it “was selected as a winning bid in CPRE Tranche 1, but was unable to execute a PPA because of changes in project economics after it posted Proposal Security in January 2019.” *Id.* at 2.

Further, the CPRE Program was enacted in part to give utilities more control over purchases from solar facilities than allowed under the federal Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3134 (PURPA). As such, utilities should be allowed to include reasonable guidelines for participation in the CPRE Program. The Commission is persuaded that Duke acted reasonably in requiring the Step 2 Proposal Security with “the intent . . . to protect integrity of the RFP process by ensuring that projects

² While the Commission recognizes that Section VI(A) of the Tranche 1 RFP was amended for Tranche 2 to clarify that no firm in-service date will be provided during the Step 2 evaluation, the Commission does not find this fact to be outcome determinative in this dispute.

that are moved into the Step 2 evaluation actually move forward to PPA if selected as a winning project.” Duke Response at 6.

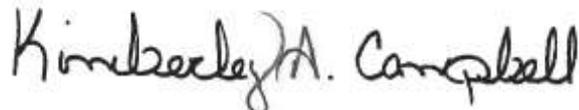
For the foregoing reasons, the Commission, therefore, concludes that Duke was reasonable in not releasing Stanly’s Proposal Security pursuant to the CPRE Tranche 1 RFP and finds good cause to deny the relief requested by Stanly and to dismiss Stanly’s Motion. Contrary to Stanly’s assertions, the forfeited Proposal Security does not result in a windfall to Duke but is credited to Duke’s customers. Lastly, in dismissing Stanly’s challenge in this proceeding, the Commission declines at this time to establish the firm deadline for the finality of CPRE tranches requested by Accion.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 20th day of October, 2020.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink that reads "Kimberley A. Campbell". The signature is written in a cursive style with a large initial 'K'.

Kimberley A. Campbell, Chief Clerk

Commissioner Daniel G. Clodfelter dissents.

Commissioner Kimberly W. Duffley dissents. Commissioners Clodfelter and Jeffrey A. Hughes join in Commissioner Duffley’s dissent.

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

Commissioner Daniel G. Clodfelter, dissenting:

I join in the dissent by Commissioner Duffley. I do not contend that the majority misreads, misunderstands, or misapplies the procedures adopted for and applicable to bidders in Tranche 1. However, as the circumstances of this petition demonstrate, those procedures created a structural inequity, unintentional though it may have been, between utility-sponsored proposals and those of market participants such as Stanly Solar. That inequity played itself out when Stanly Solar was required to forfeit its Proposal Security while a utility-sponsored proposal was allowed to withdraw after being selected as a winning bidder, all without having had to post any type of security along the way. This structural disparity has now been resolved for Tranche 2. Because the rights or obligations of no other party would be affected by the relief sought in the petition, I believe the equitable result would be to require the return of Stanly Solar's Proposal Security.

/s/ Daniel G. Clodfelter
Commissioner Daniel G. Clodfelter

DOCKET NO. SP-9590, SUB 0
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DOCKET NO. E-7, SUB 1156

Commissioner Kimberly W. Duffley, dissenting:

I dissent from the majority because the majority ignores the Independent Administrator's inequitable treatment of proposals. Specifically, Stanly Solar was required to forfeit a previously submitted Proposal Security when it withdrew its Third-Party Market Proposal, while an Asset Acquisition Proposal sponsored by the DEC/DEP Proposal Team withdrew without consequence. This inequitable treatment of proposals that results from a strict enforcement of the structure of Tranche 1 dictates my dissent from the majority. Based upon this inequitable treatment and the fact no party, including the majority, suggests that a return of Stanly's Proposal Security would cause actual harm, I would allow Stanly's Motion for Return of CPRE Proposal Security.

North Carolina General Statute § 62-110.8(d) states,

The third party entity [Accion] shall 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.

N.C.G.S. § 62-110.8(d). Further, Commission Rule R8-71(d)(iv), (viii), and (ix) state that the IA's duties shall include:

(iv) Develop and publish the CPRE Program Methodology that shall ensure equitable review between an electric public utility's Self-developed Proposal(s) as addressed in subsection (f)(2)(iv) and proposals offered by third-party market participants.

(viii) Evaluate the electric public utility's Self-developed Proposals.

(ix) Provide an independent certification to the Commission in the CPRE Compliance Report that all electric public utility and third party proposals were evaluated under the published CPRE Program methodology and that all proposals were treated equitably through the CPRE RFP Solicitation(s).

No party disagrees that under the initial construct of Tranche 1, a Third Party MP 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. In fact, in its Updated CPRE Tranche 1 Final Report of the Independent Administrator filed on July 23, 2019 (Final Report), the IA indicates this fact, stating "[t]hat based upon the experience of Tranche 1, the IA recommends revising the Proposal security requirements . . . [finding that a] proposal security or some functional equivalent should be required in the case of both Duke self-developed projects and Asset Acquisition projects that the DEC/DEP team

elects to sponsor.” Final Report at 5-7. The IA followed through on its recommendation and revised the Tranche 2 RFP which now requires both the Asset Acquisition Proposals and the Utility Self-Developed Facilities to provide such Proposal Security or a functional equivalent. See Verified Petition for Declaratory Ruling and Other Relief, Attachment A, pp. 7-8, Docket No. E-7 Sub 1156 (March 30, 2020).

The IA’s own statements and its actions to revise Tranche 2 as outlined above support Stanly’s claim that the Stanly proposal and the Asset Acquisition Proposal sponsored by the DEC/DEP Team in Tranche 1 were not treated equitably. The cure for this inequitable treatment is to return Stanly’s Proposal Security.

Finally, in light of the fact that in its CPRE Tranche 1 Final Report, the IA labels Tranche 1 as a “beta test” of the CPRE Program, the IA and the Commission should allow for flexibility and not require the strict enforcement of terms. Some flexibility in the administration of Tranche 1 is especially true under the circumstances of the present case in which two proposals were not treated equitably and where no party claims actual harm. The only “harm” claimed is by the Companies stating that “the surety bond is intended to protect the integrity of the RFP process by ensuring that projects that are moved into Step 2 evaluation actually move forward to PPA if selected as a winning project.” Duke Response at 7. This harm to the process is illusory where the IA calls Tranche 1 a “beta test” and thereafter changes the process for Tranche 2. Although I do not remember any party making this claim, the other possible claim of harm may be the threat of not fulfilling the targeted MWs. However, Tranche 2 and a possible Tranche 3, as well as other potential non-dispatchable PPAs, exist to accomplish the procurement goal. Because I find that the majority requires strict compliance for compliance’s sake and that such strict compliance is not in the public interest, I dissent and would instead allow Stanly’s motion for a return of the CPRE Proposal Security.

/s/ Kimberly W. Duffley
Commissioner Kimberly W. Duffley