

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. SP-13695, SUB 1
BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:)
Orion Renewable Resources LLC) **REPLY IN SUPPORT OF MOTION TO**
) **STRIKE, OR IN THE ALTERNATIVE**
) **TO REOPEN HEARING OF ORION**
) **RENEWABLE RESOURCES LLC**
)

NOW COMES Orion Renewable Resources LLC (“Orion”), by and through the undersigned counsel, and submits this Reply Brief in Support of its Motion to Strike or in the Alternative to Reopen Hearing (“Mot. Strike”), filed in this docket on January 25, 2021. This Brief is in response to Duke Energy Carolinas, LLC’s (“Duke’s”) Response in Opposition to Motion to Strike (“Duke Opp.”) and to the response of Accion Group, LLC (“Accion”), the CPRE Independent Administrator (“Accion Opp.”), both filed on February 15, 2021.

Orion is in the unenviable position of asking the Commission to strike portions of a late-filed exhibit (“LFE”) the Commission had requested, because Duke has abused the “latitude” provided by the Commission to prepare an LFE for strategic advantage. Duke declined to participate in this case in any capacity until it was joined as a party by the Commission for the purpose of providing a witness who could answer specific questions about Duke’s treatment of Orion’s Proposal in Step 2 of Tranche 1. At the hearing, Duke continued to position itself as neutral party, presenting scant direct testimony¹ and stating no position on Orion’s Petition for Relief. Not until Duke filed its Post-Hearing Brief did Duke state its opposition to Orion’s request for relief,

¹ The direct testimony of Duke’s witness Mr. Piper was limited to describing Mr. Piper’s responsibilities, and a brief description of the analysis performed by Duke’s T&D Team on Orion’s proposal in Tranche 1. Tr. at 114-117.

at which point it became evident that Duke’s Late-Filed Exhibit was not the objective summary of facts it purported to be, but merely an attempt to provide evidentiary support for its litigation position.

Orion does not seek a “do-over” of its case – Orion strongly agrees with Duke that the core legal issue in this docket can be resolved without reference to the LFE² – but only to avoid the prejudice that would arise from Duke taking a position on Orion’s petition and providing evidentiary support for that position, only *after* the record has closed. The appropriate remedy is to grant the relief requested by Orion.

A. Duke’s Late-Filed Exhibit is not consistent with Commission practice with respect to late-filed exhibits.

Duke does not dispute that the factual issues to which most of the LFE relates – which Duke characterizes as “the broader practical implications of the relief requested in the Petition” (Duke Opp. at 4) – were not raised by any party in pre-hearing filings, were not within the scope of the hearing as called by the Commission, were not addressed by Duke’s witness, and were only briefly discussed at the hearing itself. And while the Commission gave Duke some latitude to prepare an “informative” late-filed exhibit, it did not give Duke the discretion to raise entirely new factual issues (to which Orion has never had the chance to respond) and to later argue that these new factual issues justify denial of Orion’s Petition.

Of course Duke is correct that late-filed exhibits are a common element of Commission practice and the Commission has the discretion to rely on them. Duke Opp. at 6. And strict compliance with the rules of evidence in a LFE may be waived if no party objects. However, as a general matter late-filed exhibits are permitted to allow *specific* documents or information not

² As discussed below, there are unsupported factual statements in Duke’s Post-Hearing Brief, related to its legal arguments, that are independent of the LFE. These statements should be stricken or disregarded.

available at the hearing to be received into the record, often in response to a specific request by the Commission. Despite having filed “scores of LFEs at the request of the Commission in various proceedings,” Duke has not identified an instance in which a late-filed exhibit has been used by a party to introduce new issues after the close of all other evidence,³ much less to set up a factual basis to argue for a position it had never previously taken. The prejudice that would result from allowing such a practice is obvious. Moreover, to permit a late intervenor like Duke to broaden the scope of issues in the case via a late-filed exhibit would violate Rule R1-19(b), which only allows a late intervention which “neither broadens the issues nor seeks affirmative relief.”

The LFE presented by Duke in this case also differs from late-filed exhibits accepted by the Commission in other dockets in several important respects. It is for the most part not responsive to a request by the Commission for specific information, but instead goes far outside “the narrow issues identified by the Commission’s questions” at the hearing. Duke Opp. at 4. It was not sponsored by any fact witness, but was volunteered by Duke’s counsel.⁴ It does not consist of documents already in existence, but was created by a party to advance its (previously undisclosed) litigation position.

The Commission recently issued an Order in another docket discounting statements made by Duke in a late-filed exhibit because those statements were not “subject to examination” or introduced through the testimony of any witness who could explain the bases for the information included in the late-filed exhibit. The Commission also refused to give evidentiary weight to

³ Issues 3, 4, and 5 in the LFE had never been addressed in any filing and were not discussed by any witness at the hearing. Duke does not dispute this. Nor does Duke explain why it could not have presented information relating to “Changes in Equipment Classification Between Tranche 1 and Tranche 2” (Item 3 in the LFE) to the Commission or the parties at or before the hearing.

⁴ See Order Denying Certificate of Public Convenience and Necessity for Merchant Generating Facility, Docket No. EMP-105, Sub 0 (June 11, 2020), at 24 n.8 (declining to consider information in late-filed exhibit not sponsored by any witness, and declining to consider late-filed exhibit that consisted of statements by counsel).

portions of a late-filed exhibit consisting of letters from Duke’s Associate General Counsel, “who was neither a witness in this case nor was ever likely to be one.” *Order Denying Certificate of Public Convenience and Necessity for Merchant Generating Facility*, Docket No. EMP-105, Sub 0 (June 11, 2020), at 24 n.8. Not only does the LFE at issue here shares these deficiencies, but it was also (unlike the LFE’s in the cited case) filed specifically to support Duke’s own litigation position, making reliance on it even more inappropriate.

Late-filed exhibits are also subject to the rules of evidence. G.S. § 62-65(a). Duke correctly notes that the Commission is only required to follow those rules “insofar as practicable,” but fails to explain why it would not be practicable to follow the rules of evidence here. More importantly, in the same Order Duke cites in support of its use of the LFE, this Commission (citing the Supreme Court of North Carolina) clarified that it “can consider information contained in late-filed exhibits in reaching a decision *only if* the party against whom the exhibit is sought to be used has been provided with adequate notice and given an adequate opportunity to assert its right of cross-examination with respect to the information contained in that exhibit.” *Order Granting BellSouth’s Motion to Continue Hearing*, Docket No. P-55, Sub 1543 (June 10, 2005) at 2-3 (citation omitted; emphasis added).

B. Orion was not untimely in objecting to the Late-Filed Exhibit.

Duke takes issue with the fact that Orion did not object to the Late-Filed Exhibit as soon as it was filed, but instead filed its Motion to Strike after the parties’ Post-Hearing Briefs were filed. The reason Orion did not object earlier is straightforward: At the time the LFE was filed, Duke had not taken any position on Orion’s Petition for Relief. Duke gave no hint at the hearing that it would oppose the Petition, even in response to a direct question from Commissioner Duffley.

Tr. at 123.⁵ And Duke’s counsel represented to the Presiding Commissioner that the Company’s goal in seeking “latitude” was to prepare the “most informative” presentation of issues, not to support a litigation position. Tr. at 91-92.⁶ Since Rule R1-19(b) would have barred Duke, as a late intervenor, from “broadening the issues” in the case, Orion had no reason to think at the time the LFE was filed that Duke would attempt to introduce new issues into the case in its Post-Hearing Brief. If Duke had taken a position on Orion’s request for relief at the time of the hearing, the Commission might not have granted Duke the same “latitude” to prepare and file an LFE without affording Orion an opportunity to respond.

Under the circumstances, Orion reasonably (and it appears, naively) assumed that the LFE represented Duke’s good-faith response to the Commissioners’ questions, and not a strategic attempt to support Duke’s thus-far-undisclosed litigation position. Orion did not believe that it would be an appropriate use of the parties’ and the Commission’s limited resources to move to strike portions of an exhibit tendered by a party that did not oppose its Petition.

Orion also needs to clarify claims in Duke’s and Accion’s briefs that Duke “received input from and specifically incorporated topics identified by Orion” in the LFE, and that “DEC shared a near-final draft of the LFE with Orion prior to filing.” Orion did ask Duke to include certain categories of information in the table describing the proposals eliminated from Step 1 based on a

⁵ Duke argues that it “had no duty to forecast its legal theories in advance of briefing.” Duke Opp. at 12. But the problem isn’t that Duke hadn’t disclosed its “legal theories” – it is that Duke had never taken *any* position on Orion’s Petition for Relief. In the normal course, the parties’ positions on claims and factual issues, if not their “legal theories,” are disclosed in pleadings. And as noted above, a party that intervenes late in a proceeding is not permitted to “expand the issues” in the case, but is limited to the issues already engaged by the parties. R1-19(b).

⁶ Before Duke’s counsel requested the “latitude” to include additional (unspecified) information, the scope of the LFE as requested by the Commission was limited to information about the three proposals (including Orion’s) that were eliminated in Step 1. Tr. at 81-82.

Net Benefit analysis (page 9 of the LFE), although Duke ultimately did not include all the information requested by Orion.⁷

And while Duke did share a copy of the LFE with Orion prior to filing, it did so only at 2:33 p.m. on the day the LFE was filed. Given the very short time Orion had to review the exhibit, the fact that Duke was at that time positioned as a neutral party, and the fact that the information in the LFE was for the most part solely in Duke's possession, Orion did not dispute the contents of the exhibit prior to Duke filing it. Had Duke previously disclosed its opposition to Orion's Petition, Orion would have objected to its filing at that time.

C. The objectionable portions of Duke's Post-Hearing Brief are not its legal arguments, but its unsupported factual claims.

Duke argues that the core legal issue for determination in this proceeding – whether or not Accion's disqualification of Orion's Proposal was consistent with HB 589, the Commission's CPRE Rule, and the Tranche 1 RFP itself – can be decided by the Commission without reference to Duke's Late-Filed Exhibit. Duke Opp. at 16-17. Orion agrees. But Orion is not asking the Commission to strike or disregard the legal arguments made in Section II(a) of Duke's post-hearing brief, only the new factual arguments made by Duke relating to the Tranche 1 procurement

⁷ Orion requested that the following information be included in the LFE with reference to all three proposals eliminated in Step 1:

1. Name of project;
2. Nameplate capacity;
3. Decrement or ranking;
4. Analysis of necessary upgrades / upgrade costs in Tranche 1: (a) Whether the project has interdependencies (if analyzed); and (b) Whether required upgrades would put project over avoided cost cap (if analyzed); and
5. Whether the project participated in and/or was selected in Tranche 2 (and if so whether it signed a PPA), or whether it has otherwise signed a PPA (e.g. PURPA PPA or GSA agreement).

Duke did not include the information requested in Item 5 in the LFE. It included the other items but redacted Items 1-3 from the public version of the exhibit, and refused to provide that information to Orion on request.

target and the February 28, 2020 Memorandum published by Accion (“Tranche 2 Memorandum”). Mot. Strike at 12.

Duke’s Post-Hearing Brief made two factual claims about the Tranche 2 Memorandum – that it represented “a concession intended to avoid further costly disputes and avoid a delay in Tranche 2” and “did not accurately capture the nuance of Duke’s position with respect to the change in approach between Tranche 1 and Tranche 2” – neither of which is supported by evidence. *See* Mot. Strike at 5. Duke now characterizes these claims as a purely “legal argument,” even as it acknowledges in its Opposition Brief that these are factual statements. Duke Opp. at 14 (“as DEC explained in its post-hearing brief, it agreed to the altered approach in a good faith attempt ‘to avoid further costly disputes and avoid a delay in Tranche 2[,]’ and stated, **factually**, that the Tranche 2 Memo ‘did not accurately capture the nuance’ of DEC’s legal position.”).⁸ And Duke still fails to explain what “nuance” was missing from the Tranche 2 Memorandum’s categorical statement that “Duke evaluation personnel believe that the Company is required under the terms of N.C. Gen. Stat. 62-110.8(b)(2) to contract with Proposals that bid at or below the 20 year levelized Avoided Cost (in each pricing period) identified in the RFP, notwithstanding a determination of net benefit under the IA Evaluation Methodology, if doing so is necessary to achieve the procurement targets established for each tranche during the 45 month CPRE procurement period.” Duke may have changed its mind about this, but it is not free to pretend, without evidence, that it never actually believed what was said in the Tranche 2 Memorandum.

⁸ Duke’s acknowledgement in its Opposition Brief that “The Tranche 2 Memo was drafted in the first instance by the IA with review and comment by the Public Staff and Duke” (Duke Opp. at 14) also shows how misleading was Duke’s statement in its Post-Hearing Brief that “the IA’s memo was not drafted by Duke.” Post-Hearing Br. at 11.

In its Motion to Strike, Orion also requested that the Commission strike or disregard claims in Duke's Post-Hearing Brief that the DEC capacity shortfall in Tranche 1 "was rolled into Tranche 2," because those claims lacked evidentiary support and appear to be factually incorrect. Mot. Strike at 10. Duke appears to concede the point, as it does not address this request in its Opposition Brief.

Just as the Commission must base its decisions on competent evidence, G.S. § 62-65, a party must support the facts asserted in its pleadings by competent evidence that supports its claims. R1-5(b)(2). Duke's factual arguments should be disregarded or stricken from its Post-Hearing Brief.

CONCLUSION

Duke passed on the opportunity to intervene in this case before the hearing, and passed on the opportunity to take any position on Orion's request for relief either in witness testimony or in response to Commissioners' questions. Instead, it made the strategic choice to present itself as an unaligned party, and to submit a Late-Filed Exhibit that purported to respond to Commissioner questions. In fact, Duke's LFE was presented to provide support for a litigation position that it did not disclose until after the record had closed. The Commission should not condone this kind of gamesmanship, and should grant Orion's Motion.

Respectfully submitted, this the 22nd day of February 2021.

[Signature block on following page]

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **Reply in Support of Motion to Strike or in the Alternative to Reopen Hearing** upon all parties of record by electronic mail.

This the 22nd day of February, 2021.

/s/ _____
Benjamin L. Snowden