

**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. E-100, SUB 113**

In the Matter of:)	
Rulemaking Proceeding to Implement)	INITIAL COMMENTS OF
Session Law 2007-397)	NCSEA

INITIAL COMMENTS OF NCSEA

NOW COMES the North Carolina Sustainable Energy Association (“NCSEA”), by and through the undersigned counsel, and in accordance with the *Order Requesting Comments* (“Order”) issued by the North Carolina Utilities Commission (“Commission”) in this docket on June 11, 2021, offers the following initial comments.

I. BACKGROUND

On May 20, 2021, the North Carolina Electric Membership Corporation (“NCEMC”), Fayetteville Public Works Commission (“Fayetteville PWC”), EnergyUnited Electric Membership Corporation (“EnergyUnited EMC”), North Carolina Eastern Municipal Power Agency (“NCEMPA”), North Carolina Municipal Power Association Number 1 (“NCMPA1”), and Virginia Electric and Power Company d/b/a Dominion Energy North Carolina (“Dominion”) (NCEMC, Fayetteville PWC, EnergyUnited EMC, NCEMPA, NCMPA1, and Dominion, collectively, “Joint Movants”) filed the *Joint Motion for Clarification and Request for Declaratory Ruling of North Carolina Electric Membership Corporation, Fayetteville Public Works Commission, EnergyUnited Electric Membership Corporation, North Carolina Eastern Municipal Power Agency, North Carolina Municipal Power Agency 1, and Dominion Energy North Carolina* (“Motion”).

In the Motion, the Joint Movants detailed a long history of Commission orders and dockets which they believe support their positions and ultimately sought the following two specific forms of relief from the Commission:

1. Clarify its prior decision in the May 2009 Order on Clarification that the cost caps established by the General Assembly do not mandate what an electric power supplier must spend towards compliance with the REPS in order for its efforts to be found reasonable;

2. Issue a declaratory ruling finding that it is reasonable for an electric power supplier to elect to not enter into a contract with a renewable energy producer that would result in disproportionately high costs for REPS compliance, even if the contracted amounts would place the electric power supplier in a compliance position without exceeding the cost caps established by the General Assembly[.]¹

In response to the Motion, the Commission issued the Order where it sought for parties to respond to the Motion. In the Order, the Commission noted in pertinent part:

The Joint Movants acknowledge the Commission’s prior holding that the solar, swine and poultry waste set-asides take priority over the general REPS obligations in circumstances where the cost caps will be reached before compliance can be achieved for REPS obligations [...] However, the Joint Movants maintain that this finding does not necessarily mean that the [renewable energy certificates (“RECs”)] used for compliance with the set-asides should be more expensive, or that the electric power suppliers must be “price-takers” and purchase any offered set-aside RECs at unreasonable prices if needed for compliance.²

II. NCSEA’S POSITION AND ANALYSIS

NCSEA was granted in intervention in this docket on October 9, 2007³ and has been an active intervenor throughout the various related proceedings. NCSEA has a long history of supporting the efforts of smart implementation of the Renewable Energy and Energy Efficiency Portfolio Standard (“REPS”) programs including the specific issues related to the Motion. NCSEA has an understanding and comprehensive background of the various issues outlined in the Motion related to the statutory cost caps, N.C. Gen. Stat. §

¹ Motion, pp. 20-21.

² Order, pp. 1-2.

³ *See Order Ruling on Petitions to Intervene and Granting Motions for Limited Admission to Practice*, (October 9, 2007).

62-133.8(h)(4) (“REPS Cost Caps”), and the interplay between the solar, swine and poultry waste set-asides and the REPS Cost Caps.

Having such a comprehensive background on this subject matter does lead NCSEA to the position that the REPS Cost Cap issue has been previously decided and there is no new evidence on the record which would or should lead the Commission to change its position. On November 3, 2008, Duke Energy Carolinas, LLC filed a *Motion for Clarification* (“Duke Motion for Clarification”) with regard to eleven issues concerning the interpretation of N.C. Gen. Stat. § 62-133.8 to assist in its REPS compliance planning.

Two of these enumerated issues set out by Duke in 2008 relate to the instant issue:

1. Whether the carve-out requirements for solar, swine and poultry waste resources should receive priority over the acquisition of other renewable energy resources to achieve the general REPS requirement of 3% in 2012 and beyond?
2. Whether an electric power supplier should give priority to one carve-out requirement over another carve-out requirement (e.g. poultry waste vs. swine waste) in light of the per account cost cap?⁴

In 2009, the Commission held, in pertinent part:

As a part of compliance with the general REPS percentage requirement, the General Assembly set out three specific renewable energy resource percentage or energy requirements, the solar, swine waste, and poultry waste set-aside requirements [...] After careful review, the Commission concludes that, as Fibrowatt argues, although it might result in less renewable energy generation offsetting conventional electric generation, *the presence of the set-aside requirements demonstrates the General Assembly’s intent that they should have priority over the general REPS requirement where both cannot be met without exceeding the per-account cost cap established in G.S. 62-133.8(h)*. This interpretation is consistent with the rule of statutory construction that provides that specific provisions of a statute should prevail over general provisions. *State ex rel. Utils. Comm’n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663 (1969). Except for the earlier date established for solar, however, there is no basis for giving one set-aside requirement priority over another if they cannot all be met without exceeding the cost cap.

⁴ Duke Motion for Clarification, p. 1.

Although no set-aside requirement has priority over another, the Commission does not agree with Fibrowatt that an electric power supplier should be required to obtain some of each of the set-aside resources if it cannot satisfy all of the set-aside requirements without exceeding the cost cap. Electric power suppliers may exercise their reasonable judgment in determining which renewable energy or RECs to acquire with the funds available under the cost cap.

The Commission recognizes that electric power suppliers have already begun acquiring renewable energy and RECs in order to comply with the REPS requirement. Electric power suppliers should not be penalized for this early action, but should give appropriate priority to the set-aside requirements in future renewable energy and REC decisions.⁵

NCSEA believes that the 2009 Order, and, in particular, the passage set out above, is still relevant and applicable and should continue to be held out as precedent on of REPS Cost Cap issues such as those enumerated in the Motion. As stated in the 2009 Order, so long as the per account cost cap is not met, then the set aside requirements for poultry, swine, and solar should maintain priority over the general REPS requirement.

With regard to the Motion, NCSEA believes that the Joint Movants, so long as they are not yet exceeding REPS Cost Cap, should continue to give priority to the swine, poultry, and solar set asides, as necessary, to meet their requirements under law. The Joint Movants provide in their Motion a long history of cases where the Commission provided leniency or otherwise did not mandate various entities to follow certain provisions related to the REPS. NCSEA, while sympathetic, is not persuaded that the Commission should allow the Joint Movants the unfettered discretion to decline to comply with the REPS.

Here, there is a cost cap set by statute which was intended to protect ratepayers from excessive REPS compliance costs. This fact is acknowledged by the Joint Movants,

⁵ *Order on Duke Energy Carolinas, LLC's Motion for Clarification* ("2009 Order"), p. 5 (emphasis added).

but they seek for the Commission to ignore it.⁶ The Joint Movants’ suggestion that they alone can determine what is an unreasonable price for set-aside RECs would set up a shadow standard for REC prices that is arbitrarily determined by the utilities independent of the REPS Cost Caps. Allowing utilities to refuse an offer for set-aside RECs that was made through a request for proposals process, when accepting that offer would not exceed the REPS Cost Caps, would go against the legislative intent of the set-asides and would unnecessarily further delay compliance with the swine waste set-asides that have already been delayed for nearly a decade.

The Joint Movants also point out the prior Commission finding that the REPS Cost Cap are not a “surrogate” for reasonableness in making their argument that the cost cap should not determine whether underlying REC pricing is reasonable.⁷ NCSEA believes this is a distinction without a difference – the REPS Cost Cap is a clear legislative safeguard for spending on RECs and the amount those RECs cost will be set by the market. NCSEA does not contend the REPS Cost Cap points to “reasonableness,” as that is a question of the marketplace, but rather that the REPS Cost Cap is safeguard for ratepayers. Further, given the 2009 Order’s finding of legislative priority for these carveouts, it is unequivocal that neither the General Assembly nor prior Commission findings ever intended relief from the underlying statutory requirement for RECs.

NCSEA opposes the Commission ignoring the REPS Cost Caps and urges the Commission to reinforce its position from the 2009 Order wherein it stated that the swine,

⁶ Motion, pp. 20-21 (“[...] even if the contracted amounts would place the electric power supplier in a compliance position without exceeding the cost caps established by the General Assembly[.]”)

⁷ Motion, p. 19 (“The Commission’s refusal to view the legislative cost cap as a surrogate for reasonableness for REPS compliance purposes, as proposed by Optima KV in the 2015 delay proceeding, points to the conclusion that the cost caps are more appropriately viewed as a ceiling for spending, rather than establishing a threshold for reasonableness.”)

poultry, and solar set asides are delineated to have priority under law as written, and any such efforts to sidestep that requirement and priority should be denied.

Respectfully submitted this the 15th day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing document by hand delivery, first class mail deposited in the U.S. mail, postage pre-paid, or by email transmission with the party's consent.

This the 15th day of July, 2021.

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