STATE OF NORTH CAROLINA
UTILITIES COMMISSION RALEIGH

DOCKET NO. EMP-105, SUB 0

In the Matter of the Application of Friesian Holdings, LLC for a Certificate of Public Convenience and Necessity	)	**PRE-HEARING REPLY BRIEF OF NORTH CAROLINA CLEAN ENERGY BUSINESS ALLIANCE AND NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION**

PRE-HEARING REPLY BRIEF OF NORTH CAROLINA CLEAN ENERGY BUSINESS ALLIANCE AND NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION

Pursuant to the Commission's *Order Suspending Procedural Deadlines and Allowing Filing of Pre-Hearing Briefs,* issued on August 5, 2019 ("Briefing Order"), intervenors the North Carolina Clean Energy Business Alliance ("NCCEBA") and North Carolina Sustainable Energy Association ("NCSEA," and together with NCCEBA, "Intervenors") file the following Reply Brief in response to the filings submitted in this docket on August 26, 2019.

From a legal standpoint, the Parties' August 26 filings only underscore the fundamental points made in NCCEBA's and the Applicant's Pre-Hearing Briefs – that under state and federal law, FERC's allocation to retail ratepayers of the cost of Network Upgrades for a FERC-jurisdictional project is not an issue the Commission should consider in this proceeding. However, the Public Staff's Brief implicates critical policy issues related to interconnection that bear discussion.[1]

[1] Intervenors do not take a position on the question of whether the Commission should grant Friesian's CPCN application. Intervenors intend only to provide their view on the legal issues and policy issues discussed in the Commission's August 5, 2019 Order, and not to weigh in on the Application itself.

Nor do Intervenors request that the Commission take any particular action with regard to interconnection policy in this docket, as that would be entirely outside the proper scope of a CPCN proceeding. However,

I. ARGUMENT

A. Cost recovery of Network Upgrades by a FERC-jurisdictional Interconnection Customer is outside of the Commission's jurisdiction pursuant to federal law.

The Public Staff, while acknowledging FERC's jurisdiction over the transmission of energy in interstate commerce, as well as the refund and cost allocation requirements applicable to Friesian under Duke's OATT, nonetheless suggests that that this Commission has authority to consider that cost allocation when deciding whether to approve the project. However, it provides no legal authority to support this suggestion.

As discussed in NCCEBA's and the Applicant's Pre-Hearing Briefs, FERC has exclusive jurisdiction over "any rule, regulation, practice, or contract affecting" rates or charges for the transmission of energy in interstate commerce. *Pre-Hearing Brief of Friesian Holdings LLC* (Aug. 26, 2019) ("Applicant's Br.") at 20 (quoting 16 U.S.C. § 824e(a)); *Initial Pre-Hearing Brief of North Carolina Clean Energy Business Alliance* (Aug. 26, 2019) ("NCCEBA Br.") at 8-9. FERC's jurisdiction over transmission of power is even broader than it is over the sale of power, and specifically encompasses the allocation of costs for transmission facilities to retail ratepayers. NCCEBA Br. at 10 (citing authorities).

To the extent this Commission were to consider the allocation, to retail ratepayers, of the cost of Network Upgrades—and potentially deny certification of the project based on that allocation—there is no question that this would "affect" FERC's prior rulings regarding this allocation. In effect, it would give the Commission the power to veto that cost allocation through an exercise of its siting authority.[2] As discussed in the Applicant's Brief, this would "intrude

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the Public Staff's Pre-Hearing Brief raises a number of policy issues equally outside the scope of a CPCN hearing, to which Intervenors wish to respond.

[2] Intervenors do not dispute that this Commission has the authority, as a matter of state and federal law, to exercise authority over the siting of a new generating facility (under Gen. Stat. § 62-110.1) or new transmission line (under 62-101). However, it would be inappropriate and inconsistent with federal law

indirectly on areas of exclusive federal authority" and therefore be preempted. Applicant's Br. at 23-24.

B. The proposed Network Upgrades are not within the scope of appropriate inquiry under Gen. Stat. Chapter 62.

As discussed by Applicant and NCCEBA in their initial Briefs, the focus of the CPCN inquiry under North Carolina law is the need for, and the cost of, the *generation unit*, rather than any associated interconnection work. The Public Staff cites case law establishing that "the general purpose of the CPCN process is to provide for the orderly expansion of electric generating capacity and to protect customers against costly overbuilding." *Pre-Hearing Brief of the Public Staff* (Aug. 26, 2019) ("Public Staff Br.") at 3. However, it glosses over the critical detail that the courts have characterized this purpose as avoiding "the costly overbuilding ***of generation resources***." *State ex rel. Utils. Comm'n v. High Rock Lake Ass'n*, 37 N.C. App. 138, 141, 245 S.E.2d 787, 790 (1978)) (emph. added). As indicated by Commission Rule R8-63(b)(2)(vi), which requires only general locational information about "the transmission facilities to which the facility will interconnect" to be included in a CPCN application, interconnection is only an incidental part of this inquiry.

The General Assembly separately provided for Commission review of proposed transmission lines, including those to be constructed solely for interconnection purposes, under Gen. Stat. §62-101. The provision specifically exempts from the CPCN requirement "[t]he replacement or expansion of an existing line with a similar line in substantially the same location, or the rebuilding, upgrading, modifying, modernizing, or reconstructing of an existing line for the purpose of increasing capacity or widening an existing right-of-way[.]" Gen. Stat. § 62-101(c)(2).

for the Commission to make a siting decision based on its disapproval of a cost allocation policy already considered and approved by FERC.

This is exactly the kind of work that is generally involved in the construction of Network Upgrades for transmission-interconnected projects like Friesian. For the Commission to review the cost or necessity of Network Upgrades in a CPCN proceeding for the associated generating facility under Gen. Stat. § 62-110.1 would effectively write this exemption out of existence.

This statutory exemption provides one explanation why, as Duke notes, other merchant plants with significant FERC-jurisdictional network upgrades have been awarded CPCNs by the Commission, without any scrutiny of their interconnection costs, even where they had substantial Network Upgrades that had or will have an impact on retail customers. *See Duke Energy Progress, LLC Initial Pre-Hearing Brief* (Aug. 26, 2019) ("Duke Br.") at 6 n. 11. As discussed in NCCEBA's initial brief, it would be unreasonable and discriminatory to consider denying Friesian's application based on similar impacts. NCCEBA Br. at 13-14.

C. The Parties' filings raise important issues concerning interconnection costs that the Commission should consider in other proceedings.

The Public Staff's Pre-Hearing Brief evinces concern about the impact of the Friesian Project's Network Upgrade costs on North Carolina retail ratepayers. Intervenors do not denigrate these concerns, although they submit that this is an issue for consideration by FERC, not this Commission. But to the extent that the Commission or the Public Staff is concerned about the impacts of high interconnection costs on ratepayers or on Interconnection Customers, Intervenors suggest that the most direct way to address those concerns would be to take steps to curb the ballooning cost of interconnection work in North Carolina.

Duke's current estimate of Applicant's Network Upgrade costs is approximately $227 million. It is Intervenors' understanding that these estimated costs were originally much lower but have steadily risen over the course of the project's development. And there is the possibility that these costs will continue to rise as the project proceeds through construction. Based on the recent

experience of NCCEBA and NCSEA members going through the interconnection process, massive increases in cost estimates (as well as large exceedances of estimated costs by actual costs) are occurring more and more frequently in the interconnection process.[3]

The Commission noted, in its July 2, 2019 *Order Modifying and Accepting CPRE Program Plan* in Docket Nos. E-2 Sub 1159 and E-7 Sub 1156 ("CPRE Order"), concerns expressed by developers and the Public Staff that the actual cost of Network Upgrades could potentially exceed the costs estimated in the study process. CPRE Order at 18. To mitigate the negative impact of possible cost exceedances on the CPRE program, the Commission adopted a rebuttable presumption that Network Upgrade costs in excess of 25% over the estimated costs are unreasonably incurred and not recoverable.

Intervenors strongly support this step, and note that a 25% limit on cost exceedances is consistent with the approach taken by other state utilities commissions that have provided "guardrails" on interconnection cost exceedances.[4] But although limiting the amount by which the utility can exceed its estimated interconnection costs is important, this does not necessarily address the underlying costs themselves. And in fact Intervenors' members have seen a rapid rise (on the order of 100-200%) in the estimated cost of interconnections over the last several months.

[3] This includes not only estimated cost increases between System Impact Study and Facilities Study (owing to the fact that the cost estimates developed during Facilities Study are much more detailed), but also between Facilities Study and Interconnection Agreement (even though the cost estimates developed in the Facilities Study are supposed to be carried over to the IA). Duke has even re-issued Interconnection Agreements previously executed by the customer and replaced them with IAs bearing significantly higher estimated costs.

[4] Massachusetts, Utah, Oregon, and California all limit developer liability for interconnection costs to 125% of estimated costs. *See* National Renewable Energy Laboratory, Review of Interconnection Practices and Costs in the Western States (Apr. 2018) at 47, available at https://www.nrel.gov/docs/fy18osti/71232.pdf; M.D.P.U. No. 1320 (Oct. 1, 2016), *Standards for Interconnection of Distributed Generation for National Grid*, Ex. G § 5.1.

Although these costs are sometimes borne by QFs, for FERC-jurisdictional projects and CPRE projects, those interconnection costs are largely borne by ratepayers.

Intervenors submit that that as the Commission considers further interconnection reform efforts, including but not limited to the "queue reform" proposal advocated by the Public Staff in its Pre-Hearing Brief,[5] mechanisms to control interconnection costs should be a critical part of the discussion. Such mechanisms could include, for example, competitive bidding requirements for Upgrade projects above a certain size, or an allowance for interconnection customers to self-build Interconnection Facilities and standalone Upgrades as they can under the FERC procedures.

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

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[5] Pub. Staff Br. at 12-13.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Reply Hearing Brief** has been served upon all parties of record by electronic mail, or depositing the same in the United States mail, postage prepaid.

This the 9th day of September 2019.

Benjamin L. Snowden