

OFFICIAL COPY

FILED  
APR 27 2016  
Clerk's Office  
N.C. Utilities Commission

STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH

DOCKET NO. E-7, SUB 1086  
DOCKET NO. E-7, SUB 1087

In the Matter of )  
Application of Duke Energy Carolinas, LLC, ) NCSEA'S NOTICE OF  
for Registration of New Renewable Energy ) CROSS-APPEAL  
Facilities ) AND EXCEPTIONS  
)

NOW COMES the North Carolina Sustainable Energy Association ("NCSEA"), pursuant to N.C. Gen. Stat. § 62-90 and Rule 18 of the North Carolina Rules of Appellate Procedure, and gives its Notice of Cross-Appeal to the North Carolina Court of Appeals from the 11 March 2016 *Order Accepting Registration of New Renewable Energy Facilities* ("Order") issued by the North Carolina Utilities Commission ("Commission") in the above-captioned proceeding.

For purposes of N.C. Gen. Stat. § 62-90(a), the Order is unlawful, unjust, unreasonable and unwarranted; as such, the Order should be reversed or remanded pursuant to N.C. Gen. Stat. § 62-94(b) for the reasons set out below.

**EXCEPTION NOS. 1-3**

NCSEA adopts and incorporates herein by specific reference the three exceptions set out in the 8 April 2016 *Notice of Appeal* filed by the NC Pork Council ("Pork Council") in the above-captioned proceeding.

**EXCEPTION NO. 4**

In addition to the foregoing exceptions, NCSEA specifically sets forth the following ground(s) on which it considers the Order to be unlawful, unjust, unreasonable and unwarranted. Despite finding the Pork Council made a "compelling" argument that

AG  
Comm  
CommOp.  
CommLegal  
PS Legal  
PS Accts  
PS Elec

the “General Assembly’s main purpose in enacting the swine waste set-aside requirement was to incentivize the utilization of new technologies in North Carolina for environmentally friendly uses of swine waste in the production of electricity[.]” Order at 8, the Commission declined to construe the law to advance the General Assembly’s intent and goals. The Commission declined to engage in statutory construction because it found “no ambiguity in the provisions of G.S. 62-133.8 that are at issue in this docket.” Order at 8. The Order thereafter explained:

The statute is very specific in describing each method [for REPS compliance] separately and in plain language, and it allows an electric public utility to meet its REPS obligations by one or more of the methods. In the present docket, [Duke Energy Carolinas, LLC (“Duke Energy”)] is planning to meet all or a portion of its swine waste set-aside obligation by generating electricity at two new renewable energy facilities located in North Carolina. This method complies with G.S. 62-133.8(b)(2)a. As the fuel used to generate the electricity is derived from swine waste, the RECs may be used to meet the swine waste set-aside requirement of G.S. 62-133.8(e).

Order at 8. Based on the finding and foregoing explanation, the Commission denied the Pork Council’s request “to allow the use of electricity from out-of-State directed biogas to meet no more than 25% of the REPS swine waste set-aside requirement.” Order at 6. The Commission’s finding – together with the inferences, conclusions and ultimate decision springing therefrom – is affected by error of law, is unsupported by competent, material, and substantial evidence in view of the entire record as submitted, is arbitrary and capricious, and may have been made upon unlawful proceedings.

### *A. The Ambiguity in the Statute*

N.C. Gen. Stat. § 62-133.8(b)(2)a permits an electric public utility to comply with its REPS obligations – including the swine waste set-aside requirement – by, *inter alia*, “generat[ing] electric power at a *new renewable energy facility*.” (Emphasis added). In the Order, the Commission found this language to be clear and unambiguous and to require it to reach the conclusions it did. However, the language is not clear and unambiguous; contrary to the Commission’s finding, a key ambiguity exists in the provisions of N.C. Gen. Stat. § 62-133.8. Specifically, in order for the two facilities at issue – both owned and operated by Duke Energy – to fall within the definition of “new renewable energy facilities” set out in N.C. Gen. Stat. § 62-133.8(a)(5), they must generate electricity “by the *use* of a renewable energy resource.” N.C. Gen. Stat. § 62-133.8(a)(7)(emphasis added). “Use” is not statutorily defined. “Renewable energy resource” is statutorily defined to *include* biomass resources, including the combustible gas referred to herein as “swine biogas,” but the definition expressly *excludes* fossil fuels, such as natural gas. N.C. Gen. Stat. § 62-133.8(a)(8).

The statute does not clearly and unambiguously indicate whether a facility’s “*use*” of a renewable energy resource must be actual use *or*, alternatively, whether a facility’s use of a renewable energy resource can consist of actual use or nominated/constructive use or some combination thereof. This ambiguity is of heightened importance where – as in the instant case – directed biogas is at issue because, as the Commission has recognized,

once Directed Biogas is injected into the pipeline, it blends with the natural gas in the pipeline and becomes indistinguishable from conventional natural gas molecules. *End users, whether the Owner of the*



*Facility or other natural gas customers, receive gas that may or may not contain any component of the original biogas.*

*Order on Request for Declaratory Ruling*, p. 4, Commission Docket No. SP-100, Sub 29 (21 March 2012) (“Bloom Energy Order”) (emphasis added).

Prior to issuance of the Order, the Commission’s directed biogas orders implicitly acknowledged this key ambiguity and went on to resolve it in favor of permitting nominated/constructive use because such use was deemed consistent with the legislature’s general intent and goals for N.C. Gen. Stat. § 62-133.8. Thus, for example, the Bloom Energy Order is not predicated on any “plain language” assertion. Instead, in the Bloom Energy Order, the Commission concluded that directed biogas could constitute a renewable energy resource because “[b]y purchasing the Directed Biogas and nominating it for delivery to the Facility, an Owner is displacing, or offsetting, conventional natural gas that would have otherwise been injected into the pipeline.” Order at 4. The need to articulate such a rationale implicitly recognized that an ambiguity exists and that resolving the ambiguity required resort to legislative intent and whether displacing or offsetting conventional natural gas use was consistent with the legislature’s goals.

NCSEA does not seek to disturb the Commission’s previous orders on directed biogas; indeed, NCSEA believes the Commission reached appropriate conclusions in its previous orders based on the facts and circumstances that were before it. Critically, though, NCSEA believes the Commission reached these appropriate conclusions by acknowledging – at least implicitly – that an ambiguity exists and by then going on to resolve the ambiguity by resorting to legislative intent to construe the statute. The Commission’s holding, in the Order, that no ambiguity exists represents an unlawful,

unjust, unreasonable, and unwarranted about-face and should be held to constitute reversible error.

***B. Given the Ambiguity, the Commission Should Have Construed N.C. Gen. Stat. § 62-133.8 to Advance the Legislature's General and Specific Intents and Goals by (1) Designating All RECs Derived From Missouri/Oklahoma Swine Biogas as Out-of-State RECS and (2) Confirming that Said Out-of-State Swine RECs Can Be Used To Meet No More Than 25% of the REPS Swine Waste Set-Aside Requirement.***

While NCSEA believes the Commission reached appropriate conclusions in its previous directed biogas orders, the instant case is distinguishable from the previous cases that came before the Commission in one critical way: The current case involves swine biogas, which implicates the swine waste set-aside requirement set out in N.C. Gen. Stat. § 62-133.8(e);<sup>1</sup> none of the Commission's previous directed biogas cases have involved swine biogas or any other set-aside resource.

Where a set-aside resource is concerned, construction of an ambiguous statute necessitates resorting to two layers of legislative intent and goals. The Commission's previous orders on directed biogas have required resorting only to the first layer: the General Assembly's *general* intent and goals for N.C. Gen. Stat. § 62-133.8. Because this case implicates the swine waste set-aside requirement, resolution of the directed biogas ambiguity in this case requires – for the first time – resorting not only to the General Assembly's general intent and goals, but also to the second layer of legislative intent and goals: the General Assembly's *specific* intent and goals for the swine waste set-aside requirement.

---

<sup>1</sup> Swine biogas is a renewable energy resource that, when used to generate electricity, creates a special kind of renewable energy certificate ("REC") commonly called a "swine REC." Only swine RECs can be used to comply with the statutory swine waste set-aside requirement.

*i. The General Assembly's Undisputed Specific Intent and Goals for the Swine Waste Set-Aside Requirement*

The Commission has articulated the General Assembly's specific intent and goals for the set-aside requirements. In 2009, the Commission held that "the intent of the set-aside provisions is *to address renewable energy resources and issues indigenous to North Carolina*, and therefore, *to foster development specifically of local renewable energy facilities.*" *Order on Duke Energy Carolinas, LLC, Motion for Clarification*, p. 13, Commission Docket No. E-100, Sub 113 (7 May 2009) (emphasis added). At oral argument, Duke Energy's counsel conceded that the Commission's 2009 articulation of the legislature's specific intent remains accurate:

The Company does not disagree that the intent of the set-asides has been stated as the Commission has stated it, which was to address renewable energy resources and issues indigenous to North Carolina and to foster development of specifically local renewable energy.

*Transcript [of Oral Argument] (Heard in Raleigh 11-3-2015)*, p. 37, Commission Docket Nos. E-7, Subs 1086 & 1087 (19 November 2015). The Commission's Order similarly reaffirmed its 2009 articulation of the legislature's specific intent and goals: "There is little doubt that the General Assembly's main purpose in enacting the swine waste set-aside requirement was to incentivize the utilization of new technologies *in North Carolina* for environmentally friendly uses of swine waste in the production of electricity." Order at 8 (emphasis added).



**ii. *The Use of Missouri/Oklahoma Swine Biogas in Duke Energy's Proposed Directed Biogas Transaction Should Yield Out-of-State RECs***

As already noted above, NCSEA believes that permitting the nominated/constructive use of biogas – via directed biogas – carries out the legislature's general intent and advances the legislature's general goals for the REPS. However, where directed *swine* biogas is at issue, NCSEA believes the General's Assembly's specific intent and goals requires construing the statute to impose an additional constraint similar to that advocated for by the Pork Council.

Once again, NCSEA believes previous Commission orders provide guidance on what the additional constraint should be. The Commission has held “that unbundled out-of-state RECs may be used to meet a portion of the set-aside requirements, but that the 25% limitation applies to the general REPS obligation and each of the individual set-aside provisions.” *Order on Dominion's Motion for Further Clarification*, p. 8, Commission Docket No. E-100, Sub 113 (22 September 2009) (emphasis in original). To advance the legislature's specific intent and goals – namely, finding a way to convert North Carolina's indigenous swine waste from an environmental issue into an energy resource – the Commission should have built on its 2009 holding in the Order by (1) designating any and all RECs derived from Duke Energy's proposed directed swine biogas transaction as out-of-state RECS and (2) granting the Pork Council's request “to allow the use of electricity from out-of-state directed biogas to meet no more than 25% of the REPS swine waste set-aside requirement.” Order at 6.

The designation of the RECs at issue as out-of-state RECs and limiting their use for compliance by Duke Energy to no more than 25% of the swine waste set-aside

requirement not only advances the General Assembly's specific intent and goals for the set-aside – by ensuring that compliance with the set-aside requirement will be accomplished using no less than 75% in-state resources, thereby addressing a waste issue indigenous to North Carolina *and* fostering development of local renewable energy resources – but it also simply makes better sense when the transaction is deconstructed and scrutinized.

**iii. Duke Energy's Proposed Directed Biogas Transaction Should Not Create In-State RECs When, Conceptually, The Facilities Using the Actual Missouri/Oklahoma Swine Biogas Would Not Be Able To Create In-State RECs If They Registered As New Renewable Energy Facilities**

Broken down to its basic elements, Duke Energy's proposed directed biogas transaction using Missouri/Oklahoma swine biogas consists of the following:

1. Hog farms in Missouri and Oklahoma produce swine waste which is processed and converted into swine biogas.
2. The Missouri/Oklahoma swine biogas is injected into natural gas pipelines at injection points located in Missouri and Oklahoma.
3. Given the mechanics of natural gas pipelines and the vast distance between the injection points located in Missouri and Oklahoma and Duke Energy's proposed withdrawal point in North Carolina, it is a near certainty that most or all of the Missouri/Oklahoma swine biogas will be withdrawn from the natural gas pipelines and combusted at facilities that are proximate to the injection points. These proximate facilities, though unidentified (and likely unidentifiable), are *not* located in North Carolina and, thus, are analogous to registered *out-of-state* new renewable energy facilities that would create out-of-state swine RECs.



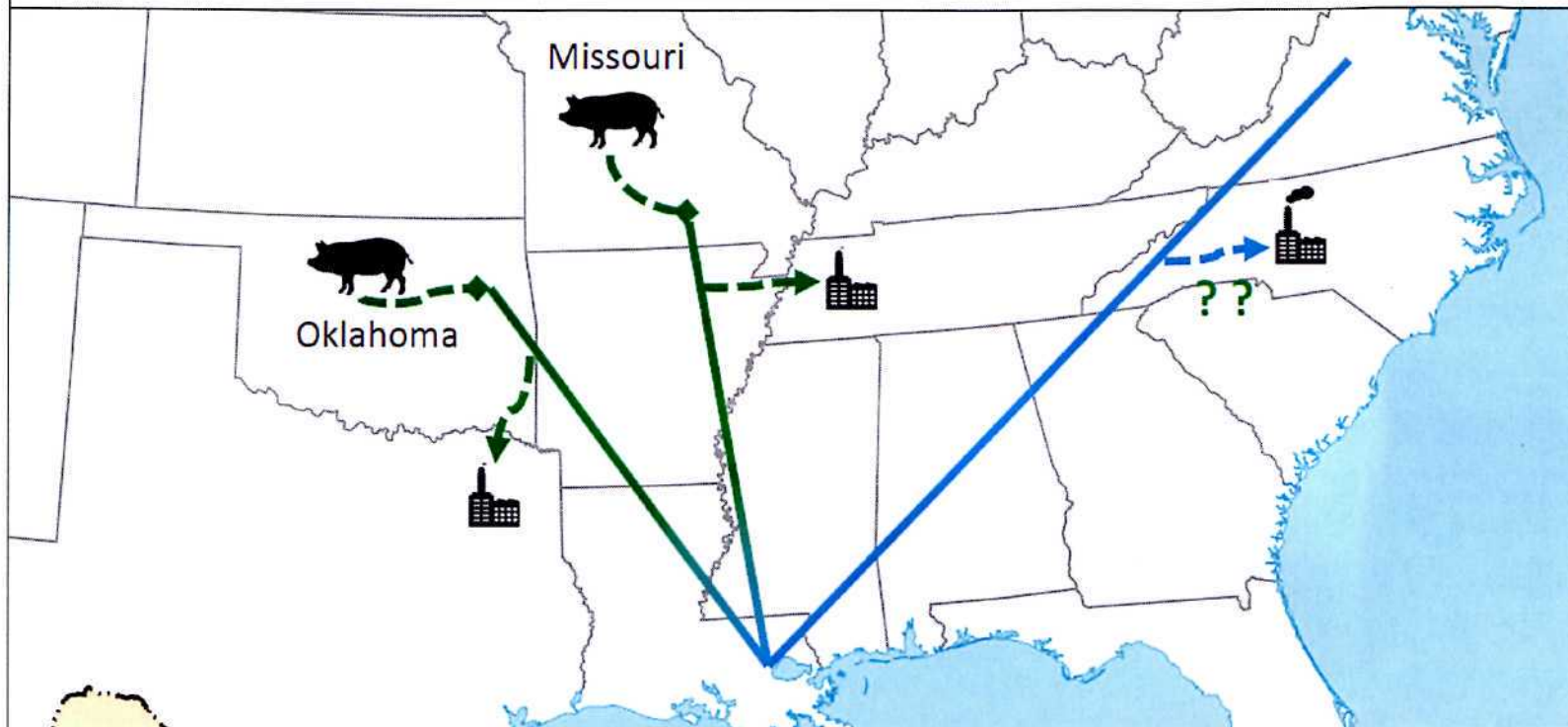
4. Conversely, given the mechanics of natural gas pipelines and the vast distance between the injection points located in Missouri and Oklahoma and Duke Energy's proposed withdrawal point in North Carolina, it is a near certainty that – despite the nomination process – few or no molecules of Missouri/Oklahoma swine biogas will actually be withdrawn from the natural gas pipelines and combusted at facilities located in North Carolina.<sup>2</sup>

The foregoing elements of Duke Energy's proposed transaction are illustrated in the figure below:

---

<sup>2</sup> In a 15 October 2015 *Order Scheduling Oral Argument* in this matter, the Commission denied the Pork Council's request for an evidentiary hearing, holding: "After carefully reviewing [Duke Energy]'s filings and the comments, there does not appear to be any factual dispute, therefore, the Chairman does not find good cause to schedule an evidentiary hearing." To the extent the factual record is deemed insufficient on appeal or is found to contain contradictory or disputed facts, NCSEA excepts to the Order on the basis that the Commission's denial of the Pork Council's request for an evidentiary hearing was inappropriate and resulted in a final order made upon unlawful or at least irregular proceedings. See N.C. Gen. Stat. § 62-94(a) (regarding appellate review of "irregularities in procedures before the Commission").

## Missouri/Oklahoma Directed Swine Biogas Should Create Out-of-State RECs

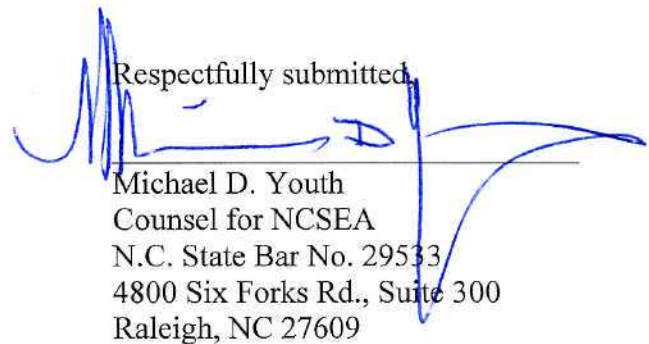


In this case, Duke Energy's nominated/constructive use of the swine biogas ought to permit it to do nothing more than stand in the shoes of the facilities most likely making actual use of the swine biogas and to achieve no more than those facilities could have achieved if actual use were required. This means, given the particular facts and circumstances presented, the Commission should have held that Duke Energy stands in the shoes of the out-of-state facilities most likely combusting the actual swine biogas molecules and, as such, that Duke Energy's proposed transaction will create only out-of-state swine RECs, which can be used to meet no more than 25% of the REPS swine waste set-aside requirement.

### **CONCLUSION**

For the reasons set out in the foregoing exceptions, the Order is unlawful, unjust, unreasonable and unwarranted; as such, the Order should be reversed or remanded pursuant to N.C. Gen. Stat. § 62-94(b).

Respectfully submitted,



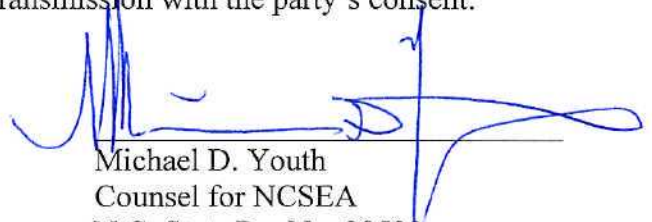
Michael D. Youth  
Counsel for NCSEA  
N.C. State Bar No. 29533  
4800 Six Forks Rd., Suite 300  
Raleigh, NC 27609



**CERTIFICATE OF SERVICE**

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing filing, 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 27<sup>th</sup> day of April, 2016.



Michael D. Youth  
Counsel for NCSEA  
N.C. State Bar No. 29533  
4800 Six Forks Rd., Suite 300  
Raleigh, NC 27609  
(919) 832-7601 Ext. 118  
michael@energync.org