NORTH CAROLINA
PUBLIC STAFF
UTILITIES COMMISSION

September 9, 2019

Kimberley A. Campbell, Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4325

Re: Docket No. EMP-105, Sub 0

Dear Ms. Campbell:

In connection with the above-captioned docket, I transmit herewith for filing on behalf of the Public Staff the Pre-Hearing Reply Brief of the Public Staff.

By copy of this letter, I am serving all parties of record.

Sincerely yours,

/s/ Tim R. Dodge
Staff Attorney
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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. EMP-105, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Friesian Holdings, LLC, for a) Certificate of Public Convenience and) Necessity to Construct a 70-MW Solar) Facility in Scotland County, North Carolina)	PRE-HEARING REPLY BRIEF OF THE PUBLIC STAFF

NOW COMES THE PUBLIC STAFF – North Carolina Utilities Commission, by and through its Executive Director, Christopher J. Ayers, and pursuant to the Commission's August 5, 2019, *Order Suspending Procedural Deadlines and Allowing Filing of Pre-Hearing Briefs*, respectfully submits the following pre-hearing reply brief in the above-captioned matter. In response to the Order, the following parties submitted briefs on August 26, 2019: Duke Energy Progress, LLC ("DEP"), Friesian Holdings, LLC ("Friesian" or the Applicant), the North Carolina Clean Energy Business Alliance ("NCCEBA"), and the Public Staff.

I. Response to Friesian

In its brief, Friesian requested that the Commission issue an order ruling that the Commission does not have the authority to consider FERC-jurisdictional Network Upgrade costs[1] as part of its review of applications for certificates of public convenience and necessity ("CPCN") for merchant plant facilities, and provided several arguments in

[1] The Public Staff uses the terms "Network Upgrades" and "Interconnection Facilities" as those terms are defined in the Joint Open Access Transmission Tariff of Duke Energy Carolinas, LLC, Duke Energy Florida, LLC, and Duke Energy Progress, LLC. ("OATT").

support of its position, including that (i) the Commission's standard of review for a merchant facility is limited to public need for the facility; (ii) State law does not allow consideration of Network Upgrade costs in a CPCN proceeding; (iii) the Public Staff and Commission have not previously considered Network Upgrade costs in a CPCN proceeding; (iv) the Commission is pre-empted by federal law from considering Network Upgrade costs; (v) the Commission does not have the authority to consider the costs of Interconnection Facilities in a CPCN proceeding; and, (vi) the Commission's June 14, 2019, *Order Approving Revised Interconnection Standard and Requiring Reports and Testimony* ("*2019 NCIP Order*"), directing the utilities to seek to recover from interconnection customers all expenses associated with supporting the generator interconnection process under the NCIP is not relevant to the consideration of FERC-jurisdictional interconnection costs. The Public Staff responds to these arguments below:

With regard to the standard of review, Friesian states that the Commission's review of a merchant generator CPCN application is focused on the need for the generator facility itself. (Friesian brief at 14). Friesian recognizes that the standard of review found by the North Carolina Supreme Court and the Commission is to avoid "costly over-building of generation resources" and to protect "ratepayers from paying for unneeded electric generating supply." (Id. at 15-16). Friesian then concludes that the existing power purchase agreement ("PPA") it has signed with the North Carolina Electric Membership Corporation ("NCEMC"), and the fact that DEP's integrated resource plan (IRP) shows a need for approximately 6,300 megawatts (MW) of new resources over the planning horizon as sufficiently demonstrating need. (Id. at 15-16).

Friesian appears to argue that so long as a merchant facility has demonstrated a need exists pursuant to Commission Rule R8-63(b)(3), it has met the standard for CPCN. While the Public Staff does not take issue with the need for the generating capacity demonstrated by Friesian[2] and that the facility will not necessarily result in over-building of generation capacity, the Public Staff finds that Friesian's response bypasses the second key component of the need standard – the avoidance of "*costly* over-building." (emphasis added). This is the key question at this preliminary point in the proceeding for the Commission – what costs can the Commission appropriately consider in its review of a merchant plant CPCN application?

As noted in the Public Staff's August 26 brief, N.C. Gen. Stat. § 62-110.1 clearly authorizes the Commission to consider the costs associated with the construction of a generating facility, as well as the facility's utilization of electric transmission and natural gas infrastructure capacity in the region (Public Staff Brief at 5-7). These additional considerations are embodied in the additional application requirements included in Rule R8-63(b)(1) and (b)(2). Friesian seems to minimize or ignore the purpose of this additional information required as part of a CPCN application and focuses solely on the demonstration of need encapsulated in R8-63(b)(3).

[2] The mere existence of a capacity need at some point over the 15-year planning horizon of a utility's IRP does not necessarily demonstrate a need for additional generating capacity, and other support may still be required. Alternatively, in the unlikely event a utility's IRP did not demonstrate some need over the planning horizon, the issue of whether the Commission is meeting its statutory responsibility to provide for the "orderly expansion of electric generating capacity and to protect customers against costly overbuilding" may be called into question if it does not consider need outside of Rule R8-63(b). The Public Staff notes that in the context of determining need for new capacity for small power producers, the General Assembly's revisions to N.C. Gen. Stat. § 62-156(b)(3) provide that "[a] future capacity need shall only be avoided in a year where the utility's most recent biennial integrated resource plan filed with the Commission pursuant to G.S. 62-110.1(c) has identified a projected capacity need to serve system load and the identified need can be met by the type of small power producer resource based upon its availability and reliability of power…". This limitation on the payment for avoided capacity in years where the IRP does not demonstrate a need is consistent with the goal of preventing costly overbuilding of electric generation in the State.

Friesian further notes that the definition of merchant plant in R8-63(b)(2) is based in part on the exclusion of the construction costs of the generating facility from rate base of a public utility. (Friesian brief at 17). However, Friesian states that the only costs an applicant is required to submit with its application are the construction costs of the generating facility and that these are the only costs the Commission can consider by statute. (Id. at 16). This seems paradoxical – under Friesian's approach, the only costs the Commission is allowed to consider are those that are borne solely by the Applicant, and that the potential cost impacts associated with all of the other aspects of the application (i.e., interconnection and transmission costs, fuel and operational costs, etc.), some of which may have impacts to customers in the State, cannot be considered. The Public Staff disagrees and notes that even if the application requirements in R8-63 do not explicitly call for submission of cost information associated with the siting of an electric generating facility in the State, the Commission still has the authority to review the costs as part of its granting of a CPCN. To follow Friesian's position would require the Commission and Public Staff to put on "blinders" with regard to the most significant portion of costs that will be borne by customers (retail and wholesale) as a result of construction and interconnection of the project.

Similarly, Friesian notes that the Public Staff and Commission have not previously considered Network Upgrade costs in a CPCN proceeding. The Public Staff does not dispute that it has not raised questions or concerns with regard to Network Upgrade costs in prior proceedings, but notes that the magnitude of the costs raised in the Friesian application in comparison to the total Network Upgrade costs indicated in the Large Generator Interconnection Agreement ("LGIA"), are without parallel. The Public Staff

notes that using the capacity factor from the original CPCN application filed for the Friesian project in Docket No. SP-8467, Sub 0 (approximately 28.9%), spreading the estimated $223.5 million of Network Upgrades over each megawatt-hour (MWh) of power generated by the facility over its 20-year expected useful life (not including any degradation), would result in an implied Network Upgrade cost of approximately $63 for every MWh generated by the facility. This cost alone does not consider construction costs of the generating facility itself, Interconnection Facilities costs, financing, operations, and other costs. For comparison, the Public Staff notes that in Tranche 1 of the Competitive Procurement for Renewable Energy (CPRE) Program in Docket Nos. E-2, Sub 1159 and E-7, Sub 1156, DEP used the following 20-year levelized avoided cost thresholds for transmission-connected projects located in DEP service territory: $57.40 for Summer Capacity and Energy on Peak, $78.20 for Non-Summer Capacity and Energy on Peak, and $36.70 for Energy off Peak.3

One of the purposes of Rule R8-63 seeking information on the applicant's financial position in a CPCN proceeding is to allow the Commission to consider the viability of the applicant and to ensure that any costs imposed on the utility's system as a result of interconnecting the facility are not likely to be stranded in the event the facility were to default or cease operations.[4] In this case, the scale of the Network Upgrade costs alone that result from interconnecting the proposed facility, without providing any other identified

[3] Updated CPRE Tranche 1 Final Independent Administrator Report filed in Docket Nos. E-2, Sub 1159 and E-7, Sub 1156, at 24. (July 23, 2019).

[4] *See, e.g. Order Granting Certificate and Accepting Registration of New Renewable Facility* in Docket No. EMP-49, Sub 0, at Finding of Fact No. 3: "Atlantic Wind is financially fit and operationally able to undertake the construction and operation of the Facility.", (May 3, 2011); *See also* Ordering Paragraph No. 14 in *Order Granting Certificate with Conditions* in Docket No. EMP-92, Sub 0: "NTE's proposed merchant plant will be financed by private companies, rather than ratepayers. Under this approach, if assets become stranded, the owner will face the financial consequences, not captive North Carolina retail electric customers." (January 19, 2017).

benefits for reducing transmission congestion or reliability issues,[5] highlights the appropriate nature of this information for Commission consideration.

Friesian also argues that the Commission is pre-empted by federal law from considering Network Upgrade costs. Friesian noted that while "states have jurisdiction over matters such as the construction and siting of most transmission, FERC has jurisdiction over the allocation of interstate transmission costs, transmission planning, and the question of whether interstate transmission costs are recoverable in FERC jurisdictional rates." (Friesian brief at 20-21, internal citations omitted). Friesian indicates that the position taken by the Public Staff would give the Commission jurisdiction over the allocation of FERC-jurisdictional Network Upgrade costs associated with a generating facility. (Id.) The Public Staff disagrees with this characterization of its argument. As noted in the Public Staff's brief, the issue at hand is not over the allocation of the Network Upgrade costs or FERC's authority over those costs. The Public Staff recognizes the authority of FERC to regulate the transmission and sale of energy at wholesale and also acknowledges the refund and cost allocation requirements under the OATT. These

[5] The Public Staff notes that NCSEA in its Motion to Intervene noted that DEP had identified the Bennettsville SS - Laurinburg 230 kV transmission line as "Constrained Infrastructure" and that Network Upgrades associated with Friesian "may render this area no longer constrained, allowing for the interconnection of additional renewable energy resources". This classification of constrained infrastructure was done in the context, however, of DEP's grid locational guidance provided as part of its CPRE Tranche 1 RFP. The General Assembly in N.C. Gen. Stat. § 62-110.8(c) provided the utilities to consider the location of the CPRE procurement, specifically taking into account:

> …
> the potential for increased delivered cost to a public utility's customers as a result of siting additional renewable energy facilities in a public utility's service territory, including additional costs of ancillary services that may be imposed due to the operational or locational characteristics of a specific renewable energy resource technology, such as nondispatchability, unreliability of availability, and creation or exacerbation of system congestion that may increase redispatch costs.

It is important to note, as well, that all Network Upgrades for projects participating in CPRE would be included in rate base, but only those projects that were at or below the cost-effectiveness threshold (including Network Upgrades) would be eligible for selection.

requirements do not limit, however, the authority of the Commission to consider the potential impact on ratepayers of any costs associated with the siting of an electric generating facility within the State. Friesian cites *Nantahala Power & Light Co. v. Thornburg*,[6] as being similar to this case, in that the Commission's Order that established different allocations of entitlement power between the parties than the allocation ordered by FERC in a wholesale ratemaking proceeding was ultimately struck down as impermissibly interfering with a FERC-jurisdictional rate. (Id. at 25-27).

The Public Staff believes that Friesian's reliance on *Nantahala* overstates the Public Staff's position on this issue to extend to challenging FERC's exclusive jurisdiction over the allocation of costs between DEP's wholesale and retail customers. That is not the case – the Public Staff is not seeking to alter or change the allocation of FERC-jurisdictional network upgrade costs between customer classes, and notes that to attempt such a change or amendment to these allocations would only be appropriate through seeking recourse from the FERC or Congress. Nor is the Public Staff raising arguments regarding the reasonableness or prudence of DEP's determination of those costs, which would be more appropriately raised at FERC in the context of a formal challenge or complaint regarding the inputs into DEP's filed transmission formula and OATT. The Public Staff believes that the determination of whether a facility should be granted a CPCN to locate its generating facility within the State, which wholly lies with the jurisdiction of the Commission, precedes those determinations. FERC explicitly recognized this in its Order No. 2003-A, 106 FERC ¶ 61,220 (Mar. 4, 2005) in which at paragraph 627, it stated that:

[6] 476 U.S. 953 (1986) ("*Nantahala*").

> …
> We note, moreover, that a number of the factors that influence siting decisions are beyond the control of both the Interconnection Customer and the Commission. Most importantly, the approval and siting of new generating facilities is ultimately under the control of state authorities.

The Public Staff recognizes that upon a determination by the Commission that a facility should be granted a CPCN, the further consideration of the reasonableness of the costs for rate recovery of the Network Upgrades required to interconnect the facility and the allocation of those costs lies with the FERC.

Lastly, Friesian notes that the Commission's *2019 NCIP Order* directing the utilities to seek to recover from interconnection customers all expenses associated with supporting the generator interconnection process under the NCIP is not relevant to the consideration of FERC-jurisdictional interconnection costs. (Id. at 29-30). The Public Staff agrees with this statement, but as noted in our reply brief, the Public Staff sought to highlight the interrelationship between the FERC-jurisdictional queue for projects seeking to site their generating facilities in North Carolina, as well as the State-jurisdictional queue. As a result of the misalignment between the recovery of interconnection costs, the Commission's consideration of CPCNs for merchant generation in North Carolina has the potential to significantly impact the costs that are assigned to State-jurisdictional interconnection customers.

II. Response to NCCEBA

In its brief, NCCEBA indicates its general support for the arguments made by Friesian. (NCCEBA Brief at 5). NCCEBA also raises concerns that requiring consideration of Network Upgrades would be generally impracticable given the typical development

cycle of projects interconnecting under the OATT, and would be highly disruptive to such projects. (Id. at 13-16)

The Public Staff does not disagree that the current development cycle may incentivize an applicant to seek a CPCN earlier in the development process, and in many cases that the CPCN application may be filed prior to having received a Facilities Study Report under the Large Generator Interconnection Procedures ("LGIP"). Nonetheless, the Public Staff believes that in light of the changes in the interconnection queue and the significant additional costs that may result to customers as a result of the increased demand on the electric transmission system in North Carolina from merchant generation, QF generation, and utility-generation, it is appropriate to consider these costs, even if it requires modifications being made to the developmental cycle for merchant generation in North Carolina. The Public Staff also notes that to the extent a project that previously received a CPCN from the Commission is later called into question, the Commission has broad authority under N.C. Gen. Stat. § 62-80 to revoke any prior order if changed circumstances or additional evidence require such action in the public interest. In addition, N.C. Gen. Stat. § 62-110.1(e1) provides that the Commission may review a previously granted CPCN "to determine whether changes in the probable future growth of the use of electricity indicate that the public convenience and necessity require modification or revocation of the certificate." Furthermore, the statute provides that, if the Commission finds that completion of the generating facility is no longer in the public interest, the Commission may modify or revoke the certificate. Id.

While the Public Staff does not advocate for a broad review of all CPCN applications granted by the Commission, it does recognize that in appropriate

circumstances and with sufficient grounds, it may be necessary under N.C. Gen. Stat. § 62-110.1(e1) or N.C. Gen. Stat. § 62-80 to review and to modify or revoke a certificate should it find that changed circumstances or additional evidence require such in the public interest.[7]

III. Conclusions

In summary, the Public Staff restates its original recommendation that the Commission finds it is appropriate to consider the entire costs associated with the construction and interconnection of a merchant generating facility, as well as the potential impact of those interconnection costs on retail rates in North Carolina, as part of its review of the application for a CPCN pursuant to N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-63; and take such other action as it finds appropriate.

Respectfully submitted this the 9th day of September, 2019.

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[7] *See Order Denying Motion for Revocation of Certificate* in Docket No. E-7, Sub 790, at 11-15. (November 4, 2009).

CERTIFICATE OF SERVICE

I certify that a copy of this Pre-Hearing Reply Brief has been served on all parties of record or their attorneys, or both, by United States mail, first-class or better; by hand delivery; or by means of facsimile, or electronic delivery upon agreement of the receiving party.

This the 9th day of September, 2019.

Electronically submitted
/s/ Tim R. Dodge