

168 FERC ¶ 61,011
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

Broad River Solar, LLC	Docket Nos. ER19-1819-000
Stony Knoll Solar, LLC	ER19-1820-000
Speedway Solar NC, LLC	ER19-1821-000

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION AND
AUTHORIZATION TO MAKE AFFILIATE SALES

(Issued July 9, 2019)

1. In this order, we grant Broad River Solar, LLC (Broad River), Stony Knoll Solar, LLC (Stony Knoll), and Speedway Solar NC, LLC (Speedway Solar) (collectively, Applicants) authority to make wholesale sales of electric energy and capacity at market-based rates, subject to the limitations contained in their proposed tariffs, effective July 10, 2019, as requested. We also grant Applicants' requests for certain waivers commonly granted to market-based rate sellers. Lastly, as discussed below, we grant Applicants' requests for authorization to make affiliate sales at market-based rates pursuant to a competitive solicitation process that we find satisfies the Commission's affiliate abuse concerns.
2. Additionally, we find that Applicants meet the criteria for Category 2 sellers in the Southeast region and Category 1 sellers in the Central, Southwest, Southwest Power Pool, Northeast and Northwest regions and are so designated.¹

¹ See *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 816, 153 FERC ¶ 61,065, at P 320 (2015), *order on reh'g*, Order No. 816-A, 155 FERC ¶ 61,188 (2016); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, at PP 848-850, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom.*

I. Background

3. On May 10, 2019, Applicants submitted applications for market-based rate authority with accompanying tariffs providing for the sale of energy and capacity at market-based rates under a limited set of circumstances. Applicants represent that they are indirect, wholly-owned subsidiaries of Duke Energy Corporation (Duke Energy). Applicants explain that they each seek authorization to make market-based rate sales to an affiliate, Duke Energy Carolinas, LLC (Duke Carolinas), pursuant to a power purchase agreement (PPA) awarded through the state-mandated competitive procurement of renewable energy (Competitive Procurement) established by North Carolina House Bill 589 (HB 589). Applicants explain that HB 589 requires Duke Carolinas and Duke Energy Progress, LLC (Duke Progress) (together, the Duke Utilities) to procure a total of 2,660 megawatts (MW) of renewable energy capacity over a 45-month period via a series of requests for proposals (RFP) to be completed by 2021.

4. Applicants explain that their requests for market-based rate authority and authorization to make affiliate sales are modeled after the request for market-based rate authority approved last year for Carolina Solar Power, LLC (Carolina Solar),² an affiliate of Applicants. Applicants state that the Commission approved Carolina Solar's market-based rate application, finding that the Competitive Procurement established by HB 589 sufficiently addressed both market power and affiliate abuse issues.³ Applicants also point out that, in *Carolina Solar*, the Commission required that any affiliate of Carolina Solar seeking market-based rate authorization to sell power under a Competitive Procurement-awarded PPA to the Duke Utilities would need to independently submit an application for approval to make sales at market-based rates.⁴ Applicants assert that there have been no material changes to the facts relied upon by the Commission in approving Carolina Solar's request for market-based rate authority and granting waiver of the affiliate restrictions. Applicants note that there were no material changes to the

Mont. Consumer Counsel v. FERC, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Public Citizen, Inc. v. FERC*, 567 U.S. 934 (2012).

² *Carolina Solar Power, LLC*, 164 FERC ¶ 61,058 (2018) (*Carolina Solar*).

³ See Broad River Filing at 2; Stony Knoll Filing at 2; Speedway Solar Filing at 2.

⁴ *Carolina Solar*, 164 FERC ¶ 61,058 at P 35 (“To the extent that an applicant wishes to point to this order regarding the Commission’s decision with respect to Carolina Solar, such application should discuss whether there have been any changes to the competitive solicitation process or any other facts relied upon by the Commission in granting Carolina Solar waiver of the affiliate restrictions and restrictions against market-based sales in the Duke Utilities’ balancing authority areas.”).

Competitive Procurement process described in detail in Carolina Solar's application. Applicants add that, while there were minor changes to the *pro forma* PPA and RFP documents submitted to the Commission with Carolina Solar's application, none of the changes substantively altered the fundamental RFP structure that served as the basis for Commission approval of Carolina Solar's market-based rate authority. Applicants point out that all such minor changes were overseen and approved by the Competitive Procurement Independent Administrator, the Accion Group (Accion), and resulted from the stakeholder input process contemplated by the North Carolina Utilities Commission's (North Carolina Commission) Rule R8-71 (Competitive Procurement Rule). Applicants also explain that there have been no revisions to HB 589 or the Competitive Procurement Rule since Carolina Solar's application was filed.⁵

5. Applicants explain that Accion administers the Competitive Procurement solicitation as the Independent Administrator, and its duties remain the same as what was described in Carolina Solar's application. According to Applicants, Accion released the RFP and related documents, including the *pro forma* PPA, for the first RFP tranche (Tranche 1)⁶ to market participants on July 10, 2018 with a deadline for responses of October 10, 2018. Applicants state that, before releasing the RFP and *pro forma* PPA, Accion conducted a comment period, as required by the Competitive Procurement Rule, to allow all potential participants to provide comments on the *pro forma* PPA, RFP, and other documents, and also held meetings with market participants in May 2018 to discuss any revisions to the *pro forma* PPA or RFP. Applicants explain that, based on feedback from various market participant meetings, Accion recommended a number of changes to the *pro forma* PPA and the RFP, which were accepted by the Duke Utilities⁷ and included in the final version of the *pro forma* PPA for Tranche 1 approved by the North Carolina

⁵ See Broad River Filing at 3; Stony Knoll Filing at 3; Speedway Solar Filing at 3. Applicants also state that a more detailed overview of HB 589, the Competitive Procurement structure and process, the role of the Independent Administrator, and RFP evaluation factors can be found in Carolina Solar's market-based rate application and supplement.

⁶ Applicants state that Tranche 1 sought renewable generating facilities in the amount of 80 MW for Duke Progress and 600 MW for Duke Carolinas.

⁷ Applicants explain that the small number of revisions to the RFP and the *pro forma* PPA were made to more fully explain and clarify certain provisions in these documents.

Commission on June 25, 2018. Applicants note that the final version of the Tranche 1 RFP documents was not required to be filed at the North Carolina Commission.⁸

6. Applicants state that, on April 9, 2019, Accion announced that 14 projects had been selected in Tranche 1, including Applicants' projects. Applicants explain that, as a result, Broad River, Stony Knoll, and Speedway Solar will develop 50 MW, 22.6 MW, and 22.6 MW solar-powered electric generation facilities located in Cleveland County, Surry County, and Cabarrus County, North Carolina, respectively.⁹ Applicants state that 58 proposals were received for a total of 2,682.72 MW for Duke Carolinas and 19 proposals were received for a total of 1,156.25 MW for Duke Progress. According to Applicants, all proposals used solar photovoltaic technology, and three also included battery storage energy. Applicants explain that, ultimately, 12 projects totaling 515 MW, including Applicants' projects, were selected as the winning bidders for Duke Carolinas, with two of the selected proposals including storage, and two projects totaling 87 MW were selected for Duke Progress. Applicants represent that of the 14 solar projects selected in Tranche 1, five are Duke Energy projects totaling 189.5 MW and representing 31.5 percent of the total awarded capacity for Tranche 1. Applicants note that, in addition, one selected project was an asset acquisition bid by a non-affiliate third party.¹⁰

7. Applicants state that Accion was responsible for evaluating and ranking all bids submitted into Tranche 1 consistent with the process explained in Carolina Solar's application. According to Applicants, at the conclusion of the evaluation process, Accion notified market participants on April 9, 2019 of the results, and informed winning bidders that they had 60 days from the date of notification to enter into a PPA with the Duke Utilities. Applicants note that Accion issued a report at the end of the Tranche 1

⁸ See Broad River Filing at 4-5; Stony Knoll Filing at 4-5; Speedway Solar Filing at 4-5. Applicants' filings include redlined versions of the RFP and *pro forma* PPA comparing these documents to those submitted with Carolina Solar's application.

⁹ See Broad River Filing at 2; Stony Knoll Filing at 2; Speedway Solar Filing at 2.

¹⁰ See Broad River Filing at 6; Stony Knoll Filing at 6; Speedway Solar Filing at 6. Applicants also explain that, as discussed in Carolina Solar's application, HB 589 capped Duke Energy bid awards to 30 percent of the total Competitive Procurement, which includes bids by Duke Progress and Duke Carolinas and their affiliates. Applicants state that, because the 30 percent cap is calculated based on total Competitive Procurement, Duke Energy affiliates could be awarded a percentage larger than 30 percent in a single tranche, as long as the cap is not exceeded across the entire procurement. In addition, they point out that the 30 percent cap does not apply to projects bid by non-affiliated third parties for acquisition. See Broad River Filing at 6 nn.23-24; Stony Knoll Filing at 6 nn.23-24; Speedway Solar Filing at 6 nn.23-24.

selection process that confirmed that the process was fairly conducted, with all market participants having access to the same information at the same time, and that Accion was unaware of any bias towards or against any market participant.¹¹

II. Notice of Filings

8. Notice of each Applicant's filing was published in the *Federal Register*,¹² with interventions and protests due on or before May 31, 2019. None was filed.

9. Notice of Broad River's request for blanket authorization under Part 34 of the Commission's regulations was separately published in the *Federal Register*,¹³ with interventions and protests due on or before June 3, 2019. None was filed.

10. Notice of Stony Knoll's request for blanket authorization under Part 34 of the Commission's regulations was separately published in the *Federal Register*,¹⁴ with interventions and protests due on or before June 3, 2019. None was filed.

11. Notice of Speedway Solar's request for blanket authorization under Part 34 of the Commission's regulations was separately published in the *Federal Register*,¹⁵ with interventions and protests due on or before June 3, 2019. None was filed.

III. Discussion

12. As discussed below, we grant each Applicant authority to make wholesale sales of energy and capacity at market-based rates, subject to the limitations in its market-based rate tariff, effective July 10, 2019, as requested. In addition, as discussed below, we grant Applicants' requests for authorization to make affiliate sales to Duke Carolinas at market-based rates pursuant to the competitive solicitation process described in their filing.

¹¹ See Broad River Filing at 5-6; Stony Knoll Filing at 5-6; Speedway Solar Filing at 5-6.

¹² 84 Fed Reg. 22,486 (2019).

¹³ *Id.*

¹⁴ 84 Fed. Reg. 22,489 (2019).

¹⁵ 84 Fed. Reg. 22,492 (2019).

A. Market-Based Rate Authorization

13. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.¹⁶

1. Horizontal Market Power

14. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.¹⁷ The Commission has stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess horizontal market power, while failure of either screen creates a rebuttable presumption that the applicant has horizontal market power.¹⁸

15. Applicants assert that they only seek authority to make market-based sales in the Duke Carolinas balancing authority area under a PPA awarded through the Competitive Procurement process. Each Applicant explains that it currently neither owns nor controls any generation facilities; however, if the Duke Utilities' uncommitted generation capacity is attributed to the Applicant as an affiliate of the Duke Utilities, each Applicant concedes that it would not pass the indicative screens for the Duke Utilities' balancing authority areas.¹⁹

16. Applicants argue that, instead, the Duke Utilities' uncommitted capacity should not be considered when evaluating whether Applicants have the ability to exercise horizontal market power for purposes of their market-based rate authorization for the same reasons as in *Carolina Solar*. Specifically, Applicants argue that, in *Carolina Solar*, the Commission noted that, under limited circumstances, a seller that would otherwise fail the Commission's market-based rate tests may file a request for contract-specific market-based rates based on a determination that the seller does not have market power with respect to the specific long-term contract being filed.²⁰ Applicants add that

¹⁶ Order No. 697, 119 FERC ¶ 61,295 at PP 62, 399, 408, 440.

¹⁷ *Id.* P 62.

¹⁸ *Id.* PP 33, 62-63.

¹⁹ See Broad River Filing at 9, 11; Stony Knoll Filing at 9, 11; Speedway Solar Filing at 9, 11.

²⁰ *Carolina Solar*, 164 FERC ¶ 61,058 at P 13 (quoting Order No. 697-A, 123 FERC ¶ 61,055 at PP 279-282).

the Commission further explained that, in that scenario, the seller “must show that a buyer under a long-term contract has viable alternatives including the entry of an appropriate amount of third-party newly-constructed resources during the relevant future period as an alternative to purchasing under the contract at issue.”²¹ Applicants contend that, in *Carolina Solar*, the Commission concluded that the PPAs that result from the Competitive Procurement process are analogous to the type of long-term contracts the Commission discussed in Order No. 697-A and that there were no market power concerns raised by PPAs awarded through the Competitive Procurement process.²²

17. Applicants state that the same circumstances apply to them to support a finding by the Commission that there are no horizontal market power issues. Applicants explain that they only seek authority to make market-based sales in the Duke Carolinas balancing authority area under PPAs awarded through the state-mandated Competitive Procurement process. Applicants add that the Tranche 1 PPAs will be for one new 50 MW and two new 22.6 MW solar photovoltaic facilities not already in service, increasing supply in a procompetitive manner, and that to be awarded a PPA, Applicants’ bids to sell renewable power had to be determined by Accion to be among the most competitive bids in the RFP. Applicants further point out that the competitive solicitation provided a meaningful opportunity for new generation to enter the market, compete, and provide viable alternatives to Duke Energy-affiliated projects, demonstrated by the fact that more than half of the 14 projects selected in Tranche 1 were not affiliated with Duke Energy and that participation in Tranche 1 exceeded the target procurement.²³

18. We find that these indicators of competitiveness suggest that neither Applicants nor their affiliates can raise barriers to entry to restrict participation of newly constructed generation from non-affiliated sellers. In addition, certain features of this competitive solicitation process, in particular the 30 percent cap on affiliate participation, the 20-year term of the resulting PPAs, and the requirement that all eligible generation must be procured from resources that are placed in service after the date of the electric utility’s initial competitive procurement, provide evidence that the RFP process provides a meaningful opportunity for other sellers to enter the market in order to compete and provide the purchaser with viable and comparable alternatives. We note that these aspects of the competitive solicitation process remain unchanged from *Carolina Solar*.²⁴

²¹ *Id.* (quoting Order No. 697-A, 123 FERC ¶ 61,055 at P 282).

²² See Broad River Filing at 9-10; Stony Knoll Filing at 10-11; Speedway Solar Filing at 10-11 (citing *Carolina Solar*, 164 FERC ¶ 61,058 at P 16).

²³ See Broad River Filing at 10-11; Stony Knoll Filing at 11-12; Speedway Solar Filing at 11-12.

²⁴ *Carolina Solar*, 164 FERC ¶ 61,058 at P 15.

Moreover, the fact that the resulting contracts are the result of a competitive procurement will also help ensure just and reasonable rates. Finally, the procurement is in response to a state-mandated program and the RFP process is designed to be a rigorous, fair, and open process that is administered by an independent evaluator and overseen by the North Carolina Commission. These factors provide additional assurance as to the competitive nature of this particular solicitation, which safeguards against the exercise of market power. In addition, the RFP is a pay-as-bid rather than a single, price clearing auction, which limits any seller's ability to exercise market power to influence prices because the price received by each winning seller will equal the seller's bid rather than the highest-priced bid accepted.

19. Thus, as in *Carolina Solar*, we find that the PPAs, including the *pro forma* PPA, that result from this competitive solicitation are analogous to the type of long-term contract that the Commission discussed in Order No. 697-A. Further, the nature of this competitive solicitation process makes it likely that the buyer can be expected to have access to viable and comparable alternatives including third-party newly constructed resources, as contemplated by Order No. 697-A. Based on the specific facts presented here, we find that there is no basis to conclude that Applicants will have market power with respect to any PPA that Applicants have been or may be awarded under this particular competitive procurement, including the *pro forma* PPA. Specifically, our finding is based on the following cumulative set of facts: (1) the competitive solicitation process is for long-term PPAs for new generation not already in service, providing a meaningful opportunity for new generation to enter the market to compete and provide the purchaser with viable alternatives to purchasing from Applicants; (2) there was robust participation in Tranche 1 of the Competitive Procurement process; (3) new generation owned by the Duke Utilities and their affiliates cannot account for more than 30 percent of the total 2,660 MWs being procured, ensuring participation by competitors; (4) the RFP was a pay-as-bid solicitation; and (5) the *pro forma* PPA resulted from a state-mandated solicitation process administered by an independent evaluator.²⁵ Based on Applicants' representations, we find that Applicants satisfy the Commission's

²⁵ In addition, pursuant to HB 589, the cost of the renewable energy procured through the solicitations will be capped at the Duke Utilities' 20-year forecast of their respective avoided cost rates at the time of each solicitation. See N.C. Gen. Stat. § 62-110.8(b)(2) (2019) ("To ensure the cost-effectiveness of procured new renewable energy resources, each public utility's procurement obligation shall be capped by the public utility's current forecast of its avoided cost calculated over the term of the power purchase agreement . . . consistent with the [North Carolina] Commission-approved avoided cost methodology."). Further, any resale of the procured MWs will be subject to the Duke Utilities' existing mitigation, further limiting any risk of market power abuse.

requirements for market-based rate authority regarding horizontal market power for the *pro forma* PPA filed with their applications.

20. Applicants must notify the Commission if there is a change to any of the facts and circumstances that the Commission relied upon in making this finding, such as if the terms of any PPAs ultimately executed with Duke Carolinas differ from the *pro forma* PPA accepted here.²⁶

2. Vertical Market Power

21. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved Open Access Transmission Tariff (OATT) on file or that the seller has received waiver of the OATT requirement under 18 C.F.R. § 35.28(d)(1) or satisfies the requirements for blanket waiver under 18 C.F.R. § 35.28(d)(2).²⁷ Applicants state that they do not and will not own or operate any transmission facilities other than discrete interconnection facilities.²⁸ Applicants state that transmission facilities (including limited interconnection facilities) that are owned by affiliates either (1) are subject to OATTs on file with the Commission, (2) are under the operational control of an independent system operator or regional transmission operator, (3) have received a waiver from the

²⁶ 18 C.F.R. § 35.42 (2018); *see also Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

²⁷ *See Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities*, Order No. 807, 150 FERC ¶ 61,211, at P 57, *order on reh'g*, Order No. 807-A, 153 FERC ¶ 61,047 (2015) (waiving the OATT requirements of 18 C.F.R. § 35.28, the Open Access Same-Time Information System requirements of Part 37, and the Standards of Conduct requirements of Part 358, under certain conditions, for entities that own interconnection facilities); *see also Oildale Energy, LLC*, 153 FERC ¶ 61,013, at PP 12-14 (2015).

²⁸ *See Broad River Filing at 12; Stony Knoll Filing at 12; Speedway Solar Filing at 12; see, e.g., Broad River Filing at 12 n.36* (“To the extent it is deemed necessary in order to satisfy the requirements for a blanket waiver as described in Section 35.28(d)(2) of the Commission’s Regulations, Applicant commits to comply with and be bound by the obligations and procedures applicable to electric utilities under Section 210 of the FPA, provided that the blanket waiver described is limited to the interconnection facilities that qualify for waiver under Order No. 807.”).

Commission under 18 C.F.R. § 35.28(d)(1), or (4) would qualify for a blanket waiver under 18 C.F.R. § 35.28(d)(2).²⁹

22. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.³⁰ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities, and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).³¹ The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.³² The Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.³³

23. Applicants represent that Duke Energy owns Piedmont Natural Gas Company, Inc., a natural gas local distribution company.³⁴ Applicants state that their affiliates, Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc., operate natural gas local distribution and storage facilities and their affiliate, Duke Energy Indiana, LLC, owns coal reserves.³⁵ Applicants represent that their affiliates own or control through lease agreements a fleet of coal rail cars for private use in connection with the companies' respective coal-fired generation, and their affiliates also own various limited rail tracks

²⁹ See Broad River Filing at 12-13; Stony Knoll Filing at 13; Speedway Solar Filing at 13.

³⁰ Order No. 697, 119 FERC ¶ 61,295 at P 440.

³¹ Order No. 697-A, 123 FERC ¶ 61,055 at P 176; *see also* Order No. 816, 153 FERC ¶ 61,065 at PP 207-212.

³² Order No. 697, 119 FERC ¶ 61,295 at P 447; *see also* Order No. 816, 153 FERC ¶ 61,065 at PP 354, 356.

³³ Order No. 697, 119 FERC ¶ 61,295 at P 446.

³⁴ See Broad River Filing at 13; Stony Knoll Filing at 13; Speedway Solar Filing at 13.

³⁵ See Broad River Filing at 13; Stony Knoll Filing at 13; Speedway Solar Filing at 13.

that are dedicated for private local transportation of coal.³⁶ Applicants' filings also include a list of their affiliated natural gas pipelines and storage companies.³⁷

24. Finally, Applicants affirmatively state that neither they nor their affiliates have erected barriers to entry into the relevant markets and that they will not erect barriers into such markets.³⁸

25. Based on Applicants' representations, we find that they satisfy the Commission's requirements for market-based rate authority regarding vertical market power.

B. Affiliate Abuse Analysis

26. Because Applicants were successful bidders in Tranche 1 of the Duke Utilities' competitive solicitation process, they are entering into PPAs with their affiliate, Duke Carolinas. Thus, Applicants request authorization to make affiliate sales pursuant to these PPAs and other PPAs that they might be awarded and enter into pursuant to and in accordance with the Competitive Procurement program provided for under HB 589, as implemented in accordance with the Competitive Procurement Rule. At issue is whether Applicants have satisfied the Commission's concerns regarding the potential for affiliate abuse. In *Edgar*, the Commission stated that, in cases where affiliates are entering into market-based rate agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted. Under *Edgar*, the Commission has approved affiliate sales resulting from competitive bidding processes after the Commission has determined that, based on the evidence, the proposed sale was a result of direct head-to-head competition between affiliated and competing unaffiliated suppliers.³⁹

³⁶ See Broad River Filing at 13; Stony Knoll Filing at 13-14; Speedway Solar Filing at 13-14.

³⁷ See Broad River Filing at 13-14; Stony Knoll Filing at 14; Speedway Solar Filing at 14.

³⁸ See Broad River Filing at 14-15; Stony Knoll Filing at 15; Speedway Solar Filing at 15.

³⁹ See *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382, at 62,167-69 (1991) (*Edgar*); see also *Connecticut Light & Power Co.*, 90 FERC ¶ 61,195, at 61,633-34 (2000); *Aquila Energy Marketing Corp.*, 87 FERC ¶ 61,217, at 61,857-58 (1999); *MEP Pleasant Hill, LLC*, 88 FERC ¶ 61,027, at 61,059-60 (1999).

27. When an entity presents evidence seeking to satisfy the *Edgar* competitive bidding criteria, the Commission has required assurance that: (1) a competitive solicitation process was designed and implemented without undue preference for an affiliate; (2) the analysis of bids did not favor affiliates, particularly with respect to non-price factors; and (3) the affiliate was selected based on some reasonable combination of price and non-price factors.⁴⁰

28. In *Allegheny*, the Commission provided guidance as to how it will evaluate whether a competitive solicitation process satisfies the *Edgar* criteria.⁴¹ As the Commission stated in *Allegheny*, the underlying principle when evaluating a competitive solicitation process under the *Edgar* criteria is that no affiliate should receive undue preference during any stage of the process. The Commission stated that the following four guidelines will help the Commission determine if a competitive solicitation process satisfies that underlying principle: (1) Transparency: the competitive solicitation process should be open and fair; (2) Definition: the product or products sought through the competitive solicitation should be precisely defined; (3) Evaluation: evaluation criteria should be standardized and applied equally to all bids and bidders; and (4) Oversight: an independent third party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection.⁴² The *Edgar* criteria and *Allegheny* guidelines are designed to ensure that the transactions between affiliates do not unduly favor affiliates, and thereby protect captive customers from affiliate abuse.

29. As discussed below, we conclude that the competitive solicitation process described by Applicants satisfies the Commission's concerns regarding affiliate abuse. Accordingly, we will grant Applicants' requests for authorization to make affiliate sales to Duke Carolinas pursuant to the competitive solicitation process described in the filings. In the event that there are any changes in the facts and circumstances that the Commission is relying upon in granting Applicants waiver of the affiliate restrictions, Applicants must make a change in status filing with the Commission pursuant to 18 C.F.R. section 35.42.⁴³

1. Transparency Guideline

30. Applicants state that the Competitive Procurement RFP process has been transparent from the outset. First, they explain that it was the product of a legislative

⁴⁰ *Edgar*, 55 FERC at 62,168.

⁴¹ *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 (2004) (*Allegheny*); see also Order No. 697, 119 FERC ¶ 61,295 at P 540.

⁴² *Allegheny*, 108 FERC ¶ 61,082 at P 22.

⁴³ See also Order No. 652, 110 FERC ¶ 61,097.

process that resulted in a bill that provided for the Duke Utilities to procure renewable energy through an open and transparent competitive solicitation process and included the 30 percent limitation on Duke Energy bids. Second, they note that the North Carolina Commission implemented the statute through a comprehensive Competitive Procurement Rule and approved the Duke Utilities' proposed Competitive Procurement implementation program with limited modifications. Third, they add that the RFP was overseen by Accion, which was also responsible for evaluating all bids. Fourth, they explain that affiliate concerns are accounted for through North Carolina Commission rules, which were subject to public comment, and that restrictions are in place to ensure that communication regarding each RFP must be made through Accion. Fifth, they state that Accion verified that all participants had access to the same information for Tranche 1 and that all information concerning the bid eligibility rules, the *pro forma* PPA, and RFP milestone documents was and will continue to be available on Accion's public website. Thus, Applicants contend that the Competitive Procurement RFP for Tranche 1 was transparent.⁴⁴

31. Based on Applicants' representations, we find that the competitive solicitation process is consistent with the Commission's Transparency guideline.

2. Definition Guideline

32. Applicants argue that the competitive solicitation meets the Definition guideline by clearly describing the renewable energy products sought in the Competitive Procurement RFPs. Applicants explain that those products were first specified in a statute that detailed the renewable generating facilities that the Duke Utilities were required to procure. Applicants add that the general terms of the products sought were widely publicized through the North Carolina Commission Competitive Procurement proceedings and the specific terms for the sale of renewable energy were contained in a standard *pro forma* PPA that was approved by the North Carolina Commission following a public comment period that enabled comments by all interested stakeholders. Applicants also state that the RFP described the price and non-price criteria under which the bids were evaluated.⁴⁵

33. Based on Applicants' representations, we find that the competitive solicitation process is consistent with the Commission's Definition guideline.

⁴⁴ See Broad River Filing at 17-18; Stony Knoll Filing at 17-18; Speedway Solar Filing at 17-18.

⁴⁵ See Broad River Filing at 18-19; Stony Knoll Filing at 19; Speedway Solar Filing at 19.

3. Evaluation Guideline

34. Applicants contend that the competitive solicitation meets the Evaluation guideline. Applicants state that Accion administered all aspects of the bidding, bid evaluation, and selection of the winning bidders. Applicants explain that Accion, which was selected and approved by the North Carolina Commission as the Independent Administrator, has no financial interest in the outcome of the RFP, in the Duke Utilities, or in any of the bidders. Applicants add that Accion does not own any facilities that participate in the power markets and does not have market power in North Carolina or South Carolina. Applicants explain that Accion monitored all phases of the RFP and evaluated and ranked bids based on the price and non-price factors specified in the final RFP documents. As such, Applicants state that the solicitation used standardized evaluation criteria that was applied equally to all bidders and bids, and that the awards made pursuant to the RFP were based on stated price and non-price terms and publicly available RFP documents criteria. In addition, Applicants explain that, pursuant to the Competitive Procurement Rule, no market participants, including Applicants or the team established by the Duke Utilities to prepare bids, were permitted to communicate with the team that evaluated the bids.⁴⁶

35. Based on Applicants' representations, we find that the competitive solicitation process is consistent with the Commission's Evaluation guideline.

4. Oversight Guideline

36. Finally, Applicants argue that the Tranche 1 RFP satisfies the Oversight guideline. They state that an independent entity administered the bidding and evaluated bids, and that entity has no financial interest in the outcome of the solicitation or in any of the bidders, including Applicants, and does not own any facilities that participate in power markets. They add that Accion, which was approved by the North Carolina Commission with no objection from any stakeholder, monitored all phases of the solicitation process and independently evaluated and ranked the bids that were submitted. Applicants also state that the North Carolina Commission has required the Duke Utilities to submit a detailed report following the Tranche 1 solicitation.⁴⁷

37. Based on Applicants' representations, we find that the competitive solicitation process is consistent with the Commission's Oversight guideline.

⁴⁶ See Broad River Filing at 19; Stony Knoll Filing at 19-20; Speedway Solar Filing at 19-20.

⁴⁷ See Broad River Filing at 19-20; Stony Knoll Filing at 20; Speedway Solar Filing at 20.

C. Other Waivers, Approvals, and Authorizations

38. Applicants request the following waivers and authorizations: (1) waiver of the filing requirements of subparts B and C of Part 35 of the Commission's regulations, except sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of the accounting and other requirements of Parts 41, 101, and 141 of the Commission's regulations, except sections 141.14 and 141.15; and (3) blanket authorization under section 204 of the FPA⁴⁸ and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

39. We grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations.⁴⁹ Notwithstanding the waiver of the accounting and reporting requirements, we expect Applicants to keep their accounting records in accordance with generally accepted accounting principles.

⁴⁸ 16 U.S.C. § 824c (2012).

⁴⁹ We note that the Commission has examined and approved the continued applicability of the waiver of its accounting and reporting requirements in Parts 41, 101, and 141 of the Commission's regulations, as well as the continued applicability of the blanket authorization for the issuance of securities and the assumption of liabilities in Part 34 of the Commission's regulations. *See* Order No. 697, 119 FERC ¶ 61,295 at PP 984-985 (regarding waiver of Parts 41, 101, and 141) and PP 999-1000 (regarding blanket approval under Part 34). However, waiver of the provisions of Part 101 that apply to hydropower licensees is not granted with respect to licensed hydropower projects. Hydropower licensees are required to comply with the requirements of the Uniform System of Accounts pursuant to 18 C.F.R. Part 101 to the extent necessary to carry out their responsibilities under Part I of the FPA. We further note that a licensee's status as a market-based rate seller under Part II of the FPA does not exempt it from its accounting responsibilities as a licensee under Part I of the FPA. *See* Order No. 816, 153 FERC ¶ 61,065 at PP 345-350; *Seneca Generation, LLC*, 145 FERC ¶ 61,096, at P 23 n.20 (2013) (citing *Trafalgar Power, Inc.*, 87 FERC ¶ 61,207, at 61,798 (1999) (noting that "all licensees are required to comply with the requirements of the Uniform System of Accounts to the extent necessary to carry out their responsibilities under [s]ections 4(b), 10(d) and 14 of the FPA")). *See also* Order No. 697, 119 FERC ¶ 61,295 at P 983 & n.1126 (granting waiver of subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except for 18 C.F.R §§ 35.12(a), 35.13(b), 35.15 and 35.16).

D. Reporting Requirements

40. An entity with market-based rate authorization must file an Electric Quarterly Report (EQR) with the Commission, consistent with Order No. 2001⁵⁰ and Order No. 768,⁵¹ to fulfill its responsibility under FPA section 205(c)⁵² to have rates on file in a convenient form and place.⁵³ Applicants must file EQRs electronically with the Commission consistent with the procedures set forth in Order No. 770.⁵⁴ Failure to timely and accurately file an EQR is a violation of the Commission's regulations for which Applicants may be subject to refund, civil penalties, and/or revocation of market-based rate authority.⁵⁵

⁵⁰ *Revised Public Utility Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, 125 FERC ¶ 61,103 (2008).

⁵¹ *Elec. Mkt. Transparency Provisions of Section 220 of the Fed. Power Act*, Order No. 768, 140 FERC ¶ 61,232 (2012), *order on reh'g*, Order No. 768-A, 143 FERC ¶ 61,054 (2013).

⁵² 16 U.S.C. § 824d(c) (2012).

⁵³ *See Revisions to Electric Quarterly Report Filing Process*, Order No. 770, 141 FERC ¶ 61,120, at P 3 (2012) (citing Order No. 2001, 99 FERC ¶ 61,107 at P 31).

⁵⁴ *Id.*

⁵⁵ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2018). Forfeiture of market-based rate authority may require a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

41. Additionally, Applicants must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.⁵⁶

42. In Order No. 697, the Commission created two categories of sellers.⁵⁷ Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888⁵⁸); that are not affiliated with anyone that owns, operates, or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.⁵⁹ Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.⁶⁰

43. Applicants represent that they are Category 2 sellers in the Southeast region. Applicants represent that they meet the requirements for Category 1 sellers in the Central, Southwest, Southwest Power Pool, Northeast, and Northwest regions because: (i) Applicants and their affiliates own or control less than 500 MW of generation in each of these respective regions; (ii) Applicants do not own, operate or control any transmission facilities in any of these regions; (iii) Applicants are not affiliated with a

⁵⁶ 18 C.F.R. § 35.42; *see also* Order No. 652, 110 FERC ¶ 61,097.

⁵⁷ Order No. 697, 119 FERC ¶ 61,295 at P 848.

⁵⁸ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁵⁹ 18 C.F.R. § 35.36(a) (2018).

⁶⁰ Order No. 697, 119 FERC ¶ 61,295 at P 850.

franchised public utility in these regions; and (iv) Applicants do not raise any other vertical market power issues in these regions.

44. Based on Applicants' representations, we designate Applicants as Category 2 sellers in the Southeast region and Category 1 sellers in the Central, Southwest, Southwest Power Pool, Northeast, and Northwest regions. Applicants must file an updated market power analysis for the Southeast region in compliance with the regional reporting schedule adopted in Order No. 697.⁶¹ The Commission also reserves the right to require such an analysis at any time for any region.⁶²

45. This order satisfies the requirement that Applicants must first receive Commission authorization, pursuant to section 205 of the FPA, before engaging in power sales at market-based rates for the instant affiliate sales. We note that Applicants must receive prior approval from the Commission under section 205 of the FPA for any other sales to affiliates with a franchised electric service territory and captive customers.⁶³

The Commission orders:

(A) Applicants' respective market-based rate tariffs are hereby accepted for filing, effective July 10, 2019, as discussed in the body of this order.

(B) Waiver of the provisions of subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16, is hereby granted.

(C) Waiver of Part 101 of the Commission's regulations is hereby granted, with the exception that waiver of the provisions of Part 101 that apply to hydropower licensees is not granted with respect to licensed hydropower projects. Waiver of Parts 41 and 141 of the Commission's regulations is hereby granted, with the exception of sections 141.14 and 141.15.

(D) Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is hereby granted. Applicants are hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate

⁶¹ *Id.*

⁶² *Id.* P 853.

⁶³ See *San Diego Gas & Electric Co.*, 164 FERC ¶ 61,011, at P 21 (2018) (citing 18 C.F.R. § 35.39(b)).

purposes of Applicants, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(E) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of Applicants' issuance of securities or assumptions of liability.

(F) Applicants are hereby required to file EQRs in compliance with Order Nos. 2001 and 768. If the effective dates of Applicants' respective market-based rate tariffs fall within a quarter of the year that has already expired, Applicants' EQRs for the expired quarter are due within 30 days of the date of this order.

(G) Applicants' requests for authorization to make affiliate sales at market-based rates to Duke Carolinas pursuant to the competitive solicitation process described in their filings are hereby granted, as discussed in the body of this order.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.