

**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 September 23, 2019, a motion to modify and delay the 2019 requirements of N.C. Gen. Stat. § 62-133.8(e) and (f) was filed jointly by Duke Energy Carolinas, LLC (DEC); Duke Energy Progress, LLC (DEP) (together, Duke); Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina (DENC); North Carolina Electric Membership Corporation (NCEMC); Public Works Commission of the City of Fayetteville (FPWC); EnergyUnited Electric Membership Corporation (EnergyUnited); the Tennessee Valley Authority (TVA); the Town of Waynesville; the Town of Windsor; North Carolina Eastern Municipal Power Agency (NCEMPA); and North Carolina Municipal Power Agency Number 1 (NCMPA1 and together with NCEMPA, Power Agencies) (hereinafter referred to collectively as the Joint Movants).<sup>1</sup> The Joint Movants seek Commission approval of the following requests: 1) to modify the requirements of North Carolina Gen. Stat. § 62-133.8(e) (Compliance With [North Carolina’s Renewable Energy and Energy Efficiency Portfolio Standard (REPS)] Requirement Through Use of Swine Waste Resources), as those requirements apply to DEC, DEP, and DENC, by lowering the 2018 compliance requirement to 0.04% of prior-year retail sales, delaying the scheduled increase to 0.07% of prior-year retail sales to begin in calendar year 2020, and delaying future increases by one year; 2) to modify the requirements of N.C.G.S. § 62-133.8(e), as those requirements apply to all other electric power suppliers, by delaying those requirements until calendar year 2020 and by delaying future increases in those requirements by one year; 3) to modify the requirements of N.C.G.S. § 62-133.8(f) (Compliance With REPS Requirement Through Use of Poultry Waste Resources) by lowering the 2019 statewide requirement to 500,000

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<sup>1</sup> DEC states that it is also acting in its capacity as REPS compliance aggregator for Blue Ridge Electric Membership Corporation, Rutherford Electric Membership Corporation, the City of Dallas, the Town of Forest City, and the Town of Highlands. 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. NCEMPA states that it is acting in its capacity as REPS compliance aggregator for its 32 member municipalities, which are electric power suppliers. NCMPA1 states that it is acting in its capacity as REPS compliance aggregator for its 19 member municipalities, which are electric power suppliers. NTE appears as the REPS compliance aggregator for the following North Carolina municipal utilities: the Town of Black Creek, the Town of Lucama, the Town of Sharpsburg, the Town of Stantonsburg, the Town of Winterville, the City of Concord, and the City of Kings Mountain.

MWh and delaying subsequent increases in the requirement to 700,000 MWh in 2020 and 900,000 MWh in 2021; 3) to allow Joint Movants to bank any swine and/or poultry renewable energy certificates (RECs) previously or subsequently acquired for use in future compliance years; and 4) to allow Joint Movants to replace compliance with the poultry and swine waste requirements in 2019 with other compliance measures in accordance with N.C.G.S. § 62-133.8(b), (c), and (d). The Joint Movants state that they have individually and collectively made reasonable efforts to comply with the swine 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 surrounding the Joint Movants' compliance efforts.

On October 24, 2019, the Commission issued an Order Requesting Comments.

Between November 7, 2019 and November 8, 2019, the North Carolina Poultry Federation (NCPF), the North Carolina Pork Council (NCPC), NTE Carolinas, LLC (NTE), Phibro, LLC (Phibro) and the Public Staff filed initial comments on the Joint Motion. Based on an initial review of those comments, the Commission issued an Order Requiring and Requesting Reply Comments, due on November 20, 2019.

On November 20, 2019, the following parties filed reply comments: NCEMC, Energy United, Phibro, DENC, Duke, FPWC, Power Agencies, NTE and the Public Staff. A summary of the initial and reply comments follow.

#### SUMMARY OF INITIAL COMMENTS

In its comments, NCPF states that it “does not oppose” the portion of the joint motion requesting to modify the requirements of N.C.G.S. § 62-133.8(f) by lowering the 2019 compliance requirement to 500,000 MWh and delaying the subsequent increases to 700,000 MWh in 2020 and to 900,000 MWh in 2021. NCPF limits its comments to the motion and its application to N.C.G.S. § 62-133.8(f), and takes no position with regard to banking poultry waste RECs and substituting other types of RECs for 2019 compliance purposes. In addition, NCPF stipulates and agrees that the Commission may enter an order on the motion on the basis of written submissions without the need for an evidentiary hearing. Finally, NCPF requests that the Commission “continue to monitor the process” and “continue to use its authority to motivate the parties to achieve compliance with the poultry waste set-aside as soon as practicable.”

In its comments, NCPC expresses some concern that the electric power suppliers' collective efforts have become too reliant on DEC, DEP, and DENC while other electric power suppliers' efforts have “come to rely upon [delay motions] to satisfy their statutory obligations”. NCPC states that with the compliance reports required by the Commission have become “formulaic and non-informative” and argue that “this minimalist effort towards compliance is even more concerning now that there is credible information in the record suggesting that certain electric power suppliers are not responding to requests for proposals (RFPs) and not taking on contracts for reasonably priced RECs based on the

belief that the annual Joint Motion will relieve them of their statutory obligations.<sup>2</sup> NCPD recognizes the difficulties associated with the electric power supplier's achieving compliance, but states that "electric power suppliers may be actively avoiding proposals and contracts based on the belief that annual waivers will be granted." NCPD further points to the Joint Movants petition as already setting the stage for compliance waivers in 2020 and 2021. Thus, NCPD urges the Commission to take steps to "develop and stimulate the market and assure future compliance with the swine waste set-aside". NCPD lays out four recommendation for the Commission to consider: 1) declaring that until compliance is achieved, price is not a "good faith" basis for rejecting qualifying swine waste RECs; 2) increase the maximum out of state set-aside percentage (currently established at 25%<sup>3</sup>) that can be utilized to meet compliance; 3) all RECs earned in the accounting period and all RECs banked up to that point should be applied and retired against the aggregate sector compliance goal without distinction based on the source of the RECs; and 4) the Public Staff should conduct an audit of compliance efforts targeting those electric power suppliers who have not shown any appreciable movement towards compliance over the last three years, including 2019.

In its initial comments, NTE states that that its municipalities are similarly-situated to the other cities and municipalities that are party to the motion in this docket. NTE opines that it has "engaged in reasonable efforts to obtain poultry and swine waste RECs to meet their compliance obligations" and for a lot of the same reasons as the joint movants, has "been unable to obtain additional swine and poultry waste RECs for 2019 compliance purposes." In summary, NTE states that it supports the request for relief, and agrees with the joint movants that it is in the public interest to grant the relief requested. NTE further requests that the Commission afford it the same relief as the Joint Movants.

In its initial comments, Phibro states that it does not take a position on the Joint Movants request for relief related to the poultry waste set-aside requirement. However, Phibro takes issue with the Joint Movants "claims that they have individually and collectively made reasonable efforts to comply with North Carolina's REPS requirements for swine waste resources." Phibro provides as evidence two specific events when Phibro either responded to an RFP or issued an RFP to sell out-of-state swine RECs to the Joint Movants at prices at least \$100 or greater per REC. The first instance, was in June of 2019 (June solicitation), where Phibro and one of the Joint Movants initially entered into an agreement to purchase 30 out-of-state swine RECS at an average price of \$110. This transaction ultimately fell through, according to Phibro, "as a result of a recent discussion

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<sup>2</sup> This is referencing Phibro's in its initial comments in this docket pertaining to Phibro's interactions with one of the Joint Movants regarding an RFP's for Swine RECs. Phibro states on page 2 of its initial comments, filed on November 8, 2019, in this docket that "on or about June 10, 2019, one of the Joint Movants issued an RFP for in-state and out-of-state Swine RECs. Phibro responded offering 10 MWh swine RECs at \$100, 10 at \$110 and 10 at \$120. The Joint Movant initially indicated that it expected to purchase 30 swine RECs and asked Phibro to enter into one transaction at an average price of \$110 for the 30 RECs. However, before consummating the transaction, the Joint Movant told Phibro that it was no longer interested in purchasing any swine RECs from Phibro. One of the reasons stated was that, as a result of a recent discussion with other of the Joint Movants, this Joint Movant believed the Commission would likely grant relief from the obligation."

<sup>3</sup> This does not apply to DENC pursuant to N.C.G.S. § 62-133.8(b)(2)(e).

with other of the Joint Movants, this Joint Movant believed the Commission would likely grant relief from the obligation.” The second instance, was in September 2019 (September RFP), when Phibro stated it sent an RFP for 200 out-of-state swine RECS to all “load serving entities” in North Carolina. Phibro stated that it placed a reserve price of \$100 per MWh on the auction, but received no response from the Joint Movants. As a result, Phibro states that it opposes the Joint Movants’ requested relief as related to the swine waste set-aside requirements. Additionally, Phibro states that it takes no position on the banking of swine or poultry RECs. Finally, Phibro requests that the Commission hold an evidentiary hearing to consider Phibro’s evidence in support of its view that the Joint Movants did not individually and collectively make reasonable efforts to comply with the REPS swine and poultry set-aside provisions.

The Public Staff, in its initial comments, states that the electric power suppliers’ semi-annual reports indicate that they are making good faith efforts to comply with the swine waste set-aside requirements, but will be unable to comply in 2019. The primary issue, in the Public Staff’s view, is whether the required retirement of swine waste RECs to meet a 0.04% requirement as proposed in the Joint Motion will excessively deplete the supply of RECs and make compliance excessively difficult in subsequent years. The Public Staff then details the reasons why it believes that conditions have now changed such that the Joint Movants’ request can be granted without making compliance in future years impractical.<sup>4</sup> Based upon its review of this data, the Public Staff recommends that the Commission grant the Joint Movants’ requested modifications to the swine and poultry waste set-aside requirements.

## SUMMARY OF REPLY COMMENTS

In its reply comments, NCEMC states that it has made reasonable efforts to comply with the swine and poultry waste set-asides, as evidenced by its semi-annual report. Despite these efforts, NCEMC states that it is not positioned to comply with the swine and poultry waste set-asides beyond what is set forth by the Joint Movants in this proceeding. In response to the claims made by Phibro, NCEMC responds that “NCEMC is not the unnamed Joint Movant and therefore cannot answer Phibro’s general allegations other than to assert that, even if Phibro’s allegations are proved, NCEMC and the uninvolved Joint Movants who have made reasonable efforts should not collectively be denied the relief requested.” Further, NCEMC states that it did receive Phibro’s RFP sent out in September 2019 offering out-of-state-swine RECs. However, NCEMC contends that it does not have a present need for out-of-state swine RECs, so it did not submit a proposal. With regard to Phibro’s request for a hearing, NCEMC opines that this request should not be granted due to the fact that Phibro failed to show that the Joint Movants would have collectively been able to fully comply with the swine waste set-aside had one or some of the Joint Movants purchased the out-of-state swine waste RECs from Phibro. Regarding the comments by the NCPD, NCEMC responds by stating that the NCPD comments rely heavily on those allegations of Phibro and notes that the NCPD does not oppose the Joint

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<sup>4</sup> The Public Staff’s comments includes data that is of a confidential nature, and is appropriately redacted from the public version of its comments. The Public Staff also filed under seal a version of its comments that includes the data in un-redacted form.

Movants motion. NCEMC further states that it does not support any of the four recommendations made by the NCPC. NCEMC concludes that even with Phibro's partial opposition, NCEMC believes that its efforts have been reasonable and that the requested relief should be granted.

In its reply comments, EnergyUnited states its support for the granting of the Joint Movants motion and also opposes the need for an evidentiary hearing on this matter given the evidence (annual compliance plans and compliance reports etc.) that is already available in this proceeding. EnergyUnited states that it issued no RFP's for out-of-state swine RECs during the year, but did receive an email solicitation for out-of-state swine RECs. With regard to that solicitation, EnergyUnited states that "the requested price per qualifying REC was much higher than the price for other qualifying swine waste RECs available in the market from other out-of-state producers." Thus, EnergyUnited did not submit a bid for those RECs. Further, EnergyUnited notes that it has contracts with other out-of-state suppliers at substantially lower prices than the solicitation. EnergyUnited voiced concern about requiring an electric supplier to pay prices for RECs that far exceed the price of comparable RECs from other sources. EnergyUnited expressed its belief that the price per REC is a good faith basis for rejecting an offer of any source. Further, EnergyUnited offers, that to the extent the Commission concludes that some additional guidance on pricing is warranted, the Commission could consider setting an upper limit on purchases, such as 5% or 10%. Finally, EnergyUnited notes the General Assembly's intent related to excessive prices on out-of-state RECs and points to the statutory cost cap on the annual use of such out-of-state RECs as evidence.

In its reply comments, Phibro reiterates its position regarding the denial of the Joint Movants request. Phibro states that the continual delaying of the REPS requirements "discourages investment in the very technologies that the North Carolina legislature obviously thought would be beneficial to the state of North Carolina." With that, Phibro requests that the Commission "put an end to the repeated cycle and effectuate the intent of the North Carolina legislature."

In its reply comments, DENC specifically responds to the comments made by the NCPC. DENC contends that the NCPC's recommendations are impractical and inconsistent with the practices DENC utilizes when developing its plans for REPS compliance. DENC states that it takes no position on the NCPC's first and fourth recommendations, but with regard to its second recommendation, DENC notes that it is not subject to the 25% out-of-state REC limit pursuant to N.C.G.S. § 62-133.8(b)(2)(e) and thus submits that any action the Commission takes on the NCPC's second recommendation should not apply to DENC. DENC's comments focus on the third recommendation by NCPC, which is to disregard use of the pro rata mechanism in determining REPS compliance, but instead all RECs earned in the accounting period and all RECs banked up to that point should be applied and retired against the aggregate sector compliance goal rather than by each electric power supplier's pro rata portion determined by its electricity sales. DENC states that this recommendation is inconsistent with the methodology approved nearly 10 years ago in this docket on March 31, 2010 (Pro Rata Order). DENC contends that the NCPC's recommendation disregards careful planning by DENC and overhauls the allocation method approved by the Commission

years ago with respect to calculating each utility's REPS requirements. DENC further opines that if accepted, the NCPC's third recommendation could potentially "result in wiping the slate clean for compliance purposes in future years for DENC, as the Company would be required to retire all of the banked swine-waste RECs it has acquired to date in order to cover a State-wide shortfall with respect to the aggregate requirement." In summary, DENC recommends the Commission grant the Joint Movants request and reject the NCPC's third recommendation.

In its reply comments, Duke disagrees with Phibro's assertion that it has not individually or jointly made reasonable efforts to comply with the REPS requirements for both the swine and poultry waste set-asides. Duke further states that its efforts are reflected in the semi-annual reports filed with the Commission in this docket, along with the fact that the level of swine waste set-aside compliance has grown to 0.04% in 2019\ (from 0.02% in 2018). Duke contends that it acted reasonably and prudently with respect to its decision to not purchase the out-of-state swine RECs from Phibro. Duke states it was not the party to which Phibro sought to sell 30 out-of-state swine RECs. With regard to the September RFP, Duke contends that it was prudent to not purchase RECs from Phibro, as the Duke further notes in its comments issues it had faced with the predecessor of Phibro, Blue Mountain Biogas (Blue Mountain). Duke had contracted to purchases RECs from Blue Mountain, but due to delays and other operational issues, ultimately terminated the contract.

Duke, then responds to the comments made by the NCPC. Duke responds first by stating that its compliance efforts are not in need of a new approach, as suggested by NCPC. Duke refutes NCPC's comment that "the electric suppliers are already setting the stage for compliance waiver requests in 2020 and 2021. See, Joint Motion at 14." Duke states that page 15 of the that same motion states that "This motion is not intended to address the Electric Suppliers' compliance with any REPS requirements beyond the 2019 compliance year ... ." Duke notes its disagreement with NCPC's first recommendation related to rejecting RECs based on price. Duke states in its comments that it believes that it is not in the best interest of the customers to purchase RECs at above-market prices when cheaper RECs are available from other parties or sources. Duke additionally discusses NCPC's second recommendation related to modifying the 25% maximum for out-of-state REC purchases. Duke states that does not believe this would be a solution for all electric suppliers to meet compliance as it takes years for swine-to-waste energy projects to reach commercial operation and at this time, there are only a small number of market participants. Further, Duke notes that that varying the limit on allowable out-of-state RECs would make planning and forecasting future compliance requirements overly burdensome. Duke refutes the NCPC's third recommendation regarding compliance on an aggregate basis as well. Duke disagrees and states that to impose that the Joint Movants each retire their banked swine RECS, would "result in wiping the slate clean for compliance purposes in future years." This requirement would disrupt any progress the Joint Movants had made toward compliance and would penalize DEP, DEC and DENC, as they become the major contributor towards compliance. With regard to the fourth recommendation by NCPC, Duke offered no comments about the requirement that the Public Staff conduct an audit of the compliance efforts targeting electric power suppliers who have not shown any appreciable movement towards compliance over the last three

years, including 2019. Duke concluded its comments requesting the Commission deny Phibro's request for an evidentiary hearing and also deny the NCPC's recommendations.

In its reply comments, FPWC requests that the Commission deny the relief sought by the NCPC and Phibro in their comments. FPWC states that the relief that is sought by the NCPC is "neither warranted nor consistent with developing a swine waste REC market that will be viable on the long-term basis for both buyers and sellers." FPWC further states that with respect to Phibro's allegations of solicitations for swine RECS, FWPC neither was the electric power supplier whom was in contact to buy RECs from Phibro, nor was it one of the "load serving entities" that received an RFP to sell swine RECs. Finally, FPWC states that it has no records of every having any communications with Phibro prior to the filings in this instant proceeding.

In its reply comments, the Power Agencies assert that they have made good faith efforts allow their members to comply with their REPS obligations and that despite those efforts, their members have still not been able to achieve compliance with the REPS swine and poultry waste set-aside requirements. Next the Power Agencies respond to Phibro's comments. The Power Agencies attest that they are not the unnamed electric power supplier with whom Phibro had discussions regarding RFP solicitations for swine RECS. The Power Agencies note they did receive Phibro's September solicitation, but declined to submit a bid as the Power Agencies already had enough (25%) out-of-state swine RECs to meet the cap. The Power Agencies additionally note that the Power Agencies "have never rejected a proposal for the sale of in-state swine RECs based on the proposed REC price. While they are keenly interested in any opportunity to purchase in-state swine RECs, purchasing additional out-of-state swine RECs will do nothing to improve the Power Agencies' ability to comply with the swine waste set-aside." Regarding the comments of the NCPC, the Power Agencies speak to the NCPC comments and recommendations. The Power Agencies assert that the NCPC is wrong to suggest that the Power Agencies have not actively sought to achieve compliance with the swine waste set-aside requirement. The Power Agencies state that nothing is farther from the truth, "the Power Agencies will contract with anybody for in-state swine RECs, if they can get a counter-party to even enter into an agreement for delivery of such RECs." The Power Agencies further assert that "as described in their reports filed with the Commission, the Power Agencies have had in place contracts to procure their members' pro rata shares of in-state swine RECs for the past several years, and in every case, the counterparties have not been able to fulfill their obligations under those contracts." The Power Agencies additionally state that "abandoning the settled application of the requirements on a pro rata basis would do nothing to spur compliance." In summary, the Power Agencies request that the Commission not grant Phibro's request for an evidentiary hearing nor accept any of the NCPC's recommendations, but requests the Commission grant the Joint Movants motion in this proceeding.

In its reply comments, NTE responds to the comments of the NCPC by stating that NTE has not been taking a “passive approach” to compliance with regard to the swine waste set-aside compliance, but that NTE has undertaken efforts to spur the development of projects that would generate swine waste RECs for future compliance. NTE specifically discusses a proposed biogas project that was to be developed in Wilson County, NC (which was ultimately cancelled). NTE also responds to the comments of Phibro related to the September RFP that was purportedly sent to all NC “load serving entities.” NTE states that none of its member municipalities received this RFP from Phibro. In summary, NTE re-asserts that it has made reasonable efforts to comply with the swine and poultry waste set-asides and further requests that the Commission grant the Joint Movants motion.

In its reply comments, the Public Staff reiterates that its recommendation on the Joint Motion was based on its review of the electric power supplier’s June 2019 semi-annual reports filed in Docket No. E-100, Sub 113A as well as discussions it had with parties at the June 2019 animal waste stakeholder meeting, and the 2019 REPS compliance plans filed by the parties in September of 2019. The Public Staff notes that the two incidents discussed by Phibro in its comments (the June solicitation and September RFP) were not brought up in any of these filings or discussions. Also, the Public Staff notes that it anticipates that additional information about these events will be detailed in the December 2019 semi-annual reports filed by the electric power suppliers. The Public Staff further states that once these filings are received, it will review the information and conduct additional discovery as warranted. Further, the Public Staff asserts that for purposes of 2019 compliance, the Public Staff recommends that the Commission grant the relief requested by the Joint Movants.

Regarding the NCPC’s comments, the Public Staff asserts that it disagrees with the NCPC’s statement that the relief filings made by the electric power suppliers have become the “artifice the electric suppliers [other than DEC, DEP, and DENC] have come to rely on to satisfy their statutory obligations.” On the contrary, the Public Staff asserts that the “Commission’s careful consideration of each Electric Suppliers’ compliance efforts in prior years, and its limited use of the relief authorized in N.C.G.S. § 62-133.8(i)(2), to progressively implement the swine and poultry waste requirements for has been appropriate, based on challenges these animal waste-to-energy facilities have experienced both in North Carolina and across the country.” With regard to the NCPC recommendation that the Public Staff should be directed to conduct an audit of compliance efforts targeting those electric power suppliers who have not shown any appreciable movement towards compliance over the last three years, including 2019, the Public Staff submits that it already files comments on compliance plans, compliance reports, as well as comments in any relief proceeding and believes the current requirements to be reasonable. The Public Staff additionally commented on the NCPC’s recommendation that the Commission declare, that until compliance is achieved, that price is not a good faith basis for rejecting qualifying swine waste RECs. The Public Staff states that the Commission has previously addressed this issue and that in its December 1, 2015, Order Modifying the Swine and Poultry Waste Set-Aside Requirements and Providing Other Relief (2015 Delay Order) in this Docket, found that:



[I]t 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.

2015 Delay Order at 5.

The Public Staff points out that as a result of that Order, the Commission made changes to the reporting requirements to require additional information regarding proposals being rejected and to provide a thorough discussion of the basis for rejection.

Regarding the recommendation of the NCPC that the out-of-state REC purchase limitation, currently of 25%, should be increased, the Public Staff agrees that it could be done, but notes that the current method of filing for relief, is more consistent with the goals set out by the General Assembly to promote the development of swine waste resources within the State of North Carolina.

Concerning the NCPC's recommendation that the compliance set-asides should be complied with on an aggregate basis, the Public Staff notes the Commission's Pro Rata Order, which agreed that the General Assembly established an aggregate obligation for swine and poultry waste set-aside requirements, but approved the Pro Rata Allocation Mechanism as "a reasonable and appropriate means for the electric power suppliers to meet the aggregate swine and poultry waste set-aside obligations." The Public Staff notes its belief that consistent with that Order that each electric power supplier should continue to be individually responsible for compliance of its pro rata share of the set-asides. Further, with regard to the Pork Council's position that all banked RECs should be retired against the aggregate compliance obligation without distinction based on the source of the RECs, the Public Staff states that implementing such a change in the mechanism for compliance with the aggregate requirements could be disruptive from both a compliance and cost recovery standpoint. The Public Staff notes its support for allowing the Electric Suppliers to continue banking some portion of their RECs to provide for a more consistent, sustainable level of compliance over time.

The Public Staff concludes its reply comments requesting that the Commission not require any evidentiary hearing on this matter and that the Commission direct the electric power suppliers to specifically describe in their December 2019 semi-annual report any interactions or discussions that it was party to with Phibro regarding the potential purchase of out-of-state RECs. This description should include a detailed description of the electric power suppliers' reasons for declining to purchase RECs from Phibro.

## DISCUSSION

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/or 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 (2014 Delay Order); the December 1, 2015 Order Modifying the Swine and Poultry Waste Set-Aside Requirements and Providing Other Relief (2015 Delay Order); the October 17, 2016 Order Modifying the Swine and Poultry Waste Set-Aside Requirements and Providing Other Relief (2016 Delay Order); and the October 16, 2017 Order Modifying the Swine and Poultry Waste Set-Aside Requirements and Providing Other Relief (2017 Delay Order); the October 8, 2018 Order Modifying the Swine and Poultry Waste Set-Aside Requirements and Providing Relief (2018 Delay Order) (collectively, Delay Orders).

As an initial matter, the Commission considers Joint Movants' request to consider and approve their motion without the need for an evidentiary hearing. In support of this request, Joint Movants state that the compliance status for the swine and poultry waste set-aside requirements is essentially unchanged since the Commission issued its 2018 Delay Order. The motion is verified by Kendal C. Bowman, Vice President of Regulatory Affairs and Policy, North Carolina, for Duke Energy Corporation, pursuant to Commission Rule R1-7 on behalf of the Joint Movants. Phibro is the only party that specifically opposes this motion and has requested an evidentiary hearing to determine whether the electric power suppliers have made reasonable efforts to comply with the swine waste-set-aside requirements. As detailed above, Phibro alleges that it offered to sell out-of-state swine waste RECs to the electric power suppliers, but received no expressions of interest on

the part of the electric power suppliers. Phibro contends that by not contracting to purchase any swine waste RECs available, the electric power suppliers are “not making reasonable efforts to comply.” NCPD generally supports Phibro’s view.

The reply comments filed by some of the electric power suppliers addresses their decisions to not purchase these out-of-state swine RECs from Phibro, and disputes whether some of the electric power suppliers received Phibro’s communications inviting purchase of these RECs. The Public Staff states that none of the issues Phibro raised in its comments surfaced during the Public Staff’s investigation, but the Public Staff anticipates that the December 2019 semiannual report will address these issues. Ultimately, the Public Staff recommends that the Commission not hold an evidentiary hearing and that the Commission grant the Joint Movants’ requested modifications and delays in the swine waste set-aside requirements.

The Commission agrees with the Joint Movants and the Public Staff that the present request for modification and delay in the swine and poultry waste set-aside requirements may be decided without an evidentiary hearing. In reaching this decision, the Commission relies on considerations such as regulatory certainty and efficient implementation of the REPS requirements. In short, the timing of Phibro’s intervention in this proceeding and the relatively late date on which Phibro has presented its arguments to the Commission leaves no time for scheduling and conducting an evidentiary hearing before the end of the 2019 calendar year, at which time electric power suppliers need guidance from the Commission on their REPS compliance obligations. In addition, the issues Phibro raises are not unique to the 2019 compliance year and the remedy Phibro seeks can be granted for a future compliance year if the Commission determines such relief is in the public interest. Further, based on the representations by the Public Staff that the December 2019 semiannual report will address this issue and will be filed in Docket No. E-100, Sub 100, Sub 113A, the Commission concludes that the current process for deciding these issues through the semiannual reports and through verified filings remains appropriate. The Commission expects this report to contain a detailed analysis and description of the issues that Phibro has raised regarding the potential purchase of out-of-state RECs. Finally, after the filing of that report, should the Commission determine that a hearing is appropriate for the resolution of these issues, a hearing for that purpose can be scheduled well in advance of the end of the 2020 REPS compliance year.

The Commission next determines that the electric power suppliers have made reasonable efforts to comply with the REPS requirements and that granting the relief sought in the Joint Motion is in the public interest. First, the Commission agrees with the Joint Movants that the reasons underlying the relief provided through the Delay Orders parallels those that supported granting the relief sought in the present motion: despite efforts such as engaging swine and poultry waste-to-energy developers, RFPs, evaluating bids received, negotiating and executing long-term REC purchase agreements for these resources, processing interconnection requests from these generators, executing contracts for swine and poultry derived directed biogas, monitoring executed agreements, and, in some cases, further modifying REC purchase agreements to provide

developers additional reasonable opportunities for successful project execution, expending funds on research and development, and exploring out-of-state markets, long-term compliance with the poultry and swine waste set-aside requirements remains uncertain due to counterparty performance. Second, the Commission has carefully considered NCPC's recommendations, but is not persuaded that these recommendations should be adopted at this time. As explained by the Public Staff in its reply comments, the Commission has previously addressed most of the issues raised by NCPC. Having considered these issues again here, the Commission determines that the established procedure should continue at least for the purposes of 2019 REPS compliance. As stated in the 2015 Delay Order, "the Commission does not intend to interject itself into negotiations," but "further monitoring of such negotiations may be necessary in future years." The December 2019 semiannual report, and the possible opportunity for filing of comments on that report, will provide the Commission with more detailed information and an opportunity to decide if that time has come.

More specifically, the Commission finds that the State's electric power suppliers have made a reasonable effort to comply with the 2019 statewide swine waste set-aside requirements established by N.C.G.S. § 62-133.8(e), but will not be able to fully comply. The parties state that the primary challenge has been the shortage of existing market participants in the United States and the fact that few of those market participants have actual or direct experience developing or operating those biomass technologies used to generate electric power from poultry waste or swine waste. No party presented evidence that the aggregate 2019 swine waste set-aside requirement could be met. The Joint Motion reflects that DEC, DEP, and DENC realized success in securing sufficient resources for compliance with the Swine waste set-aside of 0.02% of prior-year retail sales for 2018. Further, DEC, DEP, and DENC argued that they are in a position to meet a modified swine waste set-aside requirement of 0.04% of prior retail sales even though the other electric power suppliers in the state are not in a similar position, as they continue to struggle meeting the compliance targets. The Public Staff agreed that DEC, DEP, and DENC could meet such a modified requirement without making future compliance impractical.

The Commission's Delay Orders have noted the electric power suppliers' reporting encouraging developments in the technology of power production from swine waste that, 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. Similar to the 2018 Delay Order, the Commission finds that the Joint Motion demonstrates that the point of achieving partial compliance with the swine waste set-aside requirements has arrived. In addition, the Commission's Delay Orders permitted the Joint Movants to bank RECs for several consecutive years. The Commission further finds that the cumulative effect of this banking has resulted in the ability for DEC, DEP, and DENC to comply with the modified swine waste set-aside requirement as requested by the Joint Movants. The Commission, therefore, concludes that the Joint Movants' requested modifications to lower the swine waste set-aside requirements, and to delay the scheduled increases in compliance by one year, as applied to DEC, DEP, and DENC, is in the public interest. To require the other electric

power suppliers to meet a similar requirement, however, would result in wiping the slate clean for compliance purposes in future years and make these smaller electric power suppliers' future compliance difficult or impossible. Therefore, consistent with the 2018 Delay Order, the Commission determines that it is in the public interest to delay entirely the 2019 swine waste set-aside requirements for one additional year, as applied to electric power suppliers other than DEC, DEP, and DENC, that the future increases in the swine waste set-aside requirement should be delayed, and that the electric power suppliers that have acquired swine waste RECs for 2019 REPS compliance should be allowed to bank such RECs for swine waste set-aside 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.

Finally, the Commission similarly finds that the State's electric power suppliers have made a reasonable effort to comply with the 2019 statewide poultry waste set-aside requirement established by N.C.G.S. § 62-133.8(f), but will not be able to comply fully. 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. No party presented evidence that the aggregate 2019 poultry waste set-aside requirement of 700,000 MWh could be met; however, the parties agree that a modified compliance requirement of 500,000 MWh for 2019, 700,000 MWh for 2020, and 700,000 MWh for 2021 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.

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 public utilities shall be, and are hereby, modified according to the following schedule:

<u>Calendar Year</u>	<u>Requirement for Swine Waste Resources</u>
2019	0.04%
2020-2021	0.07%
2022-2023	0.14%
2024 and thereafter	0.20%

Electric public utilities 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 2019 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);

2. 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>
2019	0.00%
2020-2021	0.07%
2022-2023	0.14%
2024 and thereafter	0.20%

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 2019 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>
2019	500,000 MWh
2020	700,000 MWh
2021 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 2019 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 power suppliers 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; and

5. That the 2019 seminannual report shall address the issues raised by Phibro regarding the potential purchase of out-of-state RECs.

ISSUED BY ORDER OF THE COMMISSION.

This the 16<sup>th</sup> day of December, 2019.

NORTH CAROLINA UTILITIES COMMISSION



Kimberley A. Campbell, Chief Clerk

Commissioner Jeffrey A. Hughes did not participate in this decision.