

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. E-100, SUB 113

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	ORDER MODIFYING THE SWINE
Rulemaking Proceeding to Implement	)	AND POULTRY WASTE SET-ASIDE
Session Law 2007-397	)	REQUIREMENTS AND PROVIDING
	)	OTHER RELIEF

BY THE COMMISSION: On September 30, 2021, a verified motion to modify and delay the requirements of N.C. Gen. Stat. § 62-133.8(e) and (f) was filed jointly by North Carolina Electric Membership Corporation (NCEMC); Fayetteville Public Works Commission (FPWC); EnergyUnited Electric Membership Corporation (EnergyUnited); the Tennessee Valley Authority (TVA); the Town of Waynesville (Waynesville); Carolina Power Partners (CPP); North Carolina Eastern Municipal Power Agency (NCEMPA); and North Carolina Municipal Power Agency Number 1 (NCMPA1) (hereinafter referred to collectively as the Joint Movants)<sup>1</sup> seeking Commission approval to (1) modify the swine waste set-aside requirements of the North Carolina Renewable Energy and Energy Efficiency Portfolio Standard (REPS) by delaying the compliance requirements for the electric municipal corporations and municipalities for one year; (2) allow the electric municipal corporations and municipalities to bank any swine waste-derived or poultry waste-derived renewable energy certificates (RECs) previously or subsequently acquired for use in future compliance years; (3) modify the poultry waste set-aside obligation of electric membership corporations and municipalities for calendar year 2021 by using an aggregate set-aside requirement of 300,000 MWh for the electric membership corporations and municipalities, allocated based on the load ratio share calculations in the Commission's December 16, 2019 Order Establishing 2019, 2020, and 2021 Poultry Waste Set-Aside Requirement (2019 Poultry Allocation Order); and (4) allow the electric municipal corporations and municipalities to replace compliance with the swine waste and poultry waste set-aside requirements in 2021 with other compliance measures in accordance with N.C.G.S. § 62-133.8(b), (c), and (d). The Joint Movants state that they

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<sup>1</sup> NCEMC states that it is acting in its capacity as REPS compliance aggregator for 23 North Carolina distribution electric membership corporations, two cooperatives headquartered outside of North Carolina, and three North Carolina towns which are electric power suppliers. TVA states that it is acting in its capacity as REPS compliance aggregator for Blue Ridge Mountain Electric Membership Corporation, Mountain Electric Cooperative, Tri-State Electric Membership Corporation and Murphy Electric Power Board which are electric suppliers. CPP states that it is acting in its capacity as REPS compliance aggregator for the City of Concord, the City of Kings Mountain, the Town of Black Creek, the Town of Lucama, the Town of Sharpsburg, the Town of Stantonsburg, and the Town of Winterville, which are electric power suppliers. NCEMPA states that it is acting in its capacity as REPS compliance aggregator for its 32 member municipalities which are power suppliers. NCMPA1 asserts that it is acting in its capacity as REPS compliance aggregator for its 19 member municipalities which are electric power suppliers.

have individually and collectively made reasonable efforts to comply with the swine waste and poultry waste set-aside requirements and argue that the relief sought is in the public interest. Finally, the Joint Movants request that the Commission consider and approve their motion without an evidentiary hearing because they believe that through required semiannual reports and stakeholder meetings, stakeholders and regulatory staff have ample information regarding the electric municipal corporations' and municipalities' compliance efforts.

The Joint Movants state that the reasons supporting their request to delay the swine and poultry waste set-aside requirements for calendar year 2021 parallel the reasons underlying the Commission's Orders previously issued in this docket that granted similar relief.

The Joint Movants state that in order to achieve partial compliance with the poultry waste set-aside obligation for 2021, they propose that electric municipal corporations and municipalities comply with the poultry waste set-aside for this calendar year by using an aggregate set-aside requirement of 300,000 MWh for the electric membership corporations and municipalities, allocated based on the load ratio share calculations in the 2019 Poultry Allocation Order. The Joint Movants further state that they do not anticipate being able to comply with the aggregate 900,000 MWh poultry waste set-aside requirement in 2022. They note that they discussed the relief requested in this Joint Motion with counsel for Duke Energy Carolinas, LLC (DEC), and Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina (Dominion), regarding whether it would be appropriate for the electric municipal corporations and municipalities for which DEC and Dominion<sup>2</sup> provide REPS compliance services to also receive similar treatment to the relief requested by the Electric Suppliers. The Joint Movants state that DEC and Dominion are not parties to the Joint Motion; however, counsel for DEC and Dominion did authorize the Joint Movants to indicate that they request the same treatment be provided for the electric membership corporations or municipalities for which they provide REPS compliance services. The Joint Movants further note they were authorized by counsel for DEC, Dominion, and Duke Energy Progress, LLC (DEP) to indicate that their clients have no objection to the relief requested in the Joint Motion.

On October 20, 2021, the Commission issued an Order Requesting Comments. On November 2, 2021, the Public Staff filed a letter detailing two stakeholder meetings held in 2021. The Public Staff, Montauk Renewables, Inc. (Montauk) and the North Carolina Pork Council (NCPC) filed comments on November 10, 2021. On November 12, 2021, Carolina Poultry Power (Carolina Poultry), filed a letter in support of the Joint Movants petition. No other party filed comments on the motion.

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<sup>2</sup> DEC serves as the REPS compliance aggregator for Blue Ridge Electric Membership Corporation, Rutherford Electric Membership Corporation, the Town of Dallas, the Town of Forest City, and the Town of Highlands. Dominion provides REPS compliance services for the Town of Windsor.

## SUMMARY OF THE COMMENTS

### Montauk Comments

In its comments Montauk states it opposes a full delay of compliance with the swine waste set-aside requirements for the Joint Movants and argues relative to the swine waste set-aside requirements that although the time for full compliance may not yet be here, the time for partial compliance has arrived for the Joint Movants. Montauk asserts that the Commission should reject Joint Movant's request to delay the swine waste set-aside in its entirety and, instead, (1) retain the swine waste set-aside requirement as set forth in the Commission's Order Modifying the Swine Waste Set-Aside Requirements and Providing Other Relief, Docket No. E-100, Sub 113 issued on December 30, 2020 (2020 Delay Order) with the modification that (2) power suppliers will apply any already-acquired swine waste RECs to the supplier's current year pro rata obligation and (3) if a power supplier does not have sufficient swine waste RECs to comply with the current year's pro rata obligation, the power supplier's shortfall will be carried forwarded to the supplier's subsequent years' pro rata obligations.

Montauk further notes that the Joint Movants must demonstrate that they have undertaken reasonable efforts to comply with the requirements for 2021 before asking the Commission for relief. Montauk opines that the Joint Movants have not met their demonstrated burden as the most recent Compliance Plans and Reports submitted on or around May 31, 2021 for the Joint Movants appear to identify only eight specific attempts to purchase swine waste RECs over the past five years. Montauk asserts that the sole attempt to comply with this year's obligation is the 2020 RFP, which is at the center of a declaratory ruling request currently pending before the Commission in this docket.<sup>3</sup> Montauk states it is not asking for a hearing in this proceeding, however, it asks that the Commission caution Joint Movants that (a) they cannot predicate further delay on their refusal to honor their own RFP for swine waste RECs and (b) if they file a motion in 2022 that is similar to this year's motion, then an evidentiary hearing will be necessary.

Additionally, Montauk urges the Commission to reject the Joint Movants presumption that it is impossible to supply or purchase swine waste RECs. As evidence to support this, Montauk offers that DEC, DEP and Dominion have all been able to purchase swine waste RECs and have been able to comply, in part or in whole, with their larger swine waste set-aside requirement for four years now. Montauk states that it will be able to supply the necessary swine waste RECs and that its Duplin County plant in

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<sup>3</sup> On May 20, 2021, a joint motion for clarification (Joint Motion) and request for declaratory ruling pursuant to N.C.G.S. §§ 62-30 and 1-253 and North Carolina Utilities Commission Rules R1-5 and R1-7 was filed by NCEMC, FPWC, EnergyUnited, NCEMPA, NCMPA1, and Dominion (Joint Movants). The Joint Movants request clarification on whether the cost caps established by the General Assembly in Session Law 2007-397 provide a reasonable limit on the amount an electric power supplier can spend for compliance with REPS, but do not also mandate what an electric power supplier must spend toward REPS compliance for its efforts to be found reasonable. The Joint Movants also seek a declaratory ruling that it is reasonable for an electric power supplier to choose not to contract with a renewable energy provider to achieve REPS compliance with the Swine Waste Set-Aside if it would result in disproportionately high costs, even if the disproportionately high costs do not exceed the cost caps established by the General Assembly.

Magnolia, North Carolina, is currently operational. Further, Montauk states it plans to break ground on an additional facility in Duplin County that will have up to 20 times the capacity of the existing Duplin County plant in early 2022 once it gets contracts finalized with buyers. Finally, Montauk commented that the Commission should, at most, modify the 2021 swine waste set-aside requirement for the Joint Movants to require application of their banked swine waste RECs toward their current swine waste set-aside obligation. Montauk states that requiring application of banked swine waste RECs will provide a reasonable transition to the enforcement of future obligations of the swine waste set-aside requirement and will also serve to protect the swine waste REC developers in the future. Banking all swine waste RECs now for future compliance, according to Montauk, could cause fewer RECs to be needed in the future from the swine waste developers who rely on the contract demand for financing and other operational needs.

## **NCPC Comments**

In its comments NCPC states that it opposes the Joint Movants' motion as the Joint Movants fail to adequately demonstrate that the relief requested is warranted. NCPC contends that the Joint Movants rely on open, unresolved dockets and state "operational and technological challenges", which it has used for years as its reason to request delays.

NCPC also comments that the Joint Movants have failed to justify the decision not to proceed with projects based on price. NCPC contends that the Joint Movants provide no analysis demonstrating the reasonableness of their decision not to go forward with a swine waste project that conforms to their request for proposal (RFP). NCPC states that the Joint Movants should be given an opportunity to provide an analysis justifying their position, if possible, or, in the alternative, an evidentiary hearing should be conducted to address the Joint Movants' decisions and averred facts regarding "unreasonably-priced" RECs.

## **Public Staff Stakeholder Letter**

The Public Staff's letter detailing its two stakeholder meetings briefly summarizes the topics of discussion regarding supply-side shortages that impacted the availability of swine waste set-aside RECs and whether these shortages are due to technology, REC prices, or interconnection issues. The letter also references discussion of the challenges associated with obtaining swine waste RECs in general terms and identifies the following obstacles: uncertainty created by Appendix F and the use of renewable natural gas (RNG); environmental attributes transferred to swine waste REC purchasers; and the price of swine waste RECs. The letter notes that discussion of these topics was limited due to pending Commission dockets on the matters.<sup>4</sup> The letter further references discussion of the challenges associated with obtaining poultry waste RECS and identifies underperforming contracts and facilities that frequently went offline due to maintenance issues as the biggest

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<sup>4</sup> Docket No. E-100, Sub 113, filed May 20, 2021. Joint Motion for Clarification and Request for Declaratory Ruling of North Carolina Electric Membership Corporation, Fayetteville Public Works Commission, EnergyUnited Electric Membership Corporation, North Carolina Eastern Municipal Power Agency, North Carolina Municipal Power Agency Number 1, and Dominion Energy North Carolina and Optima MH, LLC's pending Motion for Declaratory Relief filed on December 7, 2020, in Docket No. E-100, Sub 113.

challenge. The Public Staff's filing indicates that stakeholder participants having difficulty obtaining poultry waste RECs stated they were continuing to work with their respective developer to modify, rather than terminate, their existing contract.

### **Public Staff Comments**

The Public Staff in its comments states that the semiannual reports of the electric municipal corporations and the municipalities indicate that they are making good faith efforts to comply with the swine waste set-aside requirements but will be unable to comply in 2021. The Public Staff notes that the problems that result in the inability of electric power suppliers to comply with increased swine waste REC requirements have been well documented and that these problems are unlikely to be resolved at any time in the near future. Based upon its review of this data, the Public Staff recommends that the Commission grant the electric municipal corporations' and municipalities' requested modifications to the swine waste set-aside requirements without an evidentiary hearing. The Public Staff requests that the Commission direct the electric municipal corporations and municipalities that are subject to the semiannual filing requirement to continue to submit semiannual reports consistent with the schedule and format required by the December 1, 2015 Order Modifying the Swine and Poultry Waste Set-Aside Requirements and Providing Other Relief (2015 Delay Order) issued in this docket.

Regarding the poultry waste set-aside requirements, the Public Staff states that the semiannual reports of the electric municipal corporations and the municipalities indicate that they are making good faith efforts to comply with the poultry waste set-aside requirements but will be unable to comply in 2021. The Public Staff states that it agrees with the Joint Movants' proposed request to decrease the poultry waste energy requirement to 300,000 MWh for 2021 compliance, because production of poultry waste RECs in 2021 has been less than the Joint Movants anticipated. The Public Staff notes that because the poultry set-aside is a statewide (or aggregate) amount, with each individual electric power supplier's obligation being set as a percentage of this amount, it does not seem appropriate to decrease one group of power suppliers' obligations, while the other group's obligations remain unchanged. Therefore, the Public Staff recommends that the statewide poultry waste requirement be set at 300,000 MWh for 2021, 500,000 MWh for 2022, and 700,000 MWh for 2023.

### **Carolina Poultry Comments**

Carolina Poultry filed a letter in support of the Joint Movants' request for relief and urges the Commission to grant the Joint Movants' motion. Carolina Poultry notes that it has experienced several development issues and explains that DEP and DEC, with whom it has REC contracts, have been extremely flexible regarding commercial operation dates.

## DISCUSSION AND CONCLUSION

Pursuant to N.C.G.S. § 62-133.8(i)(2), the Commission, in developing rules implementing the REPS, shall:

Include a procedure to modify or delay the provisions of subsections (b), (c), (d), (e), and (f) of this section in whole or in part if the Commission determines that it is in the public interest to do so. The procedure adopted pursuant to this subdivision shall include a requirement that the electric power supplier demonstrate that it made a reasonable effort to meet the requirements set out in this section.

Commission Rule R8-67(c)(5) states:

In any year, an electric power supplier or other interested party may petition the Commission to modify or delay the provisions of N.C.G.S. § 62-133.8(b), (c), (d), (e) and (f), in whole or in part. The Commission may grant such petition upon a finding that it is in the public interest to do so. If an electric power supplier is the petitioner, it shall demonstrate that it has made a reasonable effort to meet the requirements of such provisions.

The Commission has previously exercised this authority and delayed compliance with the swine and poultry waste set-aside requirements on several occasions by the following orders issued in this docket: the November 29, 2012 Order Modifying the Poultry and Swine Waste Set-Aside Requirements and Granting Other Relief; the March 26, 2014 Final Order Modifying the Poultry and Swine Waste Set-Aside Requirements and Providing Other Relief; the November 13, 2014 Order Modifying the Swine Waste Set-Aside Requirement and Providing Other Relief; the 2015 Delay Order; the October 17, 2016 Order Modifying the Swine and Poultry Waste Set-Aside Requirements and Providing Other Relief; the October 16, 2017 Order Modifying the Swine and Poultry Waste Set-Aside Requirements and Providing Other Relief; the October 8, 2018 Order Modifying the Swine and Poultry Waste Set-Aside Requirements and Providing Other Relief; the 2019 Delay Order and the 2020 Delay Order (collectively, Delay Orders).

As an initial matter the Commission considers the Joint Movants' request to consider and approve their motion without the need for an evidentiary hearing. In support of this request, the Joint Movants note that stakeholders and regulatory staff have been provided with ample information surrounding the status of the Joint Movants' compliance efforts through the submission of annual REPS compliance plans in Docket No. E-100, Sub 174, submission of the semiannual reports required of the majority of the Joint Movants in Docket No. E-100, Sub 113A, submission of the one-time reports filed by the Joint Movants in Docket No. E-100, Sub 113C pursuant to the Commission's December 30, 2020 Order Modifying the Swine Waste Set-Aside Requirements and Providing Other Relief ("2020 Delay Order"), and the opportunity to discuss and examine compliance strategies and alternatives in the stakeholder meetings conducted by the

Public Staff. The Public Staff, like the Joint Movants, recommends that the Commission approve the request without an evidentiary hearing. NCPC and Montauk are the only parties that oppose the motion, but they limit their comments to the opposition of the swine waste set-aside requirement. NCPC is the only party that requests a hearing. The NCPC takes issue with the Joint Movants' refusal to proceed with swine waste projects which they contend will result in swine waste RECs that are "unreasonably priced." NCPC contends that the Joint Movants have failed to demonstrate the reasonableness of their position that the RECs were "unreasonably-priced" and that, therefore, nothing in the record allows the Commission to conclude that the threshold in Section 133.8(i)(2) for issuing a modification or delay has been met. The NCPC notes that the REC price issue is squarely before the Commission.<sup>5</sup> In light of the fact that the REC price issue is pending before the Commission, the NCPC's request for an evidentiary hearing is denied.

Based on the semiannual reports submitted by the electric municipal corporations and municipalities in Docket No. E-100, Sub 113A, the verified motion, the parties' comments, and the entire record herein, the Commission finds that the electric municipal corporations and municipalities have made a reasonable effort to comply with the 2021 statewide swine waste set-aside requirement established by N.C.G.S. § 62-133.8(e) but will not be able to comply. Compliance with the swine waste set-aside requirements has been hindered by the fact that the technology of power production from swine waste continues to face challenges and that swine waste-to-energy projects continue to experience operational difficulties. Compliance with the swine waste set-aside has also been challenging due in part to undecided issues pending before the Commission.

The Commission's Delay Orders have noted that while electric power suppliers have been able to comply with the modified poultry waste set-aside requirements and some electric power suppliers have been able to comply with the modified swine waste set-aside requirements through a graduated increase in these requirements, other electric power suppliers have not been able to meet the swine waste RECs requirements. Industry advances discussed in the comments of Montauk and NCPC indicate that encouraging developments are occurring in the technology of power production from swine waste which, when combined with the availability of RECs banked from current and prior years, would increase the likelihood that compliance with the swine waste set-aside requirements will be achieved at some point. The Joint Motion and the comments filed by the Public Staff persuade the Commission that electric municipal corporations' and municipalities' compliance or partial compliance with the swine waste set-aside requirements is not presently possible. The Commission agrees with the Public Staff that requiring the electric municipal corporations and municipalities to meet the 2021 swine waste set-aside requirement established in the 2020 Delay Order would derail the progress made to date by the electric municipal corporations and municipalities and

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<sup>5</sup> The Commission will address the REC price issue raised by NCPC when it considers the Joint Motion for Clarification and Request for Declaratory Ruling of North Carolina Electric Membership Corporation, Fayetteville Public Works Commission, EnergyUnited Electric Membership Corporation, North Carolina Eastern Municipal Power Agency, North Carolina Municipal Power Agency Number 1, and Dominion Energy North Carolina in Docket No. E-100, Sub 113, filed May 20, 2021, which is currently pending before the Commission.

render compliance for 2021 and future years difficult or impossible. Such action is not in the public interest. Therefore, consistent with the 2020 Delay Order, the Commission determines that it is in the public interest to delay entirely the 2021 swine waste set-aside requirement for the electric municipal corporations and municipalities; allow the electric municipal corporations and municipalities that have acquired swine waste RECs for 2021 REPS compliance to bank such RECs for swine waste set-aside compliance in future years; and to allow the electric municipal corporations and municipalities to replace compliance with the swine waste set-aside requirement in 2021 with other compliance measures in accordance with N.C.G.S. § 62-133.8(b), (c), and (d).

The Commission cautions the Joint Movants that they are mandated to use reasonable efforts to comply with the swine waste set-aside requirement set forth in this order for compliance in 2022. Further, it is not an unreasonable request of the Joint Movants that they support their position on REC price with clear analysis and explanation, particularly when a proposed swine waste project complies with their RFP. Thus, the Joint Movants are directed to engage in good faith and in a commercially reasonable manner in supporting their positions regarding REC price.

Based on the semiannual reports submitted by the electric power suppliers in Docket No. E-100, Sub 113A, the verified motion, the parties' comments, and the entire record herein, the Commission similarly finds that the State's electric power suppliers have made a reasonable effort to comply with the 2021 statewide poultry waste set-aside requirement established by N.C.G.S. § 62-133.8(f), but will not be able to comply. As with the swine waste set-aside requirement, compliance with the poultry waste set-aside requirement has been hindered by the fact that the technology of power production from poultry waste continues to be in its early stages of development and projects have experienced operational challenges. The Public Staff notes that production of poultry waste RECs in 2021 fell short of anticipated levels. No party presented evidence that the aggregate 2021 poultry waste set-aside of 700,000 MWh could be met; however, the parties agree that a modified compliance requirement of 300,000 MWh for 2021, 700,000 MWh for 2022, and 900,000 MWh for 2023 is achievable. The Commission determines that it is in the public interest to modify the requirements of N.C.G.S. § 62-133.8(f) as requested in the Joint Motion. Electric power suppliers should continue to make efforts to comply with the poultry waste set-aside requirements as modified by this Order. The Commission further finds that DEC, DEP and Dominion shall be subject to the modified aggregate poultry waste set-aside requirements as established by this Order.

IT IS, THEREFORE, ORDERED as follows:

1. That the swine waste set-aside requirements of N.C.G.S. § 62-133.8(e) for electric membership corporations and municipalities shall be, and are hereby, modified according to the following schedule:

<u>Calendar Year</u>	<u>Requirement for Swine Waste Resources</u>
2021	0.00%
2022-2023	0.07%
2024-2025	0.14%
2026 and thereafter	0.20%

2. That the electric membership corporations and municipalities shall be allowed to bank any swine waste RECs previously or subsequently acquired for use in future compliance years and to replace compliance with the swine waste set-aside requirement in 2021 with other compliance measures pursuant to N.C.G.S. § 62-133.8(b) and (c), including the use of solar RECs beyond the requirements of N.C.G.S. § 62-133.8(d);

3. That the poultry waste set-aside requirements of N.C.G.S. § 62-133.8(f) shall be, and are hereby, modified according to the following schedule:

<u>Calendar Year</u>	<u>Requirement for Poultry Waste Resources</u>
2021	300,000 MWh
2022	700,000 MWh
2023 and thereafter	900,000 MWh

Electric power suppliers shall be allowed to bank any poultry waste RECs previously or subsequently acquired for use in future compliance years and to replace compliance with the poultry waste set-aside requirement in 2021 with other compliance measures pursuant to N.C.G.S. § 62-133.8(b) and (c), including the use of solar RECs beyond the requirements of N.C.G.S. § 62-133.8(d);

4. That the electric membership corporations and municipalities subject to the semiannual filing requirement shall continue to report on the schedule established in the 2015 Delay Order. These reports shall continue to include the information specified in Ordering Paragraph 3 of the Commission's 2015 Delay Order;

5. That the electric membership corporations or municipalities for which DEP, DEC and Dominion provide REPS compliance services be subject to the same relief requirements as modified by this Order;

6. That DEC, DEP and Dominion, although not a formal party to the motion, are subject to the statewide poultry waste requirements as modified by this Order; and

7. That the Chief Clerk is directed to deliver a copy of this Order to the NC-RETS Administrator.

ISSUED BY ORDER OF THE COMMISSION.

This the 4th day of March 2022.

NORTH CAROLINA UTILITIES COMMISSION



Joann R. Snyder, Deputy Clerk