

**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 POULTRY
Session Law 2007-397) AND SWINE WASTE SET-ASIDE
) REQUIREMENTS AND GRANTING
) OTHER RELIEF

HEARD: Tuesday, August 28, 2012, and Wednesday, August 29, 2012, at
 9:30 a.m., in Commission Hearing Room, Dobbs Building, 430 North
 Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner William T. Culpepper, III, Presiding, Chairman Edward S.
 Finley, Jr., and Commissioners Bryan E. Beatty, Susan W. Rabon, ToNola
 D. Brown-Bland, and Lucy T. Allen

APPEARANCES:

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BY THE COMMISSION: On May 16, 2012, the Commission issued an Order directing all of the State's electric power suppliers to file updates on the status of their plans to comply with the swine waste and poultry waste set-aside requirements established in the State's Renewable Energy and Energy Efficiency Portfolio Standard (REPS). Subsections (e) and (f) of G.S. 62-133.8 establish set-asides within the overall renewable energy requirement. They provide that a specified percentage of the power supplied to customers each year must be derived from swine waste or poultry waste. G.S. 62-133.8(e) provides that in 2012 at least 0.07% of an electric power supplier's total 2011 retail sales must come from swine waste, with the percentage increasing to 0.14% in 2015 and 0.20% during and after 2018. G.S. 62-133.8(f) provides that the State's electric power suppliers must collectively provide a total of 170,000 megawatt-hours (MWh) of power generated from poultry waste in 2012, 700,000 MWh in 2013, and 900,000 MWh in 2014 and each year thereafter. The Commission's May 16, 2012 Order noted that REPS compliance plans for 2011, submitted to the Commission as required by Commission Rule R8-67(b) in Docket No. E-100, Subs 128 and 131, and comments filed by the Public Staff in the same dockets, called into question whether the electric power suppliers would meet their 2012 swine and poultry waste set-aside requirements. The Commission required that within 30 days the State's electric power suppliers provide an update to their plans for compliance with the requirements of G.S. 62-133.8(e) and (f) in 2012 and 2013.

In response to the Commission's May 16, 2012 Order, on June 1, 2012, Duke Energy Carolinas, LLC (Duke), Progress Energy Carolinas, Inc. (PEC), Dominion North Carolina Power (DNCP), GreenCo Solutions, Inc. (GreenCo), the Public Works Commission of the City of Fayetteville (Fayetteville), the North Carolina Eastern

Municipal Power Agency (NCEMPA), and North Carolina Municipal Power Agency Number 1 (NCMPA1),¹ EnergyUnited Electric Membership Corporation (EnergyUnited), Halifax Electric Membership Corporation (Halifax), and the Tennessee Valley Authority (TVA) (collectively the Joint Movants) filed a Joint Motion to Modify and Delay the Requirements of N.C. Gen. Stat. §§ 62-133.8(e) and (f) Due to Lack of Sufficient Swine and Poultry Waste Resources; and Update Complying with the Requirements of the Order Requiring Update of Plans to Meet Swine and Poultry Waste Set-Aside Obligations (Original Joint Motion). In this motion the Joint Movants requested, pursuant to G.S. 62-133.8(i)(2), to be relieved from compliance with subsections (e) and (f) for the year 2012. G.S. 62-133.8(i)(2) is often referred to as the “off-ramp” provision of the REPS statute. It states that the Commission must develop a procedure to modify or delay the provisions of subsections (b), (c), (d), (e), and (f) of G.S. 62-133.8 in whole or in part if the Commission determines that it is in the public interest to do so. G.S. 62-133.8(i)(2) requires that the adopted procedure include a requirement that the electric power supplier demonstrate that it made a reasonable effort to meet the requirements set out in the REPS.

On June 21, 2012, the Commission issued an Order setting the case for hearing, establishing deadlines for filing testimony, and requiring the Joint Movants to respond to certain questions in their direct testimony.

On July 17, 2012, the Joint Movants filed an Amended Joint Motion to Modify and Delay the Requirements of N.C. Gen. Stat. §§ 62-133.8(e) and (f) Due to Lack of Sufficient Swine and Poultry Waste Resources; and Amended Update Complying with the Requirements of the Order Requiring Update of Plans to Meet Swine and Poultry Waste Set-Aside Obligations (Amended Joint Motion). In the Amended Joint Motion, the Joint Movants requested that they be relieved from compliance with G.S. 62-133.8(e) and (f) for two years, rather than only one year as requested in the Original Joint Motion. The Joint Movants requested that all of the deadlines in subdivisions (e) and (f) be extended for a two-year period, so that the electric power suppliers would be required to provide 0.07% of their total retail sales from swine waste in 2014, increasing to 0.14% in 2017, and to provide a collective total of 170,000 MWh of power from poultry waste in 2014, 700,000 MWh in 2015, and 900,000 MWh in 2016 and subsequent years.

On July 18, 2012, petitions to intervene were filed by TVA and Recovered Energy Investments I, LLC (REI). On August 2, 2012, a petition to intervene was filed by Tucker Engineering Associates, Inc. On August 16, 2012, a petition to intervene was filed by Halifax. All these petitions were granted by the Commission. The intervention of the Public Staff is recognized under G.S. 62-15(d). All other parties to the proceeding had previously been made parties by the Commission or allowed to intervene in this docket.

On July 25, 2012, EnergyUnited filed the direct testimony of Alec Natt, its Chief Financial Officer; Fayetteville filed the direct testimony of Keith Lynch, its Power Contracts and Regulatory Manager; NCEMPA and NCMPA1 filed the direct testimony of

¹ NCEMPA and NCMPA1 are hereinafter sometimes referred to as the Power Agencies.

Andrew M. Fusco, Director of Planning with Electricities of North Carolina, Inc.; GreenCo filed the direct testimony of Jason B. Nemeth, its Director, Business Operations; DNCP filed the direct testimony of Chiman H. Muchhala, its Manager of Market Operations; and TVA filed the direct testimony of David B. DeHart, its Program Manager, Renewable Energy. On July 27, 2012, Duke and PEC filed the direct testimony of Jennifer S. Ellis, Duke's Manager of Carolinas Wholesale, and Emily O. Felt, Duke's Director of Renewable Strategy and Compliance, Carolinas. On August 13, 2012, Halifax filed the direct testimony of its Executive Vice President, Charles H. Guerry.

On July 31, 2012, a proposed Settlement Agreement was filed by PEC, Duke, the North Carolina Sustainable Energy Association (NCSEA), the North Carolina Pork Council (NCPC), the North Carolina Poultry Federation (NCPF), and the North Carolina Farm Bureau (NCFB). On August 6, 2012, the Commission issued an Order directing Duke and PEC to respond to certain questions relating to the proposed Settlement Agreement. Responses were filed by Duke and PEC on August 13, 2012.

On August 17, 2012, the Public Staff filed the testimony of Jay B. Lucas, Electric Engineer; Green Energy Solutions NV, Inc. (GES), filed the testimony of its President, Julian Cothran;² REI filed the testimony of Thomas McKittrick, President of Forsite Development, Inc.; and the Community Groups filed the testimony of Louis A. Zeller, Executive Director of the Blue Ridge Environmental Defense League.

On August 24, 2012, Duke filed the rebuttal testimony of witness Felt; DNCP filed the rebuttal testimony of witness Muchhala; NCEMPA and NCMPA1 filed the rebuttal testimony of witness Fusco; GreenCo filed the rebuttal testimony of witness Nemeth; NCSEA filed the rebuttal testimony of James D. Kennerly, its Policy and Regulatory Analyst; and NCPF filed the rebuttal testimony of Robert L. Ford, its Executive Director. The Commission also received several consumer statement of position letters from individuals in response to the Original Joint Motion and the Amended Joint Motion.

On August 28, 2012, the matter came on for hearing as scheduled. Duke and PEC presented the direct testimony of witness Ellis and the direct and rebuttal testimony of witness Felt; DNCP presented the direct and rebuttal testimony of witness Muchhala; TVA presented the direct testimony of witness DeHart; Fayetteville presented the direct testimony of witness Lynch; NCEMPA and NCMPA1 presented the direct and rebuttal testimony of witness Fusco; EnergyUnited presented the direct testimony of witness Natt; Halifax presented the direct testimony of witness Guerry; GreenCo presented the direct and rebuttal testimony of witness Nemeth; the Community Groups presented the direct testimony of witness Zeller; REI presented the direct testimony of witness McKittrick; the Public Staff presented the direct testimony of

² The testimony of Julian Cothran on behalf of Green Energy Solutions NV, Inc. (GES), was prefiled on August 17, 2012, but, while GES was represented by counsel at the evidentiary hearing on August 28-29, 2012, no witness appeared on behalf of GES to sponsor the testimony and respond to cross examination. As a result, the Commission will treat this testimony as a statement of position.

witness Lucas; NCSEA presented the rebuttal testimony of witness Kennerly; and NCPF presented the rebuttal testimony of witness Ford.

On September 7, 2012, Public Staff witness Lucas submitted late-filed exhibits. On September 12, 2012, REI witness McKittrick submitted late-filed exhibits.

On October 1, 2012, the Community Groups filed a post hearing brief. On October 9, 2012, Duke and PEC filed a Motion for Extension of Time to File Proposed Orders. On October 10, 2012, the Commission issued an Order Granting, In Part, Motion for Extension of Time to File Proposed Orders. On October 11, 2012, the NCPF filed a post hearing brief. On October 19, 2012, the Public Staff; Fayetteville; Duke, PEC, EnergyUnited, GreenCo and Halifax collectively; REI; TVA; NCSEA; NCP; DNCP; and NCEMPA and NCMPA1 collectively, filed post hearing briefs. Also on October 19, 2012, DNCP filed an affidavit of witness Muchhala.

Based on the foregoing, the evidence and exhibits filed by the parties, and the entire record in this proceeding, the Commission makes the following

FINDINGS OF FACT

1. The State's electric power suppliers have made a reasonable effort to comply with the swine waste set-aside requirement established by G.S. 62-133.8(e) and the poultry waste set-aside requirement established by G.S. 62-133.8(f) for 2012, but will not be able to comply.

2. Compliance with the set-aside requirements has been hindered by the fact that the technology of power production from swine and poultry waste is in its early stages of development.

3. Compliance with the poultry waste set-aside requirement has been hindered in some respects, and promoted in other respects, by the fact that on several occasions the General Assembly has modified the REPS, either through amending the statute or via session law. Legislative and regulatory developments have expanded the universe of compliance options for electric power suppliers.

4. Compliance with the swine and poultry waste set-aside requirements has been hindered by disagreements between electric power suppliers and renewable power developers over the terms and conditions of power purchase agreements; prolonged negotiations and continual changes in requested terms, formats of proposal, and bidding processes presented by the electric power suppliers; misunderstandings and disagreements between electric power suppliers and renewable power developers as to the procedures for interconnecting swine and poultry waste generation facilities with the electric grid, and as to the cost of such interconnection; and by the uncertainty of future applicable environmental regulations.

5. It is appropriate to delay the statutory deadlines of the set-aside requirements, not only for those electric power suppliers who have been unable to comply, but for all electric power suppliers.

6. Electric power suppliers who have acquired swine and poultry waste renewable energy certificates (RECs) for 2012 REPS compliance may bank such RECs for swine and poultry waste set-aside requirement compliance in future years.

7. Electric power suppliers should continue to make efforts to purchase any reasonably-priced swine and poultry waste RECs available in order to support the construction and operation of swine and poultry waste generation facilities and to fulfill requirements pursuant to this Order.

8. It is in the public interest to eliminate the requirement of G.S. 62-133.8(e) for compliance by the State's electric power suppliers with the swine waste set-aside requirement in 2012 and to delay for a one-year period the requirements of G.S. 62-133.8(f) for compliance by the State's electric power suppliers with the poultry waste set-aside requirement.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-4

The evidence supporting these findings of fact appears in the testimony of Duke-PEC witnesses Felt and Ellis, DNCP witness Muchhala, TVA witness DeHart, Fayetteville witness Lynch, Power Agencies witness Fusco, EU witness Natt, Halifax witness Guerry, GreenCo witness Nemeth, Community Groups witness Zeller, NCPF witness Ford, REI witness McKittrick, and Public Staff witness Lucas, and the statement of position of GES witness Cothran.

Duke-PEC witness Felt testified that Duke worked actively and diligently to comply with its swine waste set-aside requirements. Duke was a member of the Swine REC Buyers Group, and the group entered into seven contracts with swine waste power developers. The contracts were expected to fulfill the swine waste set-aside requirements for 2012 and 2013. Witness Felt and others testified that four of these contracts were terminated because the developers missed deadlines and failed to make progress toward commercial operation. The other contracts remain in effect, and, in addition, Duke has entered into two separate contracts with swine waste developers and has purchased a small number of RECs from a pilot-scale swine waste-to-energy project.

Witness Felt testified that Duke has also entered into three contracts with poultry waste developers, and that Duke expects to have some poultry and swine waste RECs by the end of 2013. According to witness Felt, among the problems Duke has faced in attempting to comply with the swine and poultry waste set-aside requirements are the technological difficulty of producing power from swine and poultry waste; the difficulty of developers to obtain financing for projects; the fact that projects are often located in remote rural areas and interconnection costs are high; difficulties in structuring contracts

and balancing perceived risks between Duke and the developers; and uncertainty as to whether animal waste will be subject to the U.S. Environmental Protection Agency's (EPA) Commercial/Industrial Solid Waste Incinerator (CISWI) regulations. Witness Felt testified that Duke is hopeful that it can meet the current 2013 set-aside requirements, although Duke's compliance is dependent on how quickly negotiations can be completed and facilities come online. Additionally, witness Felt testified that potential compliance with the swine waste set-aside requirement in 2013 would be based in part upon a Duke biogas feasibility study, which has yet to be completed. She stated that Duke expects that it will be possible to meet the set-aside requirements in the years following 2013, but that this is also uncertain in view of the infancy of the animal waste generation industry.

Witness Felt also noted that there had been several legislative changes affecting the poultry waste set-aside requirement,³ and while these changes had expanded the universe of compliance options for the electric power suppliers, they had also created uncertainty and required the electric power suppliers to continually re-evaluate their options for complying with the poultry waste set-aside requirement at the lowest cost. In addition, witness Felt testified that the potential for future changes in law regarding the REPS was a factor considered in negotiations with renewable energy developers. However, witness Felt testified that she was not aware of any additional proposed legislative changes, nor had she conferred with Duke's legislative liaison in regards to any potential changes.

Duke-PEC witness Ellis testified that PEC, like Duke, had worked diligently to meet the swine and poultry waste set-aside requirements. PEC participated with the other members of the Swine REC Buyers Group in signing contracts with several swine waste developers and subsequently terminating four of the contracts due to the developers' failure to make progress toward commercial operation. Unlike Duke, PEC also participated in the Poultry Collaborative, and the Collaborative entered into a contract with a developer to provide RECs for compliance with the poultry waste set-aside requirement. Witness Ellis testified that PEC is in negotiations with other parties for additional contracts for both swine and poultry power. When asked about the potential obstacles to full compliance with the swine and poultry waste set-aside requirements, witness Ellis emphasized the infancy of swine waste-to-energy technology and the need for a determination as to whether power generation from poultry waste is allowable under the CISWI regulations.

DNCP witness Muchhala testified that his company had participated in the Swine REC Buyers Group, entered into contracts with several swine waste developers, and terminated four of these contracts. Because of the contract terminations, DNCP undertook a nationwide search for developers who could supply swine waste RECs, but it was unable to obtain any swine waste RECs in North Carolina or any other state, and,

³ For example Session Law 2011-309 (Senate Bill 710) allowed thermal energy from poultry waste production to be eligible towards G.S. 62-133.8(f) compliance. Session Law 2012-195 (Senate Bill 886), modified a year later by Session Law 2011-279 (Senate Bill 484), made a limited amount of non poultry waste RECs eligible for G.S. 62-133.8(f) compliance purposes.

therefore, it is unable to comply with the swine waste set-aside requirement in 2012. With respect to the poultry waste set-aside requirement, DNCP will be able to meet its own poultry waste set-aside requirement by buying out-of-state poultry waste RECs, as it is authorized to do under G.S. 62-133.8(b)(2)(e). For the purpose of meeting the poultry waste set-aside requirement of the Town of Windsor, a wholesale customer for which DNCP provides REPS compliance services, DNCP has chosen to participate in the Poultry Collaborative. Witness Muchhala testified that while DNCP is under contract with a developer to provide sufficient in-state RECs for future compliance with the poultry waste set-aside requirement, these RECs will not be available for compliance in 2012.

TVA witness DeHart testified that TVA is not a member of the Swine REC Buyers Group. TVA issued a request for offers of swine and poultry waste RECs in February 2012 and plans to issue a similar offer later this year. Witness DeHart stated that TVA plans to meet its customers' swine and poultry waste set-aside requirements through responses to this offer, through generators participating in its Generation Partners program or Renewable Standard Offer program, or through one or more stand-alone power purchase agreements with swine or poultry waste power producers.

Fayetteville witness Lynch testified confidentially concerning Fayetteville's efforts to comply with the swine and poultry waste set-aside requirements.

Power Agencies' witness Fusco testified that the Power Agencies were members of the Swine REC Buyers Group and, together with the other members, entered into contracts with several swine waste-to-energy developers, although some of these contracts subsequently had to be canceled. He further testified that the Power Agencies were initially members of the Poultry Collaborative. However, when the General Assembly passed Senate Bill 710, which allowed combined heat and power facilities, using poultry waste as a fuel to gain REC credit for the production of thermal energy produced as well as electric energy, the Power Agencies withdrew from the Poultry Collaborative and entered into a contract for poultry waste RECs with such a facility. Consequently, the Power Agencies are now in a position to comply with the poultry waste set-aside requirement for 2013, and NCMPA1 is in a position to comply for 2012 as well.

EU witness Natt testified that EU sought to obtain in-state swine and poultry waste RECs by participating in the Swine REC Buyers Group and the Poultry Collaborative. He stated that EU has entered into, and in some cases has had to cancel, the same contracts as other members of the group, and currently it has no in-state swine or poultry waste RECs. EU has, however, been able to acquire a limited number of out-of-state swine and poultry waste RECs.

Halifax witness Guerry testified that his cooperative had relied on the efforts of the Swine REC Buyers Group and the Poultry Collaborative to secure swine and poultry waste RECs. Witness Guerry testified that, at present, Halifax does not have any RECs derived from swine or poultry waste.

GreenCo witness Nemeth testified that GreenCo participated in the Swine REC Buyers Group and Poultry Collaborative, and it is also working to acquire swine waste RECs from two farms located in the service area of one of its member cooperatives, South River EMC. Witness Nemeth testified that GreenCo has also purchased out-of-state swine waste RECs, and it will consider issuing a request for proposals (RFP) for swine and poultry waste RECs. Witness Nemeth also testified about GreenCo's experience with GES. He stated that GES presented a proposal to supply poultry waste RECs to GreenCo in 2009, but that the proposal was unsatisfactory to GreenCo for several reasons. The proposal was for an industrial-scale project and would have produced far more RECs than GreenCo needed, and the proposal required GreenCo to buy all of GES's output. Witness Nemeth testified that GreenCo was also concerned because: (1) the GES project was located in South Carolina; (2) the GES project involved thermal as well as electric energy, at a time when the General Assembly had not passed legislation ensuring that thermal RECs would count toward the poultry waste set-aside requirement; and (3) there was uncertainty as to the project's costs. Witness Nemeth stated that GreenCo contacted GES to respond to its proposal. Witness Nemeth expressed strong disagreement with GES's contention that the electric power suppliers never intended to comply with the poultry waste set-aside requirement.

Community Groups witness Zeller testified that he is Executive Director of the Blue Ridge Environmental Defense League. He stated that he is opposed to the construction of biomass-fueled power plants because they increase atmospheric pollution, contribute to global warming, and involve such financial complexity that they cannot be effectively regulated by local government. In his opinion, the swine and poultry waste set-aside requirements should not be simply delayed for two years, but should be eliminated altogether. According to witness Zeller's testimony the Commission should report to the General Assembly that G.S. 62-133.8(e) and (f) are a "dead letter" and will never be met.

NCPF witness Ford testified concerning the importance of the poultry industry to the State's economy, the likelihood that land application of poultry litter as fertilizer will be restricted in the future, and the need to use litter for energy production if land application is limited. He stated that while the Commission has authority to delay and modify the application of G.S. 62-133.8(e) and (f), it does not have the authority to repeal them, and permanently excusing compliance with subdivisions (e) and (f) would have the effect of repealing them. He emphasized that the plants proposed by REI will not burn poultry waste, but instead will burn substitutes for poultry litter as authorized by Senate Bill 886, and he encouraged the Commission to approve the proposed Settlement Agreement entered into by NCPF, NCPC, NCFB, NCSEA, Duke, and PEC.

REI witness McKittrick testified that he is president of Forsite Development, Inc. (Forsite), an affiliate of REI. He stated that Forsite is the developer of Reventure Park in Mecklenburg County, a "cleanfields renewable energy demonstration park" as defined in Senate Bill 886, enacted by the General Assembly in 2010. Witness McKittrick stated that under Senate Bill 886, when one megawatt-hour of thermal or electric energy is

generated from biomass (of any kind, not necessarily poultry waste) in a cleanfields renewable energy demonstration park, it will be eligible for a three times REC multiplier (one general REC creates an additional two poultry waste RECs.)⁴ Witness McKittrick testified that REI is constructing a facility in ReVenture Park that will produce thermal and electric energy from biomass.⁵

Witness McKittrick stated that, when REI sought to enter into a contract to sell its RECs to Duke, Duke insisted that the contract include a “change of law” provision under which the risk of changes in the renewable energy statutes would be placed on REI. He stated that REI’s lenders would not approve a contract with such a provision, and the negotiations broke down. In witness McKittrick’s view, the market for poultry waste RECs cannot develop properly, and the poultry waste set-aside requirement cannot function successfully, unless electric power suppliers are willing to agree to a reasonable share of the risk of change of law and other risks inherent in a business transaction. Witness McKittrick further testified that REI is willing to sell its RECs of vintage 2013 to electric power suppliers, and the Commission should not take away this business opportunity by relieving the electric power suppliers from their obligation to meet the poultry waste set-aside requirement in 2013.

REI witness McKittrick testified that the relief sought by the Amended Joint Motion and the Settlement Agreement could put many projects in limbo, including those of REI. He testified that the interest of several electric power suppliers in purchasing poultry waste RECs is dependent on the outcome of this docket. He further stated that REI fears that if the Commission modifies the poultry waste set-aside requirements, potential purchasers will wait until after the next legislative session before deciding to purchase RECs, and if they do, REI will likely not construct one of its two proposed facilities.

According to the statement of position of GES president Cothran, GES has completed construction of a plant in South Carolina that will produce electric and thermal energy from poultry waste. Cothran asserted that GES attempted to market its RECs to several electric power suppliers, but that none were willing to negotiate with GES except for Duke. According to Cothran’s statement, Duke took such demanding and unreasonable negotiating positions that the negotiation of the contract took more than 24 months. At present, construction of the plant is complete and the facility is generating biogas from poultry waste, but the plant cannot be connected to the grid because of disputes among GES, Duke, and PEC as to the amount of the interconnection charges and who is responsible for the charges.

⁴ Reventure Park Investments I, LLC, filed a request for a declaratory ruling on March 15, 2011, regarding the Commission’s interpretation of SB 886 and how the REC provisions of the Act would be implemented. The Commission issued an Order on the request on April 18, 2011.

⁵ REI filed a report of proposed construction for the facility on June 25, 2012, in Docket No. SP-1927, Sub 0, and a registration statement as a new renewable energy facility on September 24, 2012, in Docket No. SP-1927, Sub 1.

Public Staff witness Lucas testified that EPA regulations, in particular the proposed CISWI regulations, have made compliance with the swine and poultry waste set-aside requirements difficult; however, a poultry waste facility proposed by Prestage Farms, Inc., has obtained a determination by the Division of Air Quality of the North Carolina Department of Environment and Natural Resources that its fuel source will be considered a non-solid waste fuel and thus not subject to CISWI. Witness Lucas further stated that two recurring issues have presented difficulty for swine and poultry waste developers seeking to reach agreement with electric power suppliers for the purchase of their RECs: (1) differences in agreement over contract terms, particularly “change of law” provisions, and (2) inability to reach a satisfactory interconnection agreement. Additionally, witness Lucas testified that the Public Staff believes it is reasonable for a utility to negotiate with the expectation that current law and current statutory requirements will remain in place, unless it has verifiable information indicating otherwise.

The Commission has reviewed all of the evidence and concludes the electric power suppliers have demonstrated that they made a reasonable effort to comply with the swine and poultry waste set-aside requirements for 2012. The electric power suppliers invested both time and effort to (1) solicit proposals for generation from swine and poultry waste, (2) evaluate the proposals received, (3) negotiate contracts with the developers who presented the most promising proposals, and (4) monitor the developers’ performance under their contracts. No evidence was presented to suggest that the electric power suppliers failed to make a reasonable effort to comply, except for the testimony of REI witness McKittrick that Duke’s contract negotiating position was inflexible. Although the statement of position of GES president Cothran indicates that he received no response to some of his proposals, the record shows that his company did ultimately enter into a contract with Duke. As for witness McKittrick, credible witnesses testified that Duke devoted a great deal of time to negotiating with his company, even though the two companies did not ultimately reach agreement on a contract.

Nonetheless, the Commission acknowledges the concerns raised by REI and GES that difficult negotiations, slow or inconsistent responses, interconnection issues, and shifts in position due to changes in law may, in some cases, have delayed progress toward compliance with the swine and poultry waste set-aside requirements. Therefore, similar to the stipulations agreed to in the proposed Settlement Agreement entered into by NCPF, NCPC, NCFB, NCSEA, Duke, and PEC, the Commission will require heightened reporting requirements and improvements in communications between electric power suppliers and developers, including a triannual report to the Commission and a website Information Sheet, in order to help reduce similar delays in the future.

Numerous witnesses testified that the most substantial reason for the electric power suppliers’ failure to comply with the set-aside requirements is the immaturity of the animal waste power production industry and its technology. As Duke-PEC witness Felt testified, “producing electricity from swine waste is technologically challenging and few successful applications exist.” Witnesses testified that the same is true of poultry waste technology. In essence, when the General Assembly enacted G.S. 62-133.8(e)

and (f), it was seeking to advance the development of an industry that was in its infancy. In the initial development stages of a new industry, such setbacks and failures are not unexpected.

Another factor contributing to the electric power suppliers' failure to achieve compliance with the swine and poultry waste set-aside requirements is the applicability of environmental regulations. Public Staff witness Lucas testified that it is uncertain whether EPA's proposed CISWI regulations will apply to facilities that generate electricity from animal waste. The Commission finds that uncertainty may discourage potential bidders from responding to the electric power suppliers' requests for proposals.

The General Assembly amended G.S. 62-133.8(f), the statutory provision for the poultry waste set-aside requirement, on three occasions in 2010 and 2011. In Senate Bill 886, enacted on August 5, 2010, the General Assembly authorized triple credit for RECs produced from biomass at a "cleanfields renewable energy demonstration park," with each megawatt-hour produced at such a facility counting as one general REC that upon retirement additionally will count as two poultry waste RECs, even if the facility's generation source is some form of biomass other than poultry waste. In Senate Bill 484, enacted on June 23, 2011, the triple REC credit for a facility at a cleanfields renewable energy demonstration park was limited to the first 10 megawatts of capacity at such a facility. Senate Bill 710, enacted on June 27, 2011, provides that thermal as well as electric energy produced from poultry waste is eligible for poultry waste RECs. With the enactment of each statutory change, the process of contracting for poultry waste RECs was delayed, as electric power suppliers reanalyzed the proposals they had received and determined which was lowest in cost. However, as witness Lucas and others testified, the overall effect of the statutory changes was to make more facilities eligible for poultry waste RECs and, thus, to lower the price of poultry waste RECs.

Another factor that has made it more difficult for the electric power suppliers to comply with the swine and poultry waste set-aside requirements involves differences between the electric power suppliers and swine and poultry waste developers as to the terms and conditions of purchase agreements. There was extensive testimony about the negotiations between Duke and REI concerning their proposed contract. These negotiations continued for several years and did not result in agreement, with the main area of dispute relating to Duke's proposed language on change of law. Public Staff witness Lucas testified that change of law and interconnection are recurring issues that make it difficult for electric power suppliers to reach agreement with developers, and, thus, for them to reach compliance with the swine and poultry waste set-aside requirements. The Commission agrees with witness Lucas's testimony that it is reasonable for an electric power supplier to negotiate with the expectations that current statutory requirements will remain in place, unless it has verifiable information indicating otherwise. Additionally, the Commission finds that it would be reasonable for a public utility to negotiate with the expectation that it would have a reasonable opportunity to recover prudent costs resulting from contracts entered to satisfy existing law at the time of a contract's creation.

The Commission concludes that the electric power suppliers have made a reasonable effort to comply with the swine and poultry waste set-aside requirements in 2012. While some electric power suppliers have been able to make some progress towards their compliance with the poultry waste set-aside requirement, the vast majority of them will not be able to comply successfully with either of the set-aside requirements in 2012. The primary reason for the suppliers' failure to comply is the newly developing and still unproven state of the technology for generating power from animal waste. Other reasons include (1) the uncertainty surrounding environmental regulation of the newly developing industry; (2) frequent changes in legislation relating to the poultry waste set-aside requirement; (3) prolonged negotiations and changing requests for proposals and buying groups; (4) difficulties in reaching agreement on contract terms and conditions, particularly with respect to change of law and interconnection; and (5) the lack of experience of some swine and poultry waste developers. Overall, the Commission concludes that substantial progress is being made, but at a pace that is somewhat slower than what the General Assembly envisioned.

While compliance in 2012 is not possible, at this time the Commission feels it is premature to make a similar finding for 2013. A small number of the electric power suppliers are already in position to comply with the 2013 set-aside requirements. Additionally, this Order will greatly reduce the pro-rata poultry waste set-aside requirements in 2013 for each electric power supplier (a pro-rata portion of 170,000 MWh rather than 700,000 MWh). Duke witness Felt testified that she was hopeful Duke could meet the original 2013 requirement, a requirement significantly larger than the 2013 requirement resulting from this Order, and that Duke still awaits the results of its biogas feasibility study. Legislative changes have expanded the means of compliance with the poultry waste set-aside requirement and an additional year may yield results that allow electric power suppliers to comply with the updated schedule in 2013 pursuant to this Order. Additionally, the evidence has shown that swine and poultry waste facilities are part of an ever changing market; the Commission is not in a place to anticipate changes to the market over the next year. Further, the Commission hopes to support the General Assembly's intent to facilitate near-term development of poultry and swine waste generation. As North Carolina is the only state in the country with specific REPS set-aside requirements for energy generated from animal waste, a prolonged delay could have pronounced implications on the developing markets for these RECs.

When exercising the "off ramp" authority granted to the Commission in G.S. 62-133.8(i)(2), the Commission does so with constraint and an attempt to preserve as much of the intent of the General Assembly as possible. At this time it appears premature to make a finding that the electric power suppliers have made a reasonable effort to comply with the swine and poultry waste set-aside requirements for 2013, and that a two-year delay is in the public interest. The electric power suppliers should continue to make reasonable efforts to comply with the 2013 requirements as modified pursuant to this Order. However, nothing in this Order shall preclude the electric power suppliers from making a similar motion at a later date demonstrating that they cannot

achieve compliance and have made a reasonable effort to do so in 2013, if circumstances warrant such action.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 5-7

The evidence supporting these findings of fact appears in the testimony of DNCP witness Muchhala and Power Agencies witness Fusco.

DNCP witness Muchhala testified that DNCP initially planned to participate in the Poultry Collaborative to meet its poultry waste set-aside requirements, but based on legislative and regulatory developments, as well as the growing availability of RECs in other states, DNCP limited its continued participation in the Poultry Collaborative to obtaining in-state poultry waste RECs for the Town of Windsor, a wholesale customer for which DNCP is providing REPS compliance services. For its own use, DNCP sought to purchase additional poultry waste RECs from out-of-state. As a result, DNCP has been able to make significant progress towards its 2012 poultry waste set-aside requirements through the purchase of out-of-state RECs, but it remains unable to meet the in-state needs of the Town of Windsor.⁶

DNCP witness Muchhala further testified that, as a result of DNCP's initial efforts to obtain swine waste RECs, it learned that swine waste-to-energy technology is relatively new and that a market for swine waste RECs has not developed yet. As a result, DNCP concluded that participating in the Swine REC Buyers Group was the most cost effective and prudent approach. DNCP is an active participant in the group's efforts, but as a result of the termination of several contracts originally entered into by the Swine REC Buyers Group, DNCP has conducted its own independent search for swine waste RECs in the State and across the nation. Despite its ability to use RECs derived from out-of-state facilities, DNCP has not been able to obtain or even identify sufficient quantities of swine waste RECs on a nationwide basis to meet its statutory requirements. To the extent that DNCP has been able to comply, it requests that the Commission allow it to bank the animal waste RECs it has already obtained to be used for compliance in future years, rather than retire them in 2012. DNCP states that to do otherwise would result in its being penalized for its good faith efforts to comply.

Power Agency witness Fusco testified that NCMPA1 has been able to secure sufficient poultry waste RECs to meet its 2012 requirements and that both Power Agencies anticipate being in a position to comply with the 2013 poultry waste set-aside requirement. Rather than requiring NCMPA1 to retire the 2012 poultry waste RECs it has obtained, witness Fusco requested that the Commission allow them to be banked for compliance in future obligation years. Witness Fusco stated that the Power Agencies agreed to be party to the Joint Motion because the set-aside requirements are statewide

⁶ The Commission's September 22, 2009, Order in this docket on DNCP's Motion for Further Clarification clarified that G.S. 62-133.8(b)(2)e expressly exempts DNCP from the 25% limitation on the use of unbundled out-of-state RECs. DNCP provides REPS compliance services for the Town of Windsor, an electric power supplier that is a wholesale customer of the Company, and Windsor is not exempt from the 25% limitation.

and industry-wide aggregate requirements. He further stated that any relief granted to any electric power supplier should be applied equitably to all electric power suppliers. In his opinion, suppliers that have diligently pursued efforts to comply, and have secured RECs, should not be punished for having done so by being denied the relief granted to those that could not comply and not being allowed to bank the RECs they have secured. Witness Fusco also testified that not allowing the banking of RECs could send a message to the marketplace that would potentially hinder future compliance. As an example, witness Fusco pointed out that if the Commission granted a delay, but then required those electric power suppliers who had acquired RECs to retire them, then an electric power supplier “may opt to negotiate with a supplier to delay delivery of those RECs until 2014 and, hence, avoid the additional cost of having to comply twice with the requirement that really doesn’t take effect until 2014.”

The Commission commends those electric power suppliers that have acquired sufficient poultry and/or swine waste RECs such that they could meet their 2012 poultry or swine waste set-aside requirements. The Commission is not persuaded that it would be punitive to require compliance by those electric power suppliers that can, in fact, comply. However, the Commission is concerned that some electric power suppliers might have purchased swine waste RECs that will eventually be determined to be ineligible for compliance.⁷ In addition, the Commission recognizes that the General Assembly established the swine and poultry waste set-aside requirements as aggregate obligations and imposed them on all North Carolina electric power suppliers together. Notwithstanding prior Commission Orders approving compliance based on pro-rata shares of the aggregate requirements, the Commission finds that it is in the public interest that all electric power suppliers currently be held to the same compliance schedule for the swine and poultry waste set-aside requirements.

On February 29, 2008, the Commission issued an Order Adopting Final Rules to Implement S.L. 2007-397 in this docket. In that Order the Commission considered the wording of the statutory off-ramp provision and questions about whether the off-ramp should be applied to all electric power suppliers or only to those individual electric power suppliers that demonstrated a need. The Public Staff, SunEdison, and the Solar Alliance all recommended that in a situation where a limited number of suppliers have shown the need for a modification or delay of the REPS requirement, the proper course of action for the Commission to take is to grant the modification or delay solely with respect to those suppliers that need it. The Commission agreed with this position and ultimately included in Rule R8-67(c)(5) the following sentence: “The Commission shall allow a modification or delay only with respect to the electric power supplier or group of electric power suppliers for which a need for a modification or delay has been demonstrated.” The situation envisioned by the Public Staff, SunEdison, and the Solar Alliance is different than the one currently faced by the Commission, however, where the vast majority of the electric power suppliers are unable to comply despite their reasonable efforts. In this matter the “group of electric power suppliers for which a need” has been demonstrated is all electric power suppliers due to the aggregate nature of the swine

⁷ See the Commission’s August 10, 2012 Order Requesting Audit and Recommendations in Docket No. SP-813, Sub 0.

and poultry waste set-aside requirements, the small number of electric power suppliers that can show even partial compliance, and the disincentive for future compliance were the Commission to rule otherwise

On March 31, 2010, the Commission issued an Order on Pro Rata Allocation of Aggregate Swine and Poultry Waste Set-Aside Requirements and Motion for Clarification in this docket. The Order approved a proposed pro-rata mechanism for electric power suppliers to demonstrate compliance with the swine and poultry waste set-aside requirements. Nothing in the Order, however, changed the requirements from aggregate requirements as established by the General Assembly. Under the current circumstances, to delay the requirements only for a portion of the electric power suppliers while requiring a small number of others to comply with their pro-rata portion would cause unnecessary future confusion in compliance as different electric power suppliers would be on different compliance schedules for aggregate requirements.

While G.S. 62-133.8(i)(2) requires an electric power supplier to demonstrate that it made a reasonable effort to meet the requirements, the Commission's authority to modify or delay the REPS requirements is based on the Commission's determination that it is in the public interest to do so. The Commission finds in this case that the public interest would be best served by allowing the efforts of the electric power suppliers to be considered as a whole, and that the delay should also be applied equally to all electric power suppliers. Electric power suppliers that have obtained RECs to meet some portion of their poultry or swine waste set-aside requirements should bank those RECs for compliance in 2013 and continue acquiring RECs for future compliance.

The Commission cautions, however, that if an electric power supplier is individually found not to have made reasonable efforts over the period of the delay to meet its compliance obligations, such a supplier may find the Commission less willing in future proceedings to treat it comparably to others who clearly demonstrated reasonable efforts. While not attempting to define what constitutes reasonableness, the Commission may consider the following actions as illustrative of the reasonableness of the electric power supplier's efforts: (1) issuing RFPs for qualifying resources; (2) consideration of self-build options; (3) expenditure of research and development funds to evaluate swine and poultry waste-to-energy technologies; (4) outreach efforts to poultry and swine waste power producers; (5) exploration of out-of-state markets, when permitted; (6) negotiations with developers; (7) good faith efforts to negotiate power and REC purchase contracts; and (8) good faith efforts to assist developers with interconnection agreements and place their facilities in service in a timely fashion. The Commission notes that some of these efforts are included as part of the conditions of this Order and recognizes them as solid steps in making further progress in these areas.

Despite the granting of the delay and allowing for the banking of RECs in this Order, the Commission has ongoing concerns regarding the ability of the electric power suppliers to comply in 2013 and future years based on existing contracts and estimates for facilities under construction. To the extent that electric power suppliers are able to

identify reasonably priced, technologically viable options for compliance that can be placed in service in 2012, the Commission encourages them to give those options full consideration.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

The Commission's authority to modify or delay the REPS requirements is based on the Commission's determination that it is in the public interest to do so. When establishing the REPS in Session Law 2007-397 the General Assembly set forth goals of the REPS which were "declared to be the policy of the State of North Carolina." Specifically G.S. 62-2(a)(1) stated that the development of renewable energy and energy efficiency through the implementation of a REPS will:

- a. Diversify the resources used to reliably meet the energy needs of consumers in the 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.
- d. Provide improved air quality and other benefits to energy consumers and citizens of the State.

Based on testimony in this proceeding, the market for poultry and swine waste-to-energy projects is clearly in its infancy. The lack of sufficient projects has made the poultry and swine waste set-aside requirements much more costly than other options for meeting the general REPS requirement. These costs are eventually borne by retail consumers, and allowing more time for the market to develop is in the public interest in that it will protect customers from the inflated cost of an undeveloped industry. A one-year delay will not further deter private investment in the market. Additionally, several environmental and public health concerns, including air quality concerns, in regard to the production of electricity from poultry and swine waste were expressed in witness Zeller's testimony for the Community Groups and also submitted to the Commission in several consumer statement of position letters. A delay may allow for improvements in these areas and alleviate some concerns as the industry advances technologically, allowing for advances in areas such as anaerobic digestion and emission reductions, which may allow poultry and swine waste to become a cleaner source of energy in the future. During a delay the applicability of the CISWI regulations might also be clarified which could provide certainty to both financiers and environmental groups as to the state of regulation regarding swine and poultry waste-to-energy facilities. These developments would better allow the REPS to achieve its stated goal and policy to "[p]rovide improved air quality and other benefits to energy consumers and citizens of the State."

Based on all of the forgoing evidence and conclusions, the Commission finds that the electric power suppliers sufficiently demonstrated that they have made reasonable efforts to meet the swine and poultry waste set-aside requirements in 2012, and that eliminating the 2012 swine waste set-aside requirement of G.S. 62-133.8(e) and

delaying the poultry waste set-aside requirement of G.S. 62-133.8(f) for 2012, as provided for in this Order, is in the public interest.

IT IS, THEREFORE, ORDERED as follows:

1. That the 2012 requirement of G.S. 62-133.8(e) shall be eliminated. 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> |
|----------------------|--|
| 2013-2014 | 0.07% |
| 2015-2017 | 0.14% |
| 2018 and thereafter | 0.20% |

2. That the effective date of G.S. 62-133.8(f) shall be delayed for 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> |
|----------------------|--|
| 2013 | 170,000 megawatt hours |
| 2014 | 700,000 megawatt hours |
| 2015 and thereafter | 900,000 megawatt hours |

3. That the general REPS requirements established in G.S. 62-133.8(b) and (c) shall remain unchanged as a result of this Order.

4. That Duke and PEC shall file triannual progress reports verified by an Officer of each company (Progress Reports) to the Commission, providing an up to date summary and position of Duke's and PEC's compliance with, and efforts to comply with, G.S. 62-133.8(e) and (f). The Progress Reports shall be filed on or before January 1, May 1, and September 1 of each fiscal year. The final Poultry Waste Set-Aside Progress Reports shall be made September 1, 2014, and the final Swine Waste Set-Aside Progress Reports shall be made September 1, 2018. The Progress Reports shall be provided to the Public Staff and other interested parties, subject to existing nondisclosure agreements, and shall be filed with the Commission under seal. The Progress Reports shall, without limitation, include: (a) an overall summary of Duke's and PEC's respective current compliance provisions; (b) a list of all entities that Duke and PEC have engaged in discussions about contracts for compliance with the swine and poultry waste set-aside requirements; (c) a list of and summary of relevant options and active proposals that Duke and PEC have received for compliance with the swine and poultry waste set-aside requirements and who provided them; (d) a list of all entities that Duke and PEC have contracted with for swine or poultry waste generation or RECs and a summary of the contracts; (e) for each entity listed in items (b) and/or (c) above that Duke and PEC have not contracted with, a summary of reasons why a contract has not been executed; (f) a summary of Duke's and PEC's respective plans to procure contracts for compliance with the swine and poultry waste set-aside requirements in the

next four months; (g) for any plans to procure contracts for compliance with the swine and poultry waste set-aside requirements from the preceding four months that were not implemented, a summary of why they were not implemented; and (h) a statement about Duke's and PEC's respective forecasts and plans to comply with the swine and poultry waste set-aside requirements by the statutory deadlines as amended by this Order. Duke and PEC shall also file with the Commission and provide to the Public Staff notification of any material changes that have occurred since the last Progress Reports, including delays in commercial operation date of any facilities under contract, termination of any existing contracts, or any significant modification of capacity or technology by an existing project developer that is under contract with them. The Commission reserves the right to request similar information from other electric power suppliers. The Progress Reports shall be filed in a new docket, Docket No. E-100, Sub 113A.

5. That within 45 days of the issuance of this Order, Duke and PEC shall create a web-based summary Information Sheet designed to inform developers of swine or poultry waste-to-energy facilities (waste-to-energy facilities) of the following, at a minimum: (a) typical fees, charges, terms and contract conditions associated with power purchase agreements used by Duke and PEC for the acquisition of electricity and RECs (bundled or unbundled) from waste-to-energy facilities; (b) the requirements for interconnecting an electric generation facility with Duke's and PEC's transmission or distribution systems, highlighting any unique features that may apply to remotely located facilities; (c) the identification and a brief description of considerations or difficulties that Duke and PEC have observed as being an impediment to developers of waste-to-energy facilities seeking to build and operate a facility and sell the output (bundled or unbundled) to electric power suppliers in North Carolina; (d) contact information for appropriate personnel regarding power purchase agreements; (e) contact information for appropriate personnel regarding interconnection agreements for facilities proposed to be located in the respective utility's service territory; and (f) information on any open RFPs and links on the web-based portal to any current applicable RFPs. PEC and Duke shall file a copy of their most recent Information Sheet in Docket No. E-100, Sub 113A. Parties may disseminate hard copies of the Information Sheet to developers of waste-to-energy facilities. Electric power suppliers other than PEC and Duke shall be required to provide the information specified in subparagraphs (d) through (f) above for use in the Information Sheet. Any electric power supplier other than Duke or PEC that submits to Duke or PEC a written request to do so shall be allowed by Duke and PEC to participate in the design and preparation of the Information Sheet. A draft of the Information Sheet shall be circulated to parties to this docket within 30 days from the date of this Order and those persons may provide Duke and PEC comments on the content of the Information Sheet not later than 10 days following receipt. The web-based Information Sheet shall be updated as necessary.

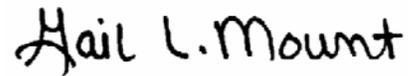
6. That the electric power suppliers may bank any poultry or swine waste RECs acquired prior to 2013 for retirement and REPS compliance in years 2013 and beyond.

7. That each of the electric power suppliers shall continue to take all reasonable actions to purchase all available and reasonably priced swine and poultry waste RECs.

ISSUED BY ORDER OF THE COMMISSION.

This the 29th day of November, 2012.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink that reads "Gail L. Mount". The signature is written in a cursive, slightly slanted style.

Gail L. Mount, Chief Clerk

Dc112912.01