OFFICIAL COPY

POYNER & SPRUILL LLP
ATTORNEYS-AT-LAW

W. Mark Griffith
Attorney-at-Law

Direct Dial: 919.783.1062
wgriffith@poynerspruill.com

www.poynerspruill.com

Other offices: Charlotte, Rocky Mount, Southern Pines

September 22, 2008

VIA HAND DELIVERY

Ms. Renne C. Vance, Chief Clerk
North Carolina Utilities Commission
430 N. Salisbury Street
5th Floor – Clerks Office
4325 Mail Service Center
Raleigh, NC 27699-4325

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N.C. Utilities Commission

Re: NCUC Docket E-100, Sub 121

Dear Ms. Vance:

We are legal counsel to ElectriCities of North Carolina, Inc. Enclosed for filing in the above-referenced docket are an original and thirty (30) copies of the Initial Comments of ElectriCities of North Carolina, Inc.

Also enclosed is an additional copy of the document to be stamped as "filed" and returned to me via my courier.

Thank you for your assistance in this matter.

Very truly yours,

POYNER & SPRUILL LLP

W. Mark Griffith

WMG:dll
Enclosures

cc: Parties of Record

clerk
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Jones
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Accts 3
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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-100, SUB 121

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Implementing a Tracking System for Renewable Energy Certificates Pursuant to Session Law 2007-397	)	**INITIAL COMMENTS OF ELECTRICITIES OF NORTH CAROLINA, INC.**

NOW COMES ElectriCities of North Carolina, Inc. ("ElectriCities"), through its attorneys, Poyner & Spruill LLP, and acting for and on behalf of the municipalities that sell electric power to retail electric power customers in the State of North Carolina, submits the comments herein to the Commission Order Establishing Process for Defining REC Tracking System Requirements and Selecting a Provider (the "Order") issued by the North Carolina Utilities Commission ("Commission") on September 4, 2008.

ElectriCities is a "joint municipal assistance agency" organized pursuant to the Joint Municipal Electric Power and Energy Act (the "Act") for the purpose of providing aid and assistance to the North Carolina Eastern Municipal Power Agency ("Eastern Agency") and the North Carolina Municipal Power Agency Number 1 ("Agency 1") in connection with their functions as "joint agencies" under the Act, and to their 51 members, all of which are North Carolina municipalities with electric distribution systems (each a "Participant Member," and collectively, the "Participant Members"). ElectriCities also provides aid and assistance to 17

other North Carolina municipalities with electric distribution systems that are not members of either Agency 1 or Eastern Agency, as well as three (3) university (non-municipal) systems.

This Docket was initiated by the Commission in response to the Petition of the North Carolina Sustainable Energy Association ("NCSEA") filed July 17, 2008, requesting the Commission to investigate, evaluate, and adopt criteria for a renewable energy certificate ("REC") tracking system to assist in determining compliance with the Renewable Energy and Energy Efficiency Portfolio Standards legislation enacted into law on August 20, 2007, as Session Law 2007-397, and codified at N.C.G.S. §62-133.8 (the "REPS Legislation"). That Petition was filed in Docket No. E-100, Sub 113, and was followed by the filing by the Public Staff on July 21, 2008, of its comments and recommendations concerning the same. In its Order, the Commission initiated this proceeding "in order to move ahead with efforts to define the requirements for a third-party REC tracking system and its administrator, with the intent of issuing a Request for Applications (RFA) in late 2008 and selecting a provider during the first quarter of 2009." With its Order, the Commission attached a draft "Requirements Document" (the "Requirements Document") which provided, among other things, that the REC tracking system ("NC-RETS") "will be required to track each individual utility's compliance against its individual statutory requirements, as well as its contribution toward the statewide aggregated goals for swine and poultry waste resources." In its Order, the Commission asked that North Carolina electric power suppliers, independent generators, customers, and other interested parties comment on and participate in the Commission's REC tracking system provider selection process, and also provided that a stakeholder group comprised of parties and other interested persons meet on September 26, 2008, to explore the parties' comments and finalize the Requirements Document. The Commission has scheduled November 3, 2008, for potential

applicants to make presentations before the Commission, and November 14, 2008, as the deadline by which the parties to this Docket must "provide comments regarding the criteria that should be used by the Commission in evaluating applications submitted by applicants." In response to the Order, ElectriCities submits the following comments:

1. The Commission appears to reach certain legal conclusions in the Requirements Document that are not supported by the REPS Legislation.

The Commission seems to have concluded in the Requirements Document that a REC may only be used to comply with a set-aside set forth in subsections (d), (e) or (f) of N.C.G.S. § 62-133.8 if that REC has been generated by the renewable energy resource that is the subject of that set-aside (solar, swine waste, or poultry waste, respectively, hereafter a "set-aside renewable energy resource"). Such a conclusion is not supported by the REPS Legislation. In its first paragraph on page 4, the Requirements Document provides that "RECs derived from swine waste resources and poultry waste resources apply toward both the utility-specific calendar-year requirements as well as toward statewide aggregated requirements, as shown below." In its continuing paragraph on the top of page 6, the Requirements Document provides that the "Commission will notify the NC-RETS Administrator when it certifies a generating facility as being eligible to have its RECs counted toward REPS compliance, including informing the NC-RETS Administrator as to whether the generating facility meets the definition of a "new" renewable energy facility ***and whether its RECs can appropriately count toward the set-asides for solar energy resources, swine waste resources, or poultry waste resources.***" Nothing contained in N.C.G.S. 62-133.8, however, distinguishes RECs by the renewable energy resource from which they are generated, or provides that only RECs generated from set-aside renewable energy resources may be used to comply with the set-asides.

Sections (b)(2)(e) and (c)(2)(d) of N.C.G.S. § 62-133.8 provide that an electric public utility and a municipality, respectively, "may meet the requirements of this section" (the term "section" meaning the requirements of N.C.G.S. § 62-133.8 as a whole section in contrast to a subsection of N.C.G.S. § 62-133.8 such as (b)(2)(e) or (c)(2)(d)) by purchasing RECs derived from in-State or out-of-state new renewable energy facilities in the case of electric public utilities, and from in-State or out-of-state renewable energy facilities in the case of municipalities and cooperatives. Furthermore, Rule R8-67(d)(1) provides that a "renewable energy certificate may be used to comply with N.C.G.S. 62-133.8(b), (c), (d), (e) and (f) in the year in which it is acquired or obtained by an electric power supplier or in any subsequent year, with the caveat that an electric public utility must use a renewable energy certificate to comply with N.C.G.S. 62-133.8(b), (d), (e) and (f) within seven years of cost recovery pursuant to subsection (e)(10) of this Rule."

The REPS Legislation simply makes no distinction between RECs generated from a set-aside renewable energy resource and RECs generated from any other renewable energy resource, in the same manner as it makes no distinction among the types of "incremental costs" incurred by an electric power supplier that will comply with the REPS Legislation.[1] The only statutory qualifications to the use of RECs to comply with N.C.G.S. § 62-133.8 are that (i) they be derived from in-State or out-of-state new renewable energy facilities in the case of electric public utilities, and from in-State or out-of-state renewable energy facilities in the case of municipalities and cooperatives; and (ii), in the case of electric public utilities, municipalities and cooperatives, that RECs derived from out-of-state renewable energy facilities shall not be used to meet more

[1] N.C.G.S. § 62-133.8(h)(3) provides that an "electric power supplier shall be conclusively deemed to be in compliance with the requirements of subsections (b), (c), (d), (e), and (f) of this section if the electric power supplier's total annual incremental costs incurred equals an amount equal to the per-account annual charges set out in subdivision (4) of this subsection applied to the electric power supplier's total number of customer accounts determined as of December 31 of the previous calendar year."

than twenty-five percent of that electric power supplier's requirements under N.C.G.S. § 62-133.8.

The qualification made by the Commission in the Requirements Document that only RECs generated from set-aside renewable energy resources may be used to comply with the set-asides is simply not supported by the REPS Legislation. Furthermore, as an added note, there is no instance in any of its rules implementing REPS, or in any of its Orders in Docket E-100, Sub 113, in which the Commission has made this distinction and new qualification to an electric power supplier's use of RECs to comply with the set-asides. Such a distinction and qualification is inconsistent with and contrary to the REPS Legislation, and thus beyond the Commission's rulemaking authority under North Carolina law. The Commission has no authority to regulate, or impose duties upon, a public utility except insofar as that authority has been conferred upon the Commission by Chapter 62 of the General Statutes, liberally construed to effectuate the policy of the State announced therein. State of North Carolina ex rel Utilities Commission v. Atlantic Coast Line Railroad Company, 268 N.C. 242, 245, 150 S.E.2d 386, 389 (1966).

2. The stakeholder group should be included in the process of reviewing the applications submitted in response to the Requirements Document.

It is unclear from the Order whether members of the stakeholder group will be allowed to actually review and evaluate applications submitted in response to the Requirements Document. Members of the stakeholder group should be included in the process of reviewing the submitted applications because they can evaluate and comment on the day-to-day practical administration of NC-RETS and the sufficiency of an applicant's proposal in consideration of the same. By allowing the stakeholder group to participate in the review of the applications and selection of the applicant, the Commission and electric power suppliers may avoid unnecessary confusion

and inefficiencies in the day-to-day practical administration of NC-RETS prior to its implementation.

3. The Requirements Document should require the applicant to discuss the design features of its tracking system that encourage, rather than discourage, participation by generators, brokers, and other users in NC-RETS.

In order for NC-RETS and REPS to be successful, NC-RETS must be (i) compatible with other REC tracking systems operating and to be operated throughout the United States, such as ERCOT, NEPOOL/GIS, GATS, WREGIS, and M-RETS; (ii) flexible so that it may be compatible with new and amended statutes, regulations, and rules governing REPS, or potentially, a national renewable energy portfolio standard; (iii) user-friendly; and (iv) cost-effective. The fewer impediments or administrative difficulties there are to participation in NC-RETS, and the more compatible NC-RETS is with existing tracking systems to which generators, brokers, and other potential users have become accustomed, the more opportunities there will be for electric power suppliers to comply with REPS efficiently, and thus, the more successful REPS will be.

The Commission should stress these objectives to the applicants in the Requirements Document, and insist that each applicant specifically address these objectives in its application and submittals. For instance, as part of its application, an applicant should be required to submit its standard user agreement to be reviewed by the Commission and the stakeholder group. The user agreement will be of vital importance to the acceptance of NC-RETS by those parties not obligated to comply with REPS, generators, or other entities that are providing RECs for purchase by electric power suppliers. An unnecessarily onerous or "one-sided" user agreement will have an adverse effect on the acceptance of NC-RETS by those out-of-state brokers, generators, and other parties not obligated to comply with REPS.

As stated above, if NC-RETS presents too much of an administrative burden (or incompatibility with other existing tracking systems to which sellers have become accustomed) for sellers of RECs, the result will be fewer RECs available for sale in North Carolina, higher costs for REPS compliance, and the diminished overall success of REPS.

4. The Requirements Document should obligate the applicant to discuss how its tracking system has been designed to improve upon existing tracking systems.

The applicant should be required as part of its application to identify problems heretofore encountered with existing tracking systems and discuss how its proposed tracking system has been designed to avoid such problems, whether that be through the applicant's tracking system being designed to be more operationally efficient, cost-effective or user-friendly. As part of that discussion, the applicant should be encouraged to compare and contrast its tracking system to existing tracking systems, and to discuss the design benefits of its tracking system. The overall success of REPS will be directly affected by the degree to which NC-RETS is user-friendly and cost-effective.

5. The Commission should correct Section X(7) of the Requirements Document to accurately reflect that RECS may not be generated from demand-side management measures, and revise Sections X(7) and X(11) of the Requirements Document to clarify whether the Commission is requiring an independent third party to verify energy consumption reductions resulting from energy efficiency and demand side management programs administered by municipalities.

Section X(7) of the Requirements Document must be corrected because it mistakenly provides that RECS may be generated from demand-side management measures: "NC-RETS shall establish an EE/DSM Account for each utility and generate RECS based on data provided by an independent third party as approved by the Commission." A REC cannot be generated,

however, from demand-side management measures because the definition of renewable energy certificate in N.C.G.S. § 62-133.8(a)(6) does not include (or conspicuously omits) demand side management measures as a generator of RECS:

> "'Renewable energy certificate' means a tradable instrument that is equal to one megawatt hour of electricity or equivalent energy supplied by a renewable energy facility, new renewable energy facility, or reduced by implementation of an energy efficiency measure[2] that is used to track and verify compliance with the requirements of this section as determined by the Commission. A 'renewable energy certificate' does not include the related emission reductions, including, but not limited to, reductions of sulfur dioxide, oxides of nitrogen, mercury, or carbon dioxide."

The Commission has previously confirmed this position in Issue 31 on page 52 of its Order Adopting Final Rules, dated February 29, 2008: "The Commission concludes that the definition of an REC should not be expanded by Commission rule to include DSM, which is not included in the statutory definition."

In addition, the Commission should revise Sections X(7) and X(11) of the Requirements Document to clarify whether the Commission is now requiring an independent third party to verify energy consumption reductions resulting from energy efficiency and demand side management programs administered by municipalities. Both Sections X(7)[3] and X(11)[4] currently provide for an independent third party to verify the reduced energy consumption achieved through energy efficiency and demand-side management measures administered by "each utility", according to Section X(7), and "per generating unit", according to Section X(11). Because of the Commission's use of the terms "each utility" and "per generating unit" rather

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[2] The definition of "energy efficiency measure" in N.C.G.S. § 62-133.8(a)(4) specifically excludes demand-side management."

[3] Section X(7) provides: "NC-RETS must be able to generate RECs from verified energy consumption reductions resulting from utility energy efficiency and demand side management programs. NC-RETS shall establish an EE/DSM Account for each utility and generate RECs based on data provided by an independent third party as approved by the Commission.

[4] Section X(11) provides: NC-RETS must issue RECs once a month per generating unit, assuming that the unit has qualifying entries in its log. RECs for reduced energy consumption shall be issued annually or as otherwise verified by an independent third party.

than the terms "electric power supplier," "electric public utility," "electric membership corporation," and "municipality", which are terms used in the REPS Legislation and the rules implementing the REPS Legislation, it is not clear whether the Commission now intends for an independent third party verification requirement as stated in Sections X(7) and X(11) to apply to all electric power suppliers (including municipalities) or only to electric membership corporations and electric public utilities whose energy efficiency and demand-side management measures are subject to the approval of the Commission pursuant to N.C.G.S. § 62-133.9(c).[5]

The Commission should thus correct Section X(7) to accurately reflect that a REC cannot be generated from demand-side management measures, and revise Sections X(7) and X(11) to clarify whether the Commission intends to require an independent third party to verify energy consumption reductions resulting from energy efficiency or demand side management programs administered by municipalities.

6. The Commission should revise the Requirements Document to address how a compliance report may be produced in NC-RETS when not all compliance mechanisms in N.C.G.S. § 62-133.8 produce, or are calculated with, RECS.

Section X(8) of the Requirements Document provides that "NC-RETS must be able to create annual compliance reports that are unique to the standards required of each kind of utility, be it an electric public utility, an EMC or a municipal utility." If it is the Commission's intent to

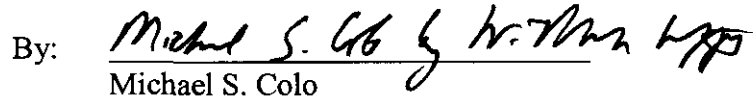
[5] For instance, according to Commission Rule R8-68(c)(3)(iii) implementing N.C.G.S. § 62-133.9, electric public utilities, in any application for approval of a new or modified demand-side management or energy efficiency measure, must describe the "industry-accepted methods to be used to measure, verify and validate the energy and peak demand savings estimated [in the application] and shall provide a schedule for reporting the savings to the Commission. The electric public utility shall be responsible for the measurement and verification of energy and peak demand savings and may use the services of an independent third party for such purpose." There is no such requirement imposed by N.C.G.S. § 62-133.8 or Commission Rule R8-67 upon municipalities.

use NC-RETS as a vehicle to create accurate and comprehensive annual compliance reports, NC-RETS must be designed to incorporate all REPS compliance information including that information which is unassociated with REC generation. For instance, in any given compliance year, according to N.C.G.S. § 62-133.8(c)(2)(c), municipalities may meet up to 30% of their REPS requirements through allocations from the Southeastern Power Administration ("SEPA"), yet according to the definition of renewable energy certificate in N.C.G.S. § 62-133.8(a)(6), energy from SEPA does not generate RECs. Likewise, in any given compliance year, according to N.C.G.S. § 62-133.8(c)(2)(b), municipalities may meet their REPS requirements through reduced energy consumption through the implementation of demand-side management measures, yet, as discussed above in Section 5, reduced energy consumption through demand-side management measures does not produce RECs according to N.C.G.S. § 62-133.8(a)(6). As a third example, the opt-out by an industrial or commercial customer pursuant to N.C.G.S. § 62-133.9(f) does not produce RECs either, but it reduces the REPS compliance requirements of that electric power supplier serving that industrial or commercial customer. Finally, since an electric power supplier may comply with its REPS obligations by meeting or exceeding the cost cap threshold, NC-RETS must be designed to incorporate that information as well.

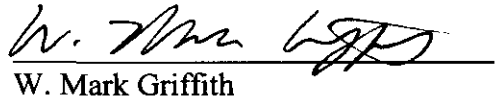
Information regarding the use of SEPA allocations, energy reductions resulting from DSM, the exclusion of the load of "opt-out" industrial or commercial customers, and the inclusion of the cost cap threshold must be incorporated into NC-RETS in order for NC-RETS to produce accurate annual compliance reports. In sum, in order for NC-RETS to produce accurate annual compliance reports, it must contemplate the incorporation of compliance information unassociated with RECs.

Respectfully submitted this the 22nd day of September, 2008.

POYNER & SPRUILL LLP

By: 

Michael S. Colo
Post Office Box 353
Rocky Mount, North Carolina
27802-0353
Telephone: 252.972.7105
E-Mail: mscolo@poyners.com

By: 

W. Mark Griffith
Post Office Box 10096
Raleigh, North Carolina 27605-0096
Telephone: 919.783.1062
E-Mail: mgriffith@poyners.com

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing document has been served upon all parties of record by depositing copies thereof in the United States mail, first class postage prepaid.

This the 22nd day of September, 2008.

POYNER & SPRUILL LLP

By: 

W. Mark Griffith
Post Office Box 10096
Raleigh, North Carolina 27605-0096
Telephone: 919.783.1062
E-Mail: mgriffith@poyners.com