

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. E-100, SUB 113

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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

BY THE COMMISSION: On August 12, 2015, a joint motion to modify and delay the 2015 requirements of G.S. 62-133.8(e) and (f) was filed by Duke Energy Carolinas, LLC (DEC);<sup>1</sup> Duke Energy Progress, LLC (DEP);<sup>2</sup> Virginia Electric and Power Company, d/b/a Dominion North Carolina Power (Dominion);<sup>3</sup> GreenCo Solutions, Inc.; Public Works Commission of the City of Fayetteville; EnergyUnited Electric Membership Corporation; Halifax Electric Membership Corporation; the Tennessee Valley Authority (TVA);<sup>4</sup> North Carolina Eastern Municipal Power Agency (NCEMPA);<sup>5</sup> and North Carolina Municipal Power Agency Number 1 (NCMPA1)<sup>6</sup> (hereinafter referred to collectively as the Joint Movants). The Joint Movants requested that the Commission relieve them of compliance with G.S. 62-133.8(e) (Compliance With [North Carolina's Renewable Energy and Energy Efficiency Portfolio Standard (REPS)] Requirement Through Use of Swine Waste Resources) and G.S. 62-133.8(f) (Compliance With REPS Requirement Through Use of Poultry Waste Resources) by delaying their need to comply with these requirements by one year until 2016. The joint motion further requested that the Commission allow the Joint Movants to bank any poultry and swine renewable energy certificates (RECs) previously or subsequently acquired for use in future compliance years and allow the Joint Movants to replace compliance with the swine and poultry waste set-aside requirements in 2015 with other compliance

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<sup>1</sup> DEC asserted that it is also acting in its capacity as REPS compliance aggregator for Blue Ridge Electric Membership Corporation (EMC), Rutherford EMC, the City of Dallas, Forest City, City of Concord, the Town of Highlands and the City of Kings Mountain.

<sup>2</sup> DEP asserted that it is also acting in its capacity as REPS compliance aggregator for the Towns of Sharpsburg, Lucama, Black Creek, and Stantonsburg, and the City of Waynesville.

<sup>3</sup> Dominion asserted that it is also acting in its capacity as REPS compliance aggregator for the Town of Windsor.

<sup>4</sup> TVA asserted that it is acting in its capacity as REPS compliance aggregator for Blue Ridge Mountain EMC, Mountain Electric Cooperative, Tri-State EMC and Murphy Electric Power Board.

<sup>5</sup> NCEMPA asserted that it is acting in its capacity as REPS compliance aggregator for its 32 member municipalities which are electric power suppliers.

<sup>6</sup> NCMPA1 asserted that it is acting in its capacity as REPS compliance aggregator for its 19 member municipalities which are electric power suppliers.

measures pursuant to G.S. 62-133.8(b), (c), and (d). The Joint Movants stated that they have individually and collectively made reasonable efforts to comply with the REPS poultry and swine waste resource provisions and that the relief sought is in the public interest. The Joint Movants requested that the Commission consider and approve their joint motion without an evidentiary hearing.

On August 18, 2015, the Commission issued an Order Requesting Comments. The Order requested comments from interested parties on the Joint Movants' motion to be filed by October 2, 2015. In their comments, parties were requested to address whether the poultry waste set-aside requirement would be achievable in 2015 if it were maintained at the 2014 level. On October 2, 2015, the Commission granted a motion for an extension of time filed by the North Carolina Pork Council (NCPC), extending the deadline by which parties may file comments until October 9, 2015.

On October 2, 2015, the North Carolina Poultry Federation (NCPF), the Public Staff, and the North Carolina Sustainable Energy Association (NCSEA) filed comments on the Joint Movant's motion. On October 9, 2015 NCPC and Optima KV, LLC (Optima), filed comments on the Joint Movant's motion. On October 15, 2015, the Public Staff filed revised comments. On October 16, 2015, DEC and DEP filed supplemental comments.

On October 27, 2015, the Joint Movants filed reply comments. On November 9, 2015, NCPC filed a motion to strike the Joint Movants' reply comments. NCPC noted that the Commission's August 18, 2015 Order Requesting Comments did not request or authorize reply comments. The Commission finds that the Joint Movant's reply comments are unnecessary to reaching its determination, and, therefore, grants NCPC's motion to strike.

NCPF, in its comments, stated that it "does not oppose the requested delay in meeting the 2015 statutory requirements" with regard to the poultry waste set-aside. NCPF further stated that it takes no position with regard to banking poultry waste RECs and substituting other types of RECs for 2015 compliance purposes.

The Public Staff, in its initial comments, stated that it had reviewed the Joint Movants' motion, the triannual reports, and the data in the North Carolina Renewable Energy Tracking System (NC-RETS). The Public Staff concluded that the Joint Movants are making good faith efforts to comply with the swine and poultry waste set-aside requirements, but will fall short for 2015. The Public Staff further stated in its initial comments that if the 2014 poultry waste level were maintained "there are currently insufficient in-state poultry waste RECs to meet the in-state portion of the 2014 poultry waste requirement in 2015." However, in its revised comments, the Public Staff added "other resources in accordance with Section 4 of S.L. 2010-195, as amended by S.L. 2011-279 (Senate Bill 886)" (S886 RECs) to its analysis of whether the poultry waste set-aside requirement could be achieved at the 2014 level. The addition of S886 RECs to the Public Staff's analysis resulted the following amended conclusion:

Based on the Public Staff's analysis, if the Commission were to use its authority under G.S. 62-133.8(i)(2) to maintain the poultry waste requirement at its current level of 170,000 MWh for an additional year, it

appears that the Electric Suppliers could achieve compliance with the amended requirement in 2015.

The Public Staff recommended that the Commission delay the Joint Movants' need to comply with the swine waste set-aside requirement of G.S. 62-133.8(e) until calendar year 2016 and modify the requirements of G.S. 62-133.8(f) to maintain the poultry waste set-aside requirement at 170,000 MWh for calendar year 2015.

NCSEA, in its comments, stated that “[w]here some equitable level of partial compliance is a viable option, yet another complete delay of the swine waste and poultry waste set-aside requirements would run counter to the intent of the General Assembly.” NCSEA recommended that the Commission require the stakeholders to partake in a joint analysis to determine the adequate level of partial compliance.

Optima, in its comments, stated that DEC and DEP have not made reasonable efforts to comply with the swine waste set-aside requirement “because they have refused to contract with Optima for the purchase of swine waste biogas at a commercially reasonable price, even though Optima’s technology is viable (as confirmed through independent expert review), and it has long-term feedstock agreements in place.” Optima described its facilities and technology and stated that it had proposed to sell DEC and DEP “biogas to generate electricity would produce the equivalent of approximately 10,500 RECs per year.” Optima further stated that DEC and DEP “rejected the proposal out of hand based on price and refused to meet with Optima to discuss the project.” Optima stated that it attempted to contract with DEC and DEP at a lower price, but such negotiations were continually rejected. Optima stated that “the proposed price would allow DEP or DEC to meet a significant portion of its swine waste set-aside obligation while consuming a relatively small percentage of its REPS cost cap” and noted Commission precedent that the set-asides should have priority under the cost cap over the general requirement. Optima recommended that the Commission “find that DEP and DEC have not made reasonable efforts to comply with their swine waste set-aside obligations in 2015.” Further, Optima recommended that the Joint Movants “should be required to partially comply with the 2015 swine waste set-aside requirements to the extent that they are able to do so based on RECs previously acquired.” Optima concurred with NCSEA’s approach to establish partial compliance. Optima also recommended changes to the triannual reporting requirements to include initial offer prices, reasons that contracts were not executed, and the current status of any contracts entered into, including any reason for termination. Finally, Optima recommended that the minutes from the Public Staff’s stakeholder meetings be made publicly available.

NCPC, in its comments, expressed concerns that requests to delay the set-asides have “become the norm”, that the motions for delay have become formulaic, and that the triannual reports have “become less than fully informative.” NCPC stated that “by acknowledging that contracts were not entered due to price, the [Joint Movants] have now placed ‘price’ squarely in issue.” Thus, NCPC contended that the Commission must determine that the Joint Movants’ contentions regarding price are accurate and reasonable before it can determine that a reasonable compliance effort has been put forth. NCPC stated its support for the approach recommended by Optima using the legislative cost cap as a surrogate for reasonableness. NCPC stated that there is no

shortage of swine waste in the State and that proven technologies exist such that production facilities would be built at an adequate price point. NCPC recommended that the triannual reports be reduced to semiannual and provided a new list of information to be included in the reports to avoid the formulaic nature of the reports. NCPC also stated its support for Optima's recommendation that each electric power supplier submit to the Commission a compliance plan for meeting the requirements of the set-aside and NCSEA's recommendation regarding partial compliance.

DEC and DEP, in their supplemental comments, stated that if the poultry waste set-aside requirement "were to be held at the state-wide 2014 level of 170,000 MWh, the Companies collectively would be able to meet the compliance target."

G.S. 62-133.8(i)(2) states that the Commission, in developing rules, 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 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 two occasions: first in its November 29, 2012 Order Modifying the Poultry and Swine Waste Set-Aside Requirements and Granting Other Relief (2012 Delay Order), and a second time in its March 26, 2014 Final Order Modifying the Poultry and Swine Waste Set-Aside Requirements and Providing Other Relief (2013 Delay Order), both issued in Docket No. E-100, Sub 113. Additionally, the Commission delayed compliance with the swine waste set-aside requirement a third time in its November 13, 2014 Order Modifying the Swine Waste Set-Aside Requirement and Providing Other Relief (2014 Delay Order).

Based on the triannual reports submitted by the electric power suppliers in Docket No. E-100, Sub 113A, the Joint Movants' motion, the parties' comments, and the entire record herein, the Commission finds that the State's electric power suppliers have made a reasonable effort to comply with the 2015 statewide swine waste set-aside requirements established by G.S. 62-133.8(e), but will not be able to comply. Compliance with the swine waste set-aside requirement has been hindered by the fact that the technology of power production from swine waste continues to be in its early stages of development. No party presented evidence that the aggregate 2015 swine

waste set-aside requirement could be met. While Optima stated that DEC and DEP had not made a good faith effort to comply with the swine waste set-aside requirement, it acknowledged that “DEP and DEC are not now in a position to comply with the swine waste set-aside in 2015, whether or not they contract with Optima.” Optima further added that “the initial Optima project can deliver some biogas relatively quickly, the project will take approximately nine (9) months to be fully operational. The other two Optima projects are not as far along in development and one of them is unlikely to be able to produce biogas in 2016.” NCPC stated that projects could be developed in North Carolina at the right price point; however, NCPC made no contention that the swine waste set-aside requirement could be met in 2015.

The Commission, at this time, is not persuaded that pricing disputes were a significant contributing factor to the Joint Movants’ failure to meet the swine waste set-aside requirement. Therefore, based on the overall availability of swine waste RECs, the lack of technological progress in the market, and contract performance, the Commission finds it appropriate to delay the swine waste set-aside by one year. However, the Commission also finds merit in NCPC’s contention that it may be inappropriate for the electric power suppliers to reject proposals solely based on the price of RECs when there is ample room under the REPS cost-cap. The Commission has clearly stated that the set-aside requirements take priority and the General Assembly has established the reasonable limit an electric power supplier can spend for compliance with the REPS. Therefore, while the Commission does not intend to interject itself into negotiations, further monitoring of such negotiations may be necessary in future years. The failure to contract with swine waste developers is directly relevant to the question of whether the electric power suppliers have made a good faith effort to comply with the swine waste set-aside requirement. Therefore, the Commission finds merit in some of the NCPC and Optima’s proposed changes to the triannual reporting requirements and stakeholder process.

The Commission finds good cause to amend the triannual reporting requirement to occur semiannually. In addition to the previously required information, the electric power suppliers shall include the following information in their semiannual reports: (1) an estimate of the number of RECs needed to comply with the swine waste set-aside in the present calendar year; (2) project developers with whom the electric supplier submitting the report had formal discussions with during the prior six months, a description of the discussions, including their current status, and any proposed project resulting from the discussion; and (3) whether any proposals were rejected during the reporting period and a thorough discussion of why an agreement could not be reached. The Commission also finds merit in the suggestion that the stakeholder meetings be synchronized with the filing of the semiannual reports and requests that the Public Staff convene a stakeholder meeting within 6 weeks of the date a semiannual report is filed. Finally, the Commission requests that the Public Staff file minutes from the stakeholder meetings in Docket No. E-100, Sub 113A. The Commission will not require the number of RECs currently held, the number expected by the end of the calendar year, the contracts in place and the RECs that will be supplied under the contract by the end of the year to be submitted at this time, as that information has typically been treated as confidential.

With regard to NCSEA, NCPC, and Optima’s request that a level of partial compliance with the swine waste set-aside requirement be required in 2015 and that the Joint Movants not bank their previously acquired swine waste RECs for future use, the Commission notes that it has permitted the Joint Movants to bank RECs for three consecutive years and the cumulative effect of this banking has yet to result in the ability to comply with the initial swine waste set-aside requirement. To require that the Joint Movants retire their banked swine RECs would, thus, result in wiping the slate clean for compliance purposes in future years. Therefore, the Commission finds that it is in the public interest to delay the entire requirement of G.S. 62-133.8(e) for one year. Electric power suppliers that have acquired swine waste RECs for 2015 REPS compliance should be allowed to bank such RECs for swine waste set-aside requirement compliance in future years. Electric power suppliers should continue to make efforts to comply with the swine waste set-aside requirement as modified by this Order.

Based on the triannual reports submitted by the electric power suppliers in Docket No. E-100, Sub 113A, the Joint Movants’ motion, the parties’ comments, and the entire record herein, the Commission further finds that the State’s electric power suppliers have made a reasonable effort to comply with the 2015 statewide poultry waste set-aside requirement established by G.S. 62-133.8(f), but will not be able to comply. 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. No party presented evidence that the aggregate 2015 poultry waste set-aside requirement could be met; however, the Public Staff, DEC, and DEP stated that, due to the availability of S886 RECs, the 2014 level of the poultry waste set-aside could be maintained. Unlike the swine waste set-aside requirement, the market for poultry waste RECs, including S886 RECs, appears at least robust enough to sustain the 2014 requirement of 170,000 MWh going forward. Therefore, the Commission finds good cause to modify the poultry waste set-aside requirement established by G.S. 62-133.8(f) by adding an additional year (2015) of compliance at the 170,000 MWh threshold, prior to escalating the requirement to 700,000 MWh.

IT IS, THEREFORE, ORDERED as follows:

1. That the 2015 swine waste set-aside requirement of G.S. 62-133.8(e), as established in the Commission’s 2014 Delay Order, is delayed for one additional year. The electric power suppliers, in the aggregate, shall comply with the requirements of G.S. 62-133.8(e) according to the following schedule:

<u>Calendar Year</u>	<u>Requirement for Swine Waste Resources</u>
2016-2017	0.07%
2018-2020	0.14%
2021 and thereafter	0.20%

Electric power suppliers 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 2015 with other compliance measures pursuant to G.S. 62-133.8(b), (c), and (d).

2. That the 2015 poultry waste set-aside requirement of G.S. 62-133.8(f), as established in the Commission's 2013 Delay Order, is modified to maintain the same level as the 2014 requirement, and that the scheduled increases in the requirement be delayed by one year. The electric power suppliers, in the aggregate, shall comply with the requirements of G.S. 62 133.8(f) according to the following schedule:

<u>Calendar Year</u>	<u>Requirement for Poultry Waste Resources</u>
2014	170,000 MWh
2015	170,000 MWh
2016	700,000 MWh
2017 and thereafter	900,000 MWh

3. That the triannual filing requirement first required by the Commission's 2012 Delay Order and that now, pursuant to the 2013 Delay Order, applies to DEP, DEC, Dominion, GreenCo, Fayetteville, EnergyUnited, Halifax, NCEMPA and NCMAPA1 shall be due semiannually. The first semiannual report shall be due to the Commission no later than January 1, 2016. Thereafter, the report shall be due to the Commission on each June 1 and December 1 until the Commission finds that it is no longer necessary. In addition to the information specified in Ordering Paragraph 4 of the Commission's 2012 Delay Order, the report shall include: (1) an estimate of the number of RECs needed to comply with the swine waste set-aside in the present calendar year; (2) project developers with whom the electric supplier submitting the report had formal discussions with during the prior six months, a description of the discussions, including their current status, and any proposed project resulting from the discussion; and (3) whether any proposals were rejected during the reporting period and a thorough discussion of why an agreement could not be reached.

4. That the Public Staff is requested to arrange and facilitate stakeholder meetings within six weeks of the filing of a semiannual report. The electric power suppliers subject to the semiannual filing requirement shall attend. Developers and other stakeholders are encouraged to participate and discuss potential obstacles to achieving the swine and poultry waste set-aside requirements and options for addressing them. The Public Staff is requested to file minutes from the stakeholder meetings in Docket No. E-100, Sub 113A.

ISSUED BY ORDER OF THE COMMISSION.

This the 1<sup>st</sup> day of December, 2015.

NORTH CAROLINA UTILITIES COMMISSION

*Gail L. Mount*

Gail L. Mount, Chief Clerk