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 Convenience and Necessity to Construct a 70-MW Solar Facility in Scotland County, North Carolina	FRIESIAN HOLDINGS, LLC'S NOTICE OF APPEAL AND EXCEPTIONS

NOW COMES Friesian Holdings, LLC ("Friesian"), pursuant to N.C. Gen. Stat. § 62-90 and Rule 18 of the North Carolina Rules of Appellate Procedure and the June 29, 2020 *Order Granting Motion for Extension of Time to File Notice of Appeal and Exceptions*, and gives Notice of Appeal to the North Carolina Court of Appeals from the *Order Denying Certificate of Public Convenience and Necessity for Merchant Plant Generating Facility* ("Order") issued by the North Carolina Utilities Commission ("Commission") on June 11, 2020 in the above-captioned proceeding.

On September 9, 2016, in Docket No. SP-8467, Sub 0, Friesian filed an application pursuant to N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-64 for a certificate of public convenience and necessity ("CPCN") for construction of a 75-MW$_{AC}$ solar photovoltaic (PV) electric generation facility to be located on Leisure Road near Academy Road, Laurinburg, Scotland County, North Carolina. On November 7, 2016, the Commission issued a CPCN to Friesian for the 75-MW$_{AC}$ facility.

On August 2, 2018, Friesian filed a motion to amend its CPCN in order to modify the layout of the site. On May 15, 2019, in Docket No. SP-8467, Sub 0 and Docket No. EMP-105, Sub 0, Friesian filed a statement requesting that it be allowed to withdraw the CPCN amendment application filed in Docket No. SP-8467, Sub 0.[1] Friesian also requested that the Commission consider the new application for a CPCN filed in Docket No. EMP-105, Sub 0 as a merchant plant application pursuant to Commission Rule R8-63. On June 14, 2019, the Commission allowed Friesian's request to withdraw its motion to amend its CPCN, canceled the CPCN, and closed Docket No. SP-8467, Sub 0.

On May 15, 2019, in Docket No. EMP-105, Sub 0, Friesian filed an application pursuant to N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-63 for a CPCN to construct a 70-MW$_{AC}$ solar PV electric generating facility (the "Facility") located in Scotland County, North Carolina ("CPCN Application" or "Application").

On June 11, 2020, the Commission issued an Order denying the CPCN Application.

On June 24, 2020, Friesian and the North Carolina Sustainable Energy Association ("NCSEA") filed a Joint Motion for Extension of Time to File Notice of

[1] When Friesian filed its initial CPCN application on May 15, 2016, Friesian proposed to sell the facility's output to Duke Energy Progress, LLC pursuant to the mandatory purchase obligation under the Public Utility Regulatory Policies Act of 1978 ("PURPA") and to interconnect to DEP's system pursuant to the North Carolina interconnection process for PURPA sales. Thereafter, however, Friesian transitioned the facility from the state-jurisdictional interconnection process to a FERC-jurisdictional interconnection process so that it could sell its output exclusively at wholesale to the North Carolina Electric Membership Corporation, Inc. Therefore, when the motion to amend the CPCN was filed on August 2, 2018, the motion was mistakenly filed pursuant to Rule R8-64 in Docket No. SP-8467, Sub 0, rather than as a merchant plant application under Rule R8-63. When the mistake was brought to the attention of Friesian, Friesian requested permission from the Commission to withdraw the motion to amend the CPCN and file a new CPCN application pursuant to Rule R8-63 in Docket No. EMP-105, Sub 0.

Appeal and Exceptions. On June 29, 2020, the Commission granted the extension of time for Friesian and NCSEA to file notices of appeal and exceptions.

Pursuant to N.C. Gen. Stat. § 62-90(a), Friesian sets forth the below exceptions and grounds on which it considers the Commission's Order to be erroneous as a matter of law. As specified below, the Order is unlawful, unjust, unreasonable, or unwarranted; in excess of statutory authority or jurisdiction of the Commission; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. Accordingly, the Order is subject to reversal by the reviewing court pursuant to N.C. Gen. Stat. § 62-94(b).

EXCEPTION NO. 1

The Order's ultimate Conclusion denying Friesian's CPCN Application and the Findings of Fact supporting this final Conclusion are unlawful, unjust, unreasonable, or unwarranted; in excess of statutory authority or jurisdiction of the Commission; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. Friesian's Application meets all applicable statutory and regulatory requirements, including N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-63, and establishes that construction of the Friesian Facility and associated upgrades ("Network Upgrades" or "Upgrades") to Duke Energy Progress, LLC's ("DEP") transmission system serves the public convenience and necessity. Friesian presented competent, material, and substantial evidence of the need for the Facility and of the numerous important public benefits to the State of North Carolina and to ratepayers that will be provided by the Facility and the Network Upgrades. The Commission unlawfully violated state and federal law in considering the Federal Energy

Regulatory Commission- ("FERC") jurisdictional Network Upgrade costs as part of the CPCN approval process. The Commission accordingly erred as a matter of law in denying Friesian's Application.

EXCEPTION NO. 2

The Order's Evidence and Conclusions for Findings of Fact 4 through 7 and the underlying Findings of Fact 4 through 7 are unlawful, unjust, unreasonable, or unwarranted; in excess of statutory authority or jurisdiction of the Commission; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious.

The Commission erred in finding and concluding that Friesian failed to demonstrate a need for the Facility and that the purchase power agreement ("PPA") entered into between Frisian and North Carolina Electric Membership Corporation ("NCEMC") does not establish the need for the Facility. Friesian established the need for the Facility with the PPA between Friesian and NCEMC. In fact, Friesian's showing of need is in excess of the showing required by N.C. Gen. Stat. § 62-110.1 and Commission precedent and practice. The Commission has consistently held that a contract for the sale of electricity is a sufficient showing of the need for a new merchant generating facility, such as the Friesian Facility. Friesian should have been entitled to a presumption that a utility such as NCEMC, especially one owned and governed by its members, would not contract for the purchase of power that it did not need. NCEMC stated in comments filed with the Commission that the purchase of Friesian's output was needed to support its long-term business plan. The Commission improperly rejected this *prima facie* evidence and found an absence of need despite no affirmative evidence to support that finding.

Not only did the Commission erroneously conclude that the PPA between Friesian and NCEMC is insufficient to demonstrate a need for the Facility, but the Commission improperly required Friesian to establish that the Facility's output is necessary to meet NCEMC's Renewable Energy and Energy Efficiency Portfolio Standard ("REPS") requirements. There is no legal or regulatory requirement for a merchant plant applicant, such as Friesian, to show that the merchant facility's output is necessary to meet a REPS obligation. Even though there is no such requirement, Friesian presented substantial evidence that the Facility will provide a significant amount of Renewable Energy Credits ("RECs") for use by NCEMC to assist it with REPS compliance, and that the Facility will further NCEMC's goal of creating a low-carbon emissions environment through sustainability and continued investment in low- and zero-emissions resources.

In addition, the Commission exceeded its authority and acted inconsistently with the Federal Power Act and the Supremacy Clause of the United States Constitution in finding that a non-speculative FERC-jurisdictional facility is not needed. FERC has the exclusive authority to determine the need for merchant power plants selling into the wholesale market and has broadly determined that the development of such facilities is in the public interest. The Commission erroneously relied on and quoted out of context the U.S. Supreme Court's decision in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 75 L.Ed.2d 752 (1983), which did not involve the need for a FERC-jurisdictional merchant power plant. States' retention of jurisdiction over the "siting, permitting, and construction" of merchant power plants does not give states the authority to determine whether such plants are "needed".

EXCEPTION NO. 3

The Order's Evidence and Conclusion for Finding of Fact 8 and the underlying Finding of Fact 8 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Commission erroneously found that the Friesian Facility would contribute to operational issues being faced by DEP's system operators, and failed to consider that the Network Upgrades would significantly alleviate those problems. The Commission also failed to consider the benefits of the Network Upgrades to DEP and its transmission system, including: if the Friesian CPCN is not granted, the need for the Network Upgrades will not go away; if the Network Upgrades are not constructed at this time, there will be further delay in the interconnection of any additional generating facilities (including non-renewable resources) in the southeastern area of DEP's system; and if the Network Upgrades are not constructed at this time, the transition to an interconnection cluster study process will be much more complex and the transition process may be delayed. The Commission also failed to consider the fact that the power provided by Friesian to NCEMC will create no operational problems for DEP.

EXCEPTION NO. 4

The Order's Evidence and Conclusion for Findings of Fact 11 and the underlying Finding of Fact 11 are unlawful, unjust, unreasonable, or unwarranted; in excess of statutory authority or jurisdiction of the Commission; affected by errors of law; and arbitrary or capricious. The Commission unlawfully violated both state and federal law in considering the FERC-jurisdictional Network Upgrade costs as part of the CPCN approval process. Nowhere in N.C. Gen. Stat. § 62-110.1 or Commission Rule R8-63 is

there authority for the Commission to review Network Upgrade costs in a CPCN proceeding. In fact, in compliance with federal law, N.C. Gen. Stat. § 62-110.1 and Rule R8-63 provide no authority for consideration of Network Upgrade costs as a factor in evaluating a CPCN application. Rather than abide by federal law, the Commission impermissibly violated FERC's exclusive jurisdiction over the "transmission of electric energy in interstate commerce" and FERC's jurisdiction "over all facilities for such transmission . . . of electric energy." *See* 16 U.S.C. § 824(b). Therefore, while N.C. Gen. Stat. § 62-110.1 and Rule R8-63 permit the Commission to consider the cost of Friesian's proposed Generating Facility (which will be borne entirely by Friesian and not by the ratepayers), the Commission's inquiry into Network Upgrade costs violated both state and federal law.

EXCEPTION NO. 5

The Order's Evidence and Conclusions for Findings of Fact 12 and 13 and the underlying Findings of Fact 12 and 13 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The competent, material, and substantial evidence in the record shows that the levelized cost of transmission ("LCOT"), which compares the cost of required Network Upgrades to the amount of energy that will be delivered by the new generating facility(ies) directly utilizing the Network Upgrades, is an inappropriate method for determining the reasonableness of network upgrade costs for a merchant plant facility. Calculating the LCOT for the Network Upgrades in no way determines the public benefits of the Upgrades. The Network Upgrades are needed to resolve a major transmission constraint in southeastern North Carolina, and those Upgrades

are the lowest cost solution to the transmission constraint in southeastern North Carolina. Comparing all of the benefits of the Network Upgrades to the cost of the Upgrades is a far better way to evaluate whether the Upgrades are in the public interest than a LCOT analysis. Moreover, even if the LCOT was an appropriate metric for assessing the public benefits of the Network Upgrades, the Commission erred in calculating the LCOT based only on energy generated by the Friesian Facility, without including the output of more than 1,000 MW of planned solar facilities that depend on and would utilize the Network Upgrades. The Commission's finding -- that the potential for the Friesian Network Upgrades to lead to the construction of these planned facilities is too speculative to be considered -- is unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious.

EXCEPTION NO. 6

The Order's Evidence and Conclusion for Findings of Fact 13 through 17 and the underlying Findings of Fact 13 through 17 are unlawful, unjust, unreasonable, or unwarranted; in excess of statutory authority or jurisdiction of the Commission; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Commission erroneously found that Friesian's evidence that the Friesian Upgrades is in the public convenience was "uncertain and speculative", especially since there is no evidence in the record to rebut the many public benefits of the Friesian Upgrades.

The Commission erred in concluding that the Friesian Facility and the associated Network Upgrades do not meet the public convenience prong of the public convenience

and necessity standard of N.C. Gen. Stat. § 62-110.1. This case involves a unique and complex set of circumstances, in which substantial Network Upgrade costs will be borne by ratepayers, but substantial benefits will flow to them as well. The Commission considered just the costs and disregarded the benefits, including the state energy policies that would be advanced by the Network Upgrades. Friesian showed that the Facility and the Network Upgrades will result in numerous and significant public benefits that far exceed the cost of the Network Upgrades. Those important public benefits include: (1) addressing the highly problematic, disruptive, and destabilizing congestion in DEP's transmission system in the southeastern portion of the state in a timely and cost-effective manner; (2) allowing for the interconnection of a substantial amount of renewable resources and non-renewable resources that are interdependent on the Friesian Network Upgrades; (3) enabling the state to achieve greenhouse gas emissions reductions (and associated health benefits) in compliance with Duke's climate strategy and the Governor's Clean Energy Plan; (4) providing long-term cost savings to the ratepayers; and (5) minimizing challenges with Duke's transition to queue reform.

The Commission's finding -- that the potential for the Friesian Network Upgrades to lead to additional generating capacity is uncertain and speculative – is not supported by competent, substantial, and material evidence in the record. The comprehensive planning process for Duke Energy's 2018 Integrated Resource Plan ("IRP") and 2019 IRP Update demonstrates that a combination of renewable resources, demand-side management and energy efficiency programs, additional base load, and intermediate and peaking generation are required over the next fifteen years to reliably meet customer demand. In addition, Duke Energy's 2018 IRP and 2019 IRP Update show that additional generation

is required to support load growth and resource portfolio improvements in southeastern North Carolina. DEP's 2019 IRP Update calls for load growth of 0.9% per year overall. Whether that new generation comes from renewable energy or other generation resources in eastern North Carolina, it cannot occur without the Network Upgrades or other major improvements to DEP's transmission system. In addition, DEP provided information that substantial Network Upgrades will be needed to accommodate the addition of a substantial amount of new grid resources. Thus, the Network Upgrades are the type of system improvements that will help to accommodate the interconnection of a significant amount of additional renewable and other resources. Also, Duke confirmed that the Network Upgrades will at least partially facilitate the interconnection of about 1,561 MW of additional solar generation and other generation resources.

Rachel Wilson, the principal author of the study entitled *North Carolina's Clean Energy Future: An Alternative to Duke's Integrated Resource Plan* ("Synapse Report"), provided uncontroverted testimony that the least expensive long-term resource plan for North Carolina ratepayers is an optimized Clean Energy scenario that adds increasing amounts of solar and storage resources over the next fifteen years. The Clean Energy scenario provides many benefits to North Carolina. Ratepayers will save an average of $584 million each year. This represents a savings of almost $8 billion in terms of the net present value of revenue requirements over the duration of the fifteen-year analysis period. Carbon dioxide emissions are 59 percent less in 2030 under the Clean Energy scenario than in the Duke IRP scenario. Health benefits range from $195 to $440 million in 2025 due to avoided emissions of sulfur dioxide, oxides of nitrogen, and particulate matter.

The Friesian Upgrades are necessary to achieve Duke Energy Corporation's ("Duke Energy") and the Governor's stated goals for carbon reduction. Governor Cooper signed Executive Order 80 on October 29, 2019 that states that North Carolina will strive to reduce state-wide greenhouse gas emissions to 40 percent below 2005 levels by 2025. Executive Order 80 further requires the North Carolina Department of Environmental Quality ("NCDEQ") to develop a North Carolina Clean Energy Plan ("Clean Energy Plan") that "fosters and encourages the utilization of clean energy resources." The Governor's Clean Energy Plan establishes a goal of 70 percent greenhouse gas emissions reductions by 2030 and carbon neutrality by 2050. Also, in mid-September 2019, Duke Energy announced its new enterprise-wide climate strategy, including updating its CO2 reduction goals to at least 50 percent by 2030 (from 2005 levels) and achieving net-zero for electricity generation by 2050. The Governor's 70 percent and Duke Energy's 50 percent targets for carbon reduction will require significant acceleration of solar integration. The Network Upgrades will provide Duke Energy with access to the optimal region for solar resources in North Carolina starting in 2024. The record is devoid of any evidence rebutting Friesian's showing that the Network Upgrades are necessary to achieve Duke Energy's and the Governor's carbon reduction goals.

The Commission erred in finding and concluding that Friesian failed to support the beneficial economic benefits of the Facility that would flow to Scotland County. Contrary to the Commission's finding, Friesian provided substantial evidence that the Friesian Facility will bring a variety of benefits to Scotland County and the surrounding community, including: property and real estate tax revenues for Scotland County; revenues for the site's landowners in the form of lease payments each year for the life of

the Facility; enhanced reputation for the County as an attractive and friendly environment for advanced manufacturing, technology, and related jobs; and new construction jobs in the area.

CONCLUSION

For the reasons set forth above, the Commission's Order is unlawful, unjust, unreasonable, or unwarranted; in excess of statutory authority or jurisdiction of the Commission; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious.

Respectfully submitted this the 10th day of August, 2020.

_/s/ Karen M. Kemerait _____
Karen M. Kemerait
Fox Rothschild LLP
434 Fayetteville Street, Suite 2800
Raleigh, North Carolina 27601
Telephone: (919) 755-8764
E-mail: kkemerait@foxrothschild.com

_/s/ Steven J. Levitas _____
Steven J. Levitas
Kilpatrick Townsend & Stockton LLP
4208 Six Forks Road, Suite 1400
Raleigh, North Carolina 27609
Telephone: (919) 420-1707
E-mail: slevitas@kilpatricktownsend.com

_/s/ Steven Shparber_____
Steven Shparber
D.C. State Bar No. 1016286
Pro Hoc Vice
Nelson Mullins Riley & Scaarborough LLP
101 Constitution Avenue, NW
Suite 900
Washington, D.C. 20007
Telephone: (202) 689-2994
E-mail: steven.shparber@nelsonmullins.com

Counsel for Friesian Holdings, LLC

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Notice of Appeal and Exceptions of Friesian Holdings, LLC upon all parties of record by first class mail deposited in the U.S. mail, postage pre-paid, and by email transmission with the party's consent, and / or by hand delivery.

This the 10th day of August, 2020.

/s/ Karen M. Kemerait
Karen M. Kemerait
Fox Rothschild LLP
434 Fayetteville Street, Suite 2800
Raleigh, North Carolina 27601
Telephone: (919) 755-8764
E-mail: kkemerait@foxrothschild.com