

STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH  
DOCKET NO. SP-13243, Sub 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	SUPPLEMENTAL AND
Requests for Declaratory Rulings of	)	AMENDED REQUESTS FOR
GESS International North Carolina, Inc.	)	DECLARATORY RULINGS

Pursuant to North Carolina Utilities Commission (“Commission”) Rule R1-5, GESS International North Carolina, Inc. (“GESS” or the “Petitioner”) herewith supplements and amends its Requests for Declaratory Rulings originally filed in this Docket (the “Requests”). This filing supplements with updated information and amends and replaces completely the original Requests for Declaratory Rulings filed in this Docket to address concerns raised by Piedmont Natural Gas Company, Inc. (“Piedmont”) regarding the original Petition and a contemporaneous Application filed by GESS in this Commission’s Docket G-9, Sub 728.<sup>1</sup>

GESS respectfully requests that the Commission issue declaratory rulings that, by virtue of the proposed activities of GESS described below, GESS will not be a “public utility” within the meaning of N.C. Gen. Stat. § 62-3(23)(a), nor will it be engaged in the “construction or operation of any public utility plant ... directly or indirectly ...” within the meaning of N.C. Gen. Stat. § 62-110 (a), or operating a “facility for ... directly or indirectly furnishing ... public utility service” within the meaning of N.C. Gen. Stat. § 62-

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<sup>1</sup> Piedmont made its initial filing in Docket G-9, Sub 728, but asked that its filing also be deemed to address the original Requests filed in this Docket. After working with Piedmont to address its concerns, GESS filed its Supplemental and Amended Application in Docket G-9, Sub 728, on January 2, 2019. This Supplemental and Amended Requests for Declaratory Rulings is intended to conform the Requests for Declaratory Rulings on record with the Commission with that Supplemental and Amended Application.

110.1(a), and that it will not be a “utility” within the definition in Commission Rule R6-2(a).

GESS also requests declaratory rulings that its proposed plants, if constructed and operated in accordance with this Request, will produce a biogas output from the plants using a “renewable energy resource”, specifically as the output of biomass resources, i.e., animal waste and agricultural waste; further, that when used in the generation of electric power, the Alternative Gas delivered by GESS qualifies for the production of Renewable Energy Certificates (“RECs”) for use by a qualifying “electric power supplier”, as statutorily defined, to meet the Renewable Energy And Energy Efficiency Standards (“REPS”) of N.C. Gen. Stat. § 62-133.8; and, provided that the blend of the biomass resources used at each production plant are measured using validated methods to determine the proportion of waste inputs used, that those portions of the gaseous output of the feed stock blend attributed to swine manure or poultry waste shall qualify for RECs suitable for compliance with the REPS for swine-waste or poultry waste resources, respectively, and that the balance of that output will qualify for general RECs under N.C. Gen. Stat. § 62-133.8(e). In support of its request for these declaratory rulings, GESS hereby submits the following to the Commission.

#### **PETITIONER**

1. GESS is a North Carolina domestic corporation with its principal place of business in Raleigh, North Carolina.
2. Correspondence in connection with this Supplemental and Amended Request should be sent as follows:

GESS International North Carolina, Inc.  
c/o Mr. Shaun Lee  
3700 National Drive, Suite 100  
Raleigh, NC 27612

(805) 334-6777  
shaun.lee@gessinternational.com

with a copy to Counsel for the Petitioner as follows:

Joseph W. Eason  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
4140 ParkLake Avenue, Suite 200  
Raleigh, NC 27612  
(919) 329-3807  
joe.eason@nelsonmullins.com

Petitioner and its Counsel agree to electronic service.

3. The Commission issued its Appendix F Order on June 19, 2018, in Docket No. G-9, Sub 698. Subject to the Commission's approval of this Requests, the execution and approval of the final Receipt Agreement(s) to be reached with Piedmont, and the approval of GESS's previously filed Supplemental And Amended Application for pilot plan participation, GESS plans to sell and deliver to Duke Energy Carolinas, LLC, "for itself and as agent for and on behalf of Duke Energy Progress, LLC" ("DEC" and "DEP", respectively), a portion of its Alternative Gas, as defined in the Appendix F Order, p.1, note 1, following the construction, testing and commercial operation of five (5) proposed anaerobic digester plants in five (5) different counties of the State.

4. GESS is informed and believes that DEC and DEP are existing customers of Piedmont, and are likely to use the waste-based Alternative Gas produced by GESS using swine waste, agricultural "green waste", and in some instances, poultry waste, to generate electric power in connection with meeting the State's Renewable Energy Portfolio Standards. GESS also plans to sell the associated Environmental Attributes associated with the Alternative Gas to these purchasers of its Alternative Gas.

5. Petitioner, through affiliates, has applied for Receipt Agreements with Piedmont for three injection points on the pipelines of Piedmont to serve five (5) bio-digester plants being developed by the Petitioner. The final form of the Receipt Agreements with Piedmont have not yet been agreed upon. GESS seeks declaratory rulings as requested herein to address questions regarding the status of GESS as a “public utility”, and regarding certain other issues pertaining to the quantity and types of RECs GESS can expect to obtain from the production plants and operation plans described herein.

6. GESS has informed Piedmont of its intent to file this Request and provided a copy of same prior to its filing and has received no response to its filing.

7. GESS has informed DEC and DEP of its intent to file this Request and provided a copy of same prior to its filing and has received no objections to its filing.

#### **SUMMARY OF PROPOSED PLANTS AND OPERATIONS**

8. GESS proposes to construct digester facilities in Bladen County, Columbus County, Robeson County, Union County and Wilson County, North Carolina. All five plants will utilize 560,000 MMbtu (+/- 10%) closed-form anaerobic digesters obtained from Biogest® Digester Systems, together with a scrubber system that removes up to 99% of impurities, producing a biogas intended to meet or exceed the standards for purity and temperature in Appendix F. To facilitate efficient operations, each plant also will have separate storage facilities for the biogas and other digestate by-products of the GESS plants to allow for on-site storage of each for varying periods of time.

9. Because the digester plants will be installed using a standard, consistent footprint for construction and installation based on numerous systems already installed and in service worldwide. GESS expects the time from commencement of construction to full

biogas production to be approximately thirteen (13) months or less. GESS currently estimates that it will invest approximately \$40 million in constructing each digester plant location.

10. Project-specific information as to each of the five (5) digester plants is set out below, including for each plant the site location, and the number of projected post-construction jobs required for on-going operations.

- a. Plant: Bladen County Green Energy Biogas Park  
Location: Bladenboro  
Locally-Based Jobs: 19 Full-Time
- b. Plant: Columbus County Green Energy Biogas Park  
Location: Clarendon  
Locally-Based Jobs: 19 Full-Time
- c. Project: Robeson County Green Energy Biogas Park #1  
Location: Orrum  
Locally-Based Jobs: 19 Full-Time
- d. Project: Union County Green Energy Biogas Park  
Location: Monroe  
Locally-Based Jobs: 18 Full-Time
- e. Project: Wilson County Green Energy Biogas Park  
Location: Stantonsburg  
Locally-Based Jobs: 18 Full-Time

Once at full production, each plant is projected to produce sufficient Alternative Gas to fill four (4) gaseous tanker trucks per day, containing roughly 1400 Mcf of scrubbed, cleaned, and pressurized, predominantly Alternative Gas, with each processing approximately 170,000 tons/year of swine waste.

11. The GESS plants will **not** be physically interconnected to the gas pipelines of Piedmont or any other pipeline operator. Each plant will have on-site facilities that allow for the pressurization of the gaseous biogas output for on-site storage or injection into pressurized tank trailers, and separate facilities for the pumping and storage of the

remaining digestate output. Both outputs can be safely stored and transported in commercially available tank trailers already in use on a daily basis on the public roads of this State.

12. Through its affiliates, GESS has obtained fifteen-year lease agreements, with three optional five-year extensions, for each of the five digester plants. Assuming construction can commence by or before the second quarter of 2019, GESS forecasts that all of the five (5) projects will be able to achieve full production of Alternative Gas during the second quarter of 2020.

13. With respect to “in-bound” feed stock, GESS or one of its affiliates will handle and manage all manure pick-up and delivery to the facilities of GESS from the waste sources. GESS will oversee the gathering, storage, transportation, weighing of trucks and loads, and bio-security activities, including wheel washing systems and tanker spraying systems at each site (including capture and handling of wash-wastes). The “green” biomass feed stock will be delivered by participating farmers using a separate entrance to the facilities of GESS, for deposit into a holding area. GESS personnel will be responsible for moving “green” biomass from the holding area to each digester.

14. Alternative Gas will be injected into Piedmont pipelines at three specific injection sites. Alternative Gas from the digester plants in Union County and Wilson County will be injected into the Piedmont system at injection points in Union County and Wilson County, respectively. Alternative Gas from the digester plants in Bladen County, Columbus County and Robeson County will be injected into the Piedmont system at a single injection site located in Bladen County.

15. GESS does not intend to tender for injection into Piedmont’s system physical deliveries or transactions that would violate Piedmont’s applicable tariffs or

Appendix F, or that would involve potential interstate sales that may affect the current regulation of Piedmont or the Piedmont pipeline system.

16. Piedmont provided GESS with boundary maps to help GESS identify three proposed injection points near Piedmont's pipelines. The boundary maps provided by Piedmont held to identify the areas within which the injection sites must be located in Bladen County, Union County, and in Wilson County. GESS provided Piedmont with proposed injection sites located within the boundaries shown on the boundary maps for testing and analysis by Piedmont.

#### **REQUEST FOR DECLARATORY RULINGS AS TO "UTILITY" ISSUES**

17. GESS respectfully requests the Commission to issue declaratory rulings that GESS's proposed activities and, through its affiliates, its ownership and operation of the equipment and facilities at the biogas plants, will not cause it to be a "public utility" within the meaning of N.C. Gen. Stat. § 62-3(23)(a)(1), nor will it be engaged in the "construction or operation of any public utility plant ... directly or indirectly ..." within the meaning of N.C. Gen. Stat. § 62-110 (a), or owning or operating a "facility for ... directly or indirectly furnishing ... public utility service" within the meaning of N.C. Gen. Stat. § 62-110.1(a), and that it will not be a "utility" within the definition in Commission Rule R6-2(a).

18. N.C. Gen. Stat. § 62-3(23)(a)(1) defines a "public utility" as

[A] person ... owning or operating in this State equipment or facilities for  
....  
producing, generating, transmitting, delivering or furnishing ... piped gas  
... or any other like agency for the production of light, heat or power to or  
for the public for compensation....

In *State ex rel. Utility Commission v. Simpson*, 295 N.C. 519, 246 S.E. 2d 753 (1978), the North Carolina Supreme Court adopted a flexible definition of the term



“public” as used in the Public Utilities Act. This Commission has commonly indicated in the context of ruling on requests for rulings similar to these Requests, that the determination of public utility status under this statutory definition, as well as the term “utility” under N.C. Gen. Stat. §§ 62-110 (a) and 110.1 (a), or under Commission Rule R6-2(a), is flexible. GESS respectfully submits that, on the facts presented here, the construction and operation of the biogas plants for injection of Alternative Gas into the pipelines of Piedmont for delivery to DEC and DEP would not cause GESS to be or deemed to be a “utility” for any purpose.

19. First, the number of direct customers is limited to two entities, each of which is a utility certificated by this Commission. DEC will be purchasing Alternative Gas on its own behalf, and on behalf of DEP, an affiliated entity that is likewise a utility certificated by this Commission, for use to generate electricity. These two purchasers have other options and have bargained to purchase the output of the proposed plants. These factors are strong indicia that sales to the “public”, as used in the relevant provisions of the Public Utilities Act and the Commission’s rule, are not occurring.

20. Second, the Commission has a long history of granting similar declaratory relief to owners and operators of landfill gas, a similar renewable energy resource, based on factors such as the presence of “bargained for” transactions with purchasers that have other energy options, direct sales to an end-user for the production of electric or other forms of energy, and the realization of environmental and other substantial public benefits from making beneficial use of an otherwise wasted resource. See, e.g., *In re Request for Declaratory Ruling of Pitt Landfill Gas, LLC*, NCUC Docket No. SP-100, Sub 13 (March 19, 1997); *In re Request for Declaratory Ruling of Duke Engineering and Services, Inc.*, NCUC Docket No. SP-100, Sub 8 (May 25, 1996); *In re Request for Declaratory Ruling*



*of Wake Landfill Gas Co., LLC and Enerdyne IV, LLC*, NCUC Docket No. SP-100, Sub 9 (July 31, 1996); *In re Request for Declaratory Ruling of Fayetteville Gas Co. LLC*, NCUC Docket No. SP-100, Sub 6 (May 24, 1996); *In re Request for Declaratory Ruling by Natural Power, Inc. and Raleigh Landfill Gas Corp.*, NCUC Docket SP-100, Sub 1 (December 22, 1988). All of these factors likewise support the relief requested here by GESS.

21. There also will be substantial environmental and other public benefits from making beneficial use of the otherwise wasted “feed stocks” for the biogas digesters, as the closed digester systems to be used in the proposed plants will provide a much more environmentally desirable method for disposal of swine waste than those currently used, and will not only produce opportunities for new revenue streams for the participating farmers, but also substantial economic investments and job opportunities in their nearby rural communities.

22. Third, even if biogas that achieves the requisite characteristics of quality, content and temperature to qualify for treatment as Alternative Gas were considered or concluded to be a utility commodity, biogas from swine and agricultural waste is certainly not “as common a utility function as other services” currently held out to the public, and as noted above, GESS does not propose to hold itself out to the “public”. See, *In the Matter of Request for Declaratory Ruling by Westmoreland-LG&E Partners*, NCUC Docket No. SP-100, Sub 2 (October 13, 1993).

23. Finally, because the biogas plants proposed by GESS are not physically interconnected to any piping system or pipeline other than those within the production plant itself, and will depend instead on delivery to an off-site injection point into pipelines using tanks hauled by motor carriers, the biogas will not become “piped gas” as that term is used

within the Public Utilities Act and the Commission's rules, until delivered to the injection point on the pipeline of Piedmont. When determining the regulatory status of the gas, or the production facilities, it is reasonable to place greater weight on the attributes of the biogas purchasers, and the regulated pipeline transportation service, rather than the facilities and equipment of the biogas producer.

#### **REQUEST FOR DECLARATORY RULINGS AS TO "REPS"-RELATED ISSUES**

24. The specific statutory purposes and public policy goals of the Renewable Energy and Energy Efficiency Portfolio Standards in this State were set out in Senate Bill 3, which amended N.C. Gen. Stat. § 62-2(a) by adding a new subsection (10). This subsection states that it is the policy of this State to promote the development of renewable energy and energy efficiency through the implementation of a REPS that will:

- a. Diversify the resources used to reliably meet the energy needs of consumers in this State;
- b. Provide greater energy security through the use of indigenous energy resources available within the State;
- c. Encourage private investment in renewable energy and energy efficiency; and,
- d. Provide improved air quality and other benefits to energy consumers and citizens of this State.

N.C. Gen. Stat. § 62-2(a)(10). The proposal of GESS involves the use of almost completely indigenous "renewable energy resources", as the feed stock for the biogas plants will be indigenous renewable resources. It also will produce substantial private investments in

renewable energy, and those investments will provide air quality and other benefits to the citizens of this State, particularly in areas of the State that have long dealt with swine waste, and which need additional private investments and jobs. Granting the declaratory relief requested by GESS, therefore, will promote several of the goals and public policies of the State.

25. All of the feed stock resources used in the operations of each of the proposed GESS production plants satisfy the definition of a “renewable energy resource”, specifically as a biomass resource. The biogas output of each facility, when used in the production of electric power, should have the environmental and renewable attributes required to qualify for the production of RECs suitable for registration and compliance under N.C. Gen. Stat. § 62-133.8, when power is generated and/or purchased by a qualifying “electric power supplier” from power generation facilities using the biogas.

26. Finally, because the Alternative Gas generated by the GESS plants will flow from the utilization of a blend of swine waste and agricultural crop-waste residuals, or swine waste and agricultural crop waste residuals, plus poultry waste, the environmental attributes for purposes of REC registration and characterization should be determined based on the blend of biomass resources used at each plant. So long as the Alternative gas produced by the GESS plants are measured at each plant during initial periods of operation, and quarterly or other interval testing thereafter, using validated methods of measure to determine the proportion of swine waste, poultry waste, and “green” agricultural waste inputs used in the production process. The portion of the gaseous output of the feed stock blend attributed to swine manure or poultry waste should be declared to qualify for the production of RECs suitable for compliance with the REPS requirements for swine-waste and poultry waste resources under N.C. Gen. Stat. § 62-133.8 (e).

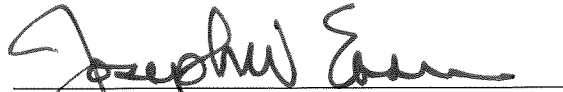
## CONCLUSION

For all of the foregoing reasons, GESS respectfully requests that the Commission issue declaratory rulings that, by virtue of the proposed activities of GESS and its affiliates described above, GESS will not be a “public utility” within the meaning of N.C. Gen. Stat. § 62-3(23)(a); nor will it be engaged in the “construction or operation of any public utility plant ... directly or indirectly ...” within the meaning of N.C. Gen. Stat. § 62-110(a) or operating a “facility for ... directly or indirectly furnishing ... public utility service” within the meaning of N.C. Gen. Stat. § 62-110.1(a); and, that GESS will not be a “utility” within the definition in Commission Rule R6-2(a).

GESS also respectfully requests declaratory rulings that its proposed plants, if constructed and operated in accordance with these Requests, will produce an output of biogas from materials that qualify as a “renewable energy resource”, specifically as the output of biomass resources, i.e., animal waste and agricultural waste. GESS also asks further for a declaration that the Alternative Gas output, when used to generate electric power, qualifies for the production of Renewable Energy Certificates (“RECs”). And, finally, that the portion of the biogas output produced at the GESS plants resulting from swine waste and poultry waste, when determined using the relative proportion of inputs of the feed stock properly measured by use of validated methods and standards of measure, will qualify for use by a qualifying “electric power supplier” to meet the REPS of N.C. Gen. Stat. § 62-133.8(e), including the “set-asides” for RECs from swine waste and poultry waste, and that the balance of that output will qualify for general RECs under N.C. Gen. Stat. § 62-133.8(e).

Respectfully submitted, this the 1<sup>st</sup> day of March, 2019.

NELSON MULLINS RILEY & SCARBOROUGH LLP

A handwritten signature in black ink, appearing to read "Joseph W. Eason", written over a horizontal line.

Joseph W. Eason  
N.C. State Bar No. 7699  
4140 Parklake Avenue, Suite 200  
Raleigh, NC 27612  
Telephone: (919) 329-3807  
joe.eason@nelsonmullins.com

*Attorneys for GESS International North Carolina, Inc.*