Action Item 3

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
COMMISSION DIRECTIVE

ADMINISTRATIVE MATTER	☐	DATE	**March 07, 2018**
MOTOR CARRIER MATTER	☐	DOCKET NO.	**2016-41-E/2016-42-E**
UTILITIES MATTER	☑	ORDER NO.	**2018-162**

THIS DIRECTIVE SHALL SERVE AS THE COMMISSION'S ORDER ON THIS ISSUE.

SUBJECT:
DOCKET NO. 2016-41-E - Power Purchase Agreement between Duke Energy Progress, LLC and Olanta Solar, LLC;

-and-

DOCKET NO. 2016-42-E - Power Purchase Agreement between Duke Energy Progress, LLC and Dillon Solar, LLC - Staff Presents for Commission Consideration the Request for Acceptance of the Filings of the Power Purchase Agreements between Duke Energy Progress, LLC, Olanta Solar, LLC, and Dillon Solar, LLC, along with Requests for Confidential Treatment of the Agreements.

COMMISSION ACTION:
The issue before us in these two dockets concerns a dispute between Duke Energy Progress, LLC and the Office of Regulatory Staff over the confidential treatment of information contained in utility scale solar power purchase agreements.

Duke asserts that these agreements contain competitively sensitive information that is not subject to disclosure under Section 30-4-40(a)(1) of the Freedom of Information Act. The company claims that competition in the utility scale solar market makes the negotiated terms of power purchase agreements valuable to solar companies wishing to interconnect to its electric grid, and that costs to ratepayers are reduced by keeping this information confidential when individual solar companies must negotiate without the advantage of knowing the terms of other agreements. In other words, the confidentiality of the agreements' terms protects the company's ability to negotiate and reduces costs to ratepayers. Examples of confidential terms in the agreements provided by Duke include such things as the commercial operating date and liquidated damages provisions.

ORS maintains customers have a right to see the information because the utility will seek to recover its solar costs from ratepayers. It states that the Commission's statutory provision regarding confidentiality at Section 58-4-55(C) only applies to uncontested proceedings and is not relevant here, since ORS is challenging confidentiality. Instead, ORS contends the prevailing statute that applies in this instance is under Freedom of Information Act Section 30-4-40(a)(5) regarding a public body's discretion to exempt information from disclosure when it pertains to documents incidental to proposed contract arrangements or information used in negotiating contracts. Under this theory, ORS concludes that insufficient support for confidentiality exists, since the agreements at issue are completed and therefore not proposed or in the negotiation process.

ORS also argues that regardless of the rule we adopt to govern disclosure of these power purchase agreements, the burden is on the utility to prove confidentiality. To make this point, ORS states the South Carolina Rule of Civil Procedure 41.1(7) places the burden on the utility to show there is a legitimate and compelling reason to keep the information from the public and this reason outweighs the public interest in favor of disclosure.

I disagree with ORS. Section 58-4-55(C) applies in this instance and explains the specific procedure for dealing with the confidentiality issue raised by ORS. Since these agreements are merely accepted for

ACCEPTED FOR PROCESSING - 2018 March 7 3:55 PM - SCPSC - 2016-41-E - Page 1 of 3

filing under Order No. 1981-214 and are not originally contested, I do not believe that challenging the confidentiality of a power purchase agreement causes the subject matter of the underlying docket to become a contested proceeding. This statute is intended to govern how a utility, ORS, and the Commission interact with confidential information in an uncontested setting and specifically provides a path for ORS to object to confidential treatment. If an objection by ORS caused the underlying subject matter to become "contested" pursuant to Section 58-4-55(C), the statute would be internally inconsistent. However, principles of statutory construction require this Commission to interpret the statute so as to avoid such a result.

As I read Section 58-4-55(C), once a utility provides ORS with information that it designates as confidential, it is ORS's burden to petition the Commission for an order that some or all of it is not entitled to protection from public disclosure. Only then is it incumbent on the utility to prove that such information is entitled to protection. Unless the commission's order on such a petition contains a finding to the contrary, all documents or information designated as confidential or proprietary pursuant to this subsection are exempt from public disclosure under the provisions of the Freedom of Information Act.

As such, I move that the Commission find the redacted material in the power purchase agreements at issue is entitled to protection under 30-4-40(a)(1) cited by the Utility. The material is competitively sensitive and could prevent the Company from negotiating contracts which are more favorable to the Company, and as a result, more favorable to ratepayers. A solar developer will seek to charge a high cost for power to maximize its gains, while the utility will seek to pay a low cost for power. The utility customer will be charged whatever rate is negotiated. It is not in the public interest to limit a company's ability to negotiate better contract terms for power purchase agreements.

Next, I find that ORS's reliance on Freedom of Information Act Section 30-4-40(a)(5) is misplaced. This statute does not rule out confidentiality once information is no longer incidental to proposed contract arrangements and contract negotiation is completed by a finalized agreement. This provision simply no longer applies once formation of the contract is complete. Further, all documents or information designated as confidential or proprietary pursuant to Section 58-4-55(C) are specifically exempt from public disclosure under the provisions of the Freedom of Information Act. Therefore, upon such a finding by the Commission, 30-4-40(a)(5) is simply not a relevant standard.

Further, when examining Rule 41.1(b), it becomes clear that Rule 41.1 only applies if Rule 26(b)(5), regarding the exchange of information between parties in the context of civil litigation, is inapplicable, and <u>there is no other governing law</u>. Rule 26(b)(5) does not apply in administrative proceedings before the Commission, and therefore I find that it is inapplicable in this context. The Commission's statute, Section 58-4-55(C) is the "other governing law" in this matter, therefore making Rule 41.1 similarly inapplicable to the question before us. The specific provisions of Section 58-4-55(C) govern the result here, not civil procedure rules.

In summary, Section 58-4-55(C) is specific to practice before the Commission, and governs in this case instead of the more generally applicable Section 30-4-40(a)(5) of the Freedom of Information Act or Rule 41.1(7) of the South Carolina Rules of Civil Procedure. In the circumstance where the Commission accepts these power purchase agreements for filing and the matter is thus uncontested, this ruling maintains that the burden is on ORS to object to confidential treatment when it believes that such information is not entitled to protection from public disclosure. It then becomes the utility's burden to rebut that position. If the Commission is persuaded by the utility's arguments, the material over which the utility claimed confidentiality remains protected. Absent an order to the contrary, all documents or information designated as confidential or proprietary pursuant to this subsection are exempt from public disclosure under the Freedom of Information Act provisions.

Accordingly, in the Dockets before the Commission, I am persuaded by the utility's arguments, and therefore, I move that the Commission accept the power purchase agreements for filing, and grant confidential treatment to the provisions of the agreements designated by the Company as confidential.

PRESIDING: <u>Whitfield</u> SESSION: <u>Regular</u> TIME: 2:00 p.m.

ACCEPTED FOR PROCESSING - 2018 March 7 3:55 PM - SCPSC - 2016-41-E - Page 2 of 3

	MOTION	YES	NO	OTHER
BOCKMAN	☑	☑	☐	
ELAM	☐	☑	☐	
FLEMING	☐	☑	☐	
HAMILTON	☐	☑	☐	
HOWARD	☐	☑	☐	
RANDALL	☐	☑	☐	
WHITFIELD	☐	☐	☐	Not Voting

Absent day of Oral Arguments

(SEAL)

RECORDED BY: J. Schmieding

ACCEPTED FOR PROCESSING - 2018 March 7 3:55 PM - SCPSC - 2016-41-E - Page 3 of 3