

OFFICIAL COPY

1 PLACE: Dobbs Building
2 Raleigh, North Carolina
3 DATE: Monday, October 21, 2019
4 DOCKET NO.: EMP-105, Sub 0
5 TIME IN SESSION: 2:00 P.M. TO 5:02 P.M.
6

7 BEFORE: Chair Charlotte A. Mitchell, Presiding
8 Commissioner ToNola D. Brown-Bland
9 Commissioner Lyons Gray
10 Commissioner Daniel G. Clodfelter
11
12

13 IN THE MATTER OF:
14 Application of Friesian Holdings, LLC, for
15 a Certificate of Public Convenience and
16 Necessity to Construct a 70-MW Solar
17 Facility in Scotland County, North Carolina

18 ORAL ARGUMENT
19
20
21
22
23
24

1 A P P E A R A N C E S:

2 FOR FRIESIAN HOLDINGS, LLC:

3 Karen M. Kemerait, Esq.

4 Fox Rothschild, LLP

5 434 Fayetteville Street

6 Suite 2800

7 Raleigh, North Carolina 27601

8

9 Steven M. Shparber, Esq.

10 Nelson Mullins Riley & Scarborough, LLP

11 101 Constitution Avenue, NW

12 Suite 900

13 Washington, D.C. 20007

14

15 FOR DUKE ENERGY PROGRESS:

16 Jack E. Jirak, Esq.

17 Associate General Counsel

18 Duke Energy Corporation

19 P.O. Box 1551/NCH 20

20 Raleigh, North Carolina 27602

21

22

23

24

1 A P P E A R A N C E S (Cont'd.):
2 FOR NORTH CAROLINA SUSTAINABLE
3 ENERGY ASSOCIATION:
4 Peter Ledford, Esq.
5 North Carolina Sustainable Energy Association
6 4800 Six Forks Road
7 Suite 300
8 Raleigh, North Carolina 27609
9
10 FOR NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION:
11 Michael D. Youth, Esq.
12 3400 Sumner Boulevard
13 Raleigh, North Carolina 27604
14
15 FOR THE USING AND CONSUMING PUBLIC:
16 Tim R. Dodge, Esq.
17 Public Staff - North Carolina Utilities Commission
18 4326 Mail Service Center
19 Raleigh, North Carolina 27699-4300
20
21
22
23
24

1 P R O C E E D I N G S

2 CHAIR MITCHELL: Good afternoon. Let's come to
3 order and go on the record, please. I'm Charlotte
4 Mitchell, Chair of the Utilities Commission. With me
5 today are Commissioners ToNola D. Brown-Bland, Lyons
6 Gray, and Daniel G. Clodfelter.

7 The Commission now calls for Oral Argument
8 Docket Number EMP-105, Sub 0, in the Matter of the
9 Application of Friesian Holdings, LLC, for a Certificate
10 of Public Convenience and Necessity to Construct a 70-MW
11 Solar Facility in Scotland County, North Carolina.

12 On May 15th, 2019, Friesian Holdings, LLC filed
13 an application, pursuant to North Carolina General
14 Statute 62-110.1 and Commission Rule R8-63, for a
15 Certificate of Public Convenience and Necessity to
16 Construct a 70-MW Solar Photovoltaic Electric Generating
17 Facility in Scotland County.

18 The Commission issued Orders in this
19 proceedings allowing the intervention of the following:
20 the North Carolina Electric Membership Corporation, Duke
21 Energy Progress, the North Carolina Sustainable Energy
22 Association, and the North Carolina Clean Energy Business
23 Alliance. The participation of the Public Staff is
24 recognized pursuant to North Carolina General Statute

1 62-15, sub (d).

2 On August 5th, 2019, the Commission issued an
3 Order Suspending the Procedural Schedule previously
4 established in this proceeding and allowing the parties
5 to file briefs addressing the appropriate standard of
6 review pursuant to North Carolina General Statute 62-
7 110.1 and Commission Rule R8-63, whether the Commission
8 has authority to consider as part of its review of the
9 CPCN application those costs associated with transmission
10 network upgrades and the impact of those costs on retail
11 rates in North Carolina, and whether the allocation of
12 costs associated with interconnecting this project is
13 consistent with the ruling in the Commission's June 14th,
14 2019 Order Approving Revised Interconnection Standard and
15 Requiring Reports and Testimony that was issued in Docket
16 Number E-100, Sub 101.

17 On August 26, 2019, the Applicant, DEP, the
18 Public Staff, and NCCEBA filed briefs.

19 On September 9th, 2019, the Applicant, DEP, the
20 Public Staff, and NCCEBA and NCSEA jointly filed reply
21 briefs.

22 On October 3rd, 2019, the Commission issued an
23 Order Scheduling Oral Argument for this time and in this
24 place, at which the parties are to address only the

1 issues noted in the Commission's August 5th Order and,
2 additionally, the questions of whether and, if so, how
3 the July 14th, 2017 decision of the United States Court
4 of Appeals for the D.C. Circuit in Orangeburg v. FERC
5 applies to the issues noted in the Commission's August
6 5th Order.

7 In compliance with the requirements of the
8 State Government Ethics Act, I remind all members of the
9 Commission of their responsibility to avoid conflicts of
10 interest, and inquire at this time whether any member of
11 the Commission has a conflict of interest with respect to
12 the matters coming before us this afternoon?

13 (No response.)

14 CHAIR MITCHELL: Please let the record reflect
15 that no one indicated a conflict in this matter.

16 I understand that the parties have reached an
17 agreement on proposed order of presentation and will
18 address that proposal in just a moment.

19 First, I call upon counsel for the parties to
20 announce their appearances, beginning with the Applicant.

21 MS. KEMERAIT: Good afternoon, Madam Chair, and
22 members of the Commission. I'm Karen Kemerait with the
23 law firm of Fox Rothschild, and I'm here on behalf of the
24 Applicant for the CPCN, Friesian Holdings, LLC.

1 preliminary matters that need to be addressed before we
2 begin? Mr. Ledford.

3 MR. LEDFORD: Madam Chair, when NCSEA is making
4 its oral argument, we do have one item that is
5 confidential that we would like to use in our argument.
6 I've discussed it with Mr. Jirak. He does not object to
7 the use of this item, but at the appropriate time, we
8 would ask that the Chair clear the room of anybody who
9 has not signed an NDA.

10 CHAIR MITCHELL: Mr. Jirak, do you need to be
11 heard on this?

12 MR. JIRAK: No. That's consistent with our
13 discussion. The only thing I would add is that
14 potentially request -- because we are speaking before
15 NCSEA, we may potentially request the opportunity to
16 respond to the documents introduced, but that remains to
17 be determined.

18 CHAIR MITCHELL: All right. Thank you. The
19 purpose of today is to -- we're here today for oral
20 argument on the legal issues that were raised in the
21 Commission's Orders. Those are four issues. I've
22 already covered them. I'm not going to cover them again.
23 This is not an evidentiary proceeding. The purpose of
24 today is to establish the scope of the evidentiary

1 proceeding that we will hold in the future, so we do not
2 intend to accept evidence today from the parties. It is
3 -- it would be our preference that you all proceed with
4 your arguments in a way that does not require our
5 clearing the room; however, if that's not possible, when
6 it's your turn, Mr. Ledford, and you feel the need to use
7 whatever illustration you feel necessary, please alert me
8 to that fact so that we can clear the room as
9 appropriate.

10 But, again, the purpose of today is oral
11 argument to help us establish the scope of the
12 evidentiary proceeding that we will hold at some point in
13 the future, so please keep that in mind. Stick to the
14 issues here. Let's use our time wisely, and let's go
15 ahead and begin.

16 We'll begin with Ms. Kemerait on behalf of the
17 Applicant.

18 MS. KEMERAIT: Again, good afternoon, Madam
19 Chair, and members of the Commission. I'm Karen Kemerait
20 with the law firm of Fox Rothschild, and I am
21 representing Friesian Holdings, LLC, and the parent
22 company of Friesian which is Birdseye Renewable Energy
23 which is based in Charlotte. And with me today is Steve
24 Shparber who is going to also be providing oral argument.

1 I will be confining my discussion to the state issues and
2 Steve will be talking about the federal issues.

3 Before we get started, I wanted to point out
4 that I had passed out before the oral argument began
5 notebooks because I thought that it would be helpful to
6 have the statutes and the rules and the case law that we
7 would be citing to and I imagine that Mr. Jirak and some
8 of the other parties would also be referring to. So we
9 thought that that might make it a little bit easier for
10 the Commission.

11 And with me today is the Friesian team that are
12 sitting in the first row of -- first row to my right. And
13 I wanted to specifically introduce Brian Bedner. And,
14 Brian, can you stand for just a minute? And Brian is the
15 President and Founder of Birdseye, which I mentioned
16 before, which is based in Charlotte.

17 What I'd like to do is to start with some
18 information about the Friesian project. And the Friesian
19 project is an advanced stage project. And the reason why
20 I say that it's an advanced stage project is because
21 Friesian has already entered into a Purchase Power
22 Agreement with the North Carolina Electric Membership
23 Corporation, it's entered into a Large Generator
24 Interconnection Agreement with Duke, and it has financing

1 in place. And the financing that's in place is for the
2 generating facility, the interconnection facilities, and
3 the network upgrades. And the PPA with the EMCs was
4 entered into on June the 14th of this year, and the PPA
5 provides that Friesian will be selling the entirety of
6 its output for the facility at wholesale -- at wholesale
7 to the North Carolina EMCs.

8 And then in regard to the large generator
9 Interconnection Agreement, it was entered into with Duke
10 on June the 6th of this year, also. And the LGIA is in
11 accordance with the Large Generator Interconnection
12 Procedures which are part of the federal -- the FERC-
13 jurisdictional Open Access Transmission Tariff which is,
14 as the Commission knows, referred to as the OATT.

15 And the interconnection with Duke has been
16 fully vetted by senior management with Duke before Duke
17 executed the IA. And, for example, before Duke and
18 Friesian entered into the IA, Friesian and Duke had a
19 number of calls and meetings that began back in the fall
20 of 2017 that discussed all implications of the project,
21 and specifically, Friesian and Duke focused on the
22 network upgrade costs and the repayment provisions in the
23 OATT and the Large Generator Interconnection Procedures.
24 And Duke's senior management and attorneys, including

1 Duke's FERC attorneys -- excuse me -- Duke's FERC
2 attorney, the risk management group with Duke, Duke's
3 Board of Directors, and Lynn Good all thoroughly vetted
4 the Interconnection Agreement and repayment provision for
5 the network upgrades to ensure that it would be in full
6 compliance with the OATT and that it would be in full
7 compliance with state and federal law. And on May the
8 1st of this year, Lynn Good and Duke's Board of Directors
9 approved the LGIA.

10 And then as the Commission knows, with an LGIA
11 there are payment provisions that come into play as
12 milestones, and Friesian has already made \$3 million in
13 payments for network upgrades. And the next payment
14 that's due is a substantial payment of \$7 million, and
15 that payment is due on December the 2nd. And these
16 payments for the network upgrades will be nonrefundable
17 if the facility is not constructed and placed into
18 operation. So as of December the 2nd, there will be \$10
19 million of network upgrade payments that will have been
20 made.

21 And so I'd like to move on to the legal issue
22 and to talk about what the issue in this case is about
23 and then also what the issue is not about. So this case
24 is about the application for a CPCN for a FERC-

1 jurisdictional 75-MW merchant plant facility that will be
2 located in Laurinburg, North Carolina. And the reason
3 that we're before the Commission is because the Public
4 Staff has opposed a CP--- has opposed the CPCN on the
5 sole basis that North Carolina retail ratepayers will be
6 responsible for paying for a portion of the FERC-
7 jurisdictional network upgrade costs.

8 And I'd like to take just a minute to talk
9 about the LGIA. Article XI of the Interconnection
10 Agreement addresses the requirement for payment of
11 interconnection facilities and network upgrades. And
12 pursuant to the Interconnection Agreement and also the
13 OATT, Friesian is responsible for the full payment for
14 the generating facility and the interconnection
15 facilities. And then in regard to the network upgrades,
16 Friesian will pay for the network upgrades, but then it
17 will be entitled to reimbursement or repayment for the
18 network upgrades if the facility is constructed and
19 placed into operation.

20 And it is the responsibility of FERC to
21 consider the prudence of the network upgrade costs and
22 also to calculate and assign the network upgrade costs.
23 And those -- and it will be calculating this in deciding
24 the network upgrade costs to the North Carolina retail

1 ratepayers, the South Carolina retail ratepayers, and
2 then the wholesale customers. And Duke has provided
3 information to Friesian and also to the Public Staff that
4 it expects that the portion of the network upgrade costs
5 that will be allocated to the North Carolina retail
6 customers will be \$227 million.

7 And so I want to make it clear from the outset
8 that just because the North Carolina Commission cannot
9 consider the network upgrade costs in a CPCN proceeding
10 doesn't mean that there will not be oversight of those
11 costs. As I mentioned, it is FERC that will be
12 responsible for considering the prudence of the costs,
13 the amount of the network upgrade costs, and then FERC
14 will calculate and assign the network upgrade costs in
15 accordance with Duke's FERC-jurisdictional OATT and the
16 Large Generator Interconnection Procedures.

17 And so to state the obvious, I want to talk
18 about what the case is not about. This is not a rate
19 case, and this is also not a rulemaking procedure to
20 attempt to change federal law or to attempt to change
21 state law. So the only issue that's been raised in this
22 docket by the Public Staff is whether the CPCN should be
23 granted due to impact to the North Carolina retail
24 ratepayers. The CPCN application meets all of the

1 requirements of Section 62-110.1 of the North Carolina
2 General Statutes and Rule R8-63, which as the Commission
3 knows, that is the rule for CPCN applications for
4 merchant plant facilities. And in the CPCN application
5 Friesian has demonstrated need. As I mentioned before,
6 Friesian has already entered into a PPA with the EMCs to
7 sell the totality of the output at wholesale to the EMCs.

8 And I also want to mention that the -- the
9 North Carolina EMCs have intervened in this docket and
10 have provided comments in the docket. And the EMCs have
11 stated that its purchase of power from Friesian will
12 advance its goal of supplying low carbon power to its
13 members and will allow it to achieve REPS compliance.
14 The EMCs have also expressed support to the Commission
15 and asked the Commission to issue the CPCN to Friesian.

16 And also in regard to the application there has
17 been no concern or opposition to the application from the
18 public. The land use hearing before -- in Scotland
19 County has already taken place, and the Scotland County
20 Board of Commissioners voted unanimously to issue the
21 conditional use permit for the project. And then, also,
22 the Public Staff made a filing on May the 31st of this
23 year, and it confirmed that Friesian had submitted a
24 complete application that meets all of the requirements

1 of 62-110.1 and the Merchant Plant Rule R8-63.

2 And I did want to point out that no issues have
3 been raised by the public or any other party about the
4 location or the siting of the generating facility. And
5 so, therefore, Friesian has submitted a complete
6 application, has demonstrated the need for the facility.
7 There are no siting concerns about the location of the
8 generating facility, and there's no concern about the
9 facility from the public. And so based upon the
10 Commission's historical practice, the CPCN would
11 ordinarily have been granted in a -- in a summary manner;
12 however, the Public Staff in this docket is requesting
13 for the first time ever that the Commission consider the
14 cost of FERC-jurisdictional network upgrade costs in a
15 merchant plant CPCN proceeding.

16 The Public Staff, in its initial brief, has
17 acknowledged that the Public Staff and the Commission
18 have never before considered the cost of network upgrades
19 in a merchant plant CPCN proceeding. In the past
20 practice to date, the consideration of the Public Staff
21 and the Commission has been limited to the cost of just
22 the generating facility for a merchant plant application.
23 And not only has the Commission never considered the cost
24 of network upgrades in a merchant plant application, but

1 no other state has denied a merchant plant CPCN type of
2 application based upon the cost of FERC-jurisdictional
3 network upgrades. So what the Commission -- so what the
4 Public Staff is asking the Commission to do is to do
5 something that is unprecedented, something that has never
6 been done in North Carolina or any state before.

7 So I'm going to move on to the legal issue, the
8 legal -- for the state issue. The legal issue is a
9 narrow legal issue, and the question is can the
10 Commission override and assume jurisdiction of FERC's
11 exclusive authority of allocating network upgrade costs
12 in a CPCN proceeding? And the short answer to that
13 question, that both Steve and I will be talking about, is
14 no. If the Commission were to consider the impact to
15 ratepayers of network upgrade costs, that would violate
16 both state and federal law. And there is no state law
17 that authorizes the Commission to consider FERC-
18 jurisdictional network upgrade costs in a CPCN
19 proceeding, and also federal law preempts state
20 commissions from considering the cost of FERC-
21 jurisdictional network upgrade costs. And neither the
22 Public Staff nor Duke has offered any authority
23 whatsoever that would allow the Commission to assume
24 FERC's exclusive jurisdiction.

1 And so the applicable state authority in North
2 Carolina for merchant plant CPCN applications is, of
3 course, 62-110.1 and then Rule R8-63. And both the
4 statute and the rule preclude the Commission from
5 considering FERC-jurisdictional network upgrade costs in
6 a merchant plant proceeding. And the reason that the
7 statute and the rule do not allow the Commission to
8 consider FERC-jurisdictional network upgrade costs is
9 because the statute and the rule comply with and follow
10 federal law.

11 As the Commission is aware, Section 62-110.1 is
12 the statute that governs the certificates for generating
13 facilities. And the statute contains clear language of
14 the requirements for a CPCN application for a merchant
15 plant, and it has no mention of network upgrade costs.
16 The statute requires that the Applicant file an estimate
17 of the construction cost of the generating facility only.
18 And, again, there is no mention of network upgrade costs.
19 And then the rule specific to merchant plant CPCN
20 applications, Rule R8-63, also excludes network upgrade
21 costs in a CPCN evaluation.

22 So subsection (2) of the rule defines a
23 merchant plant as an electric generating facility in
24 which the output will be sold exclusively at wholesale

1 and the construction cost will not be included in the
2 utility's rate base. And the rule requires that the
3 Applicant file the estimated construction cost of just
4 the generating facility. And, again, the rule contains
5 no requirement that network upgrade costs be provided in
6 the application.

7 And what the Public Staff is arguing in this
8 docket is that the Commission should, in essence, be able
9 to consider network upgrade costs simply because it can
10 consider the cost of the generating facility in a
11 merchant plant CPCN application. And what the Public
12 Staff is doing is conflating network upgrade costs and
13 inter--- the cost of interconnection facilities with a
14 generating facility cost. But, of course, a generating
15 facility, the interconnection facilities, and the network
16 upgrades are separate and distinct facilities and they
17 have separate and distinct definitions in the LGIA, and
18 the cost responsibility is treated very differently in
19 the Interconnection Agreement and in the OATT.

20 The LGIA and the OATT require that the cost of
21 the generating facility and the interconnection
22 facilities be borne entirely by the interconnection
23 customer. So Friesian will be paying for the totality of
24 the cost for the generating facility and the

1 interconnection facilities, and the ratepayers will have
2 no responsibility. It's also important to point out, and
3 I think that the Public Staff should have no concern
4 about the cost of the generating facility because it will
5 be paid solely by Friesian and not by the ratepayers.

6 And then as Steve is going to be talking about
7 the federal law and will be explaining in more detail,
8 but the Public Staff's position is an infringement upon
9 FERC's exclusive jurisdiction, which is similar to what
10 happened in the Orangeburg case that the Commission asked
11 that we reference in our oral argument. And after the
12 Orangeburg decision was rendered by the D.C. circuit, the
13 North Carolina Commission, the Public Staff, and Duke all
14 agreed that the provisions and several contracts that
15 were originally thought to be permissible, exercises the
16 Commission's retail ratemaking authority, were instead
17 impermissible intrusions upon FERC's exclusive
18 jurisdiction, and that was because the Commission was
19 effectively acting as what was described as a gatekeeper
20 for access to North Carolina's wholesale power.

21 And here the Public Staff, in determining and
22 asking the Commission to determine that FERC-
23 jurisdictional network upgrade costs should be borne --
24 should not be allocated to North Carolina retail

1 customers is performing a function that, like in
2 Orangeburg, would result in the Commission being a
3 gatekeeper standing in the way of a FERC-jurisdictional
4 function.

5 And, in fact, the Public Staff's position is an
6 even more egregious infringement upon FERC's exclusive
7 jurisdiction compared to what was at issue in the
8 Orangeburg case because here the Public Staff cannot
9 point to any authority under state law to support their
10 position, and they cannot point to any other case in the
11 country where a state has denied a CPCN for a generating
12 facility because of FERC-jurisdictional network upgrade
13 costs. And Duke also has provided no authority for a
14 state commission to deny FERC-jurisdictional -- to deny a
15 CPCN application based upon FERC-jurisdictional network
16 upgrade costs.

17 And I wanted to point out that in Duke's reply
18 brief, they spent quite a bit of time on pages 5 through
19 9 citing authority for other states that have considered
20 transmission cost and transmission line CPCNs, but that
21 authority is not relevant in any way to this case because
22 this is not a CPCN application for a transmission line.

23 And then finally I wanted to mention a filing
24 that Duke recently made in regard to a CPCN application

1 that it made for a transmission line. And the question
2 was whether the -- that the Commission should consider
3 transmission cost in Duke's transmission line CPCN
4 application, and that's in Docket Number E-2, Sub 1215.
5 And I wanted to emphasize that the CPCN requirements for
6 transmission lines are substantially different than the
7 CPCN requirements for merchant plant applications, as the
8 rule for transmission lines, which is R8-62, does allow
9 -- does require that the Applicant provide information
10 about the cost of the line, whereas the merchant plant
11 rule does not allow information about the cost of the
12 network upgrades. And in that docket a member of the
13 public filed a petition to intervene and stated that his
14 interest in the proceeding was his concern that the
15 transmission line would increase utility rates. And Duke
16 objected to that intervention by a filing that Duke made
17 on October 1st of this year and stated that this
18 proceeding concerns a CPCN for a transmission facility.
19 It is not a general rate case. And increasing utility
20 rates is not the subject matter of this proceeding. And
21 so Duke believes that even in a transmission line CPCN
22 application that the impact to ratepayers, at best, would
23 only be incidental to the CPCN proceeding.

24 So with that, I will let -- Steve will be

1 talking about the federal law aspects.

2 MR. SHPARBER: Thank you, Karen. And good
3 afternoon, Madam Chairwoman and fellow Commissioners. So
4 as Karen -- Ms. Kemerait mentioned, I am here to talk
5 about the FERC-jurisdictional and preemption arguments.

6 And to begin, I'd like to briefly start by
7 recapping the jurisdiction of FERC in states over the
8 nation's electricity sector under the Federal Power Act
9 which is where the Commission's preemption analysis
10 should begin. A lot of this is -- the cases I'll be
11 discussing are included in the booklet that we sent and
12 also have been provided and discussed in the briefs
13 previously.

14 So first, under the Federal Power Act, FERC has
15 exclusive jurisdiction over the transmission of
16 electricity -- pardon me -- the electric energy and
17 interstate commerce and over the sale of electric energy
18 at wholesale and interstate commerce and, accordingly,
19 has jurisdiction over all facilities for such
20 transmission or sale of electric energy. FERC's
21 jurisdiction extends to any rate, charge, or
22 classification for any transmission or sale, subject to
23 the jurisdiction of the Commission, and any rule,
24 regulation, practice, or contract affecting such rate

1 charge or classification.

2 By contrast, states retain authority over any
3 other sale of electric energy, meaning retail sales, and
4 also jurisdiction -- states retain jurisdiction over
5 facilities used for the generation of electric energy,
6 local distribution and transmission of electric -- of
7 electric energy in intrastate commerce. This is all from
8 16 USC 824(b), for everyone keeping track of that. So
9 while states retain jurisdiction over mat--- further --
10 pardon me -- while states retain jurisdiction over
11 matters such as the construction and siting of most
12 transmission, FERC has exclusive jurisdiction over the
13 allocation of interstate transmission costs, transmission
14 planning, and the question of whether and how interstate
15 transmission costs are recoverable in FERC's
16 jurisdictional rights.

17 Now, Public Staff has taken -- and I'm sure
18 later you're going to hear more about Public Staff's
19 position -- is that in opposing the CPCN in this
20 proceeding, it is acting within its authority to regulate
21 facilities used for the generation of electric energy
22 which is properly within -- would be within its authority
23 under the Federal Power Act. However, what Public Staff
24 is really seeking to do is utilize the CPCN proceeding in

1 a manner that has never been done in North Carolina nor,
2 to our knowledge, any other state, with the expressing of
3 disregarding and changing a FERC-jurisdictional rate
4 associated with network upgrades that are FERC-
5 jurisdictional facilities. Accordingly, the manner in
6 which the network upgrades are allocated is clearly
7 within FERC's jurisdiction under the plain language of
8 the applicable provisions of the Federal Power Act.

9 And at the outset, I think it's important for
10 the Commission to understand that we are not saying that
11 there is no forum for Public Staff to raise its concerns.
12 If Public Staff has concerns related to the allocation of
13 network upgrade costs or related to the amount of the
14 network upgrade costs, it is appropriate for Public Staff
15 to bring those concerns to FERC. It is FERC, rather than
16 Public Staff or, respectfully, rather than this
17 Commission that is responsible for determining whether
18 rates -- whether its rates are just and reasonable and
19 what is in the public interest for matters within its
20 exclusive jurisdiction.

21 However, rather than availing itself of these
22 options, Public Staff is seeking to run an end around
23 FERC's exclusive jurisdiction by raising its concerns in
24 this proceeding and then seeking to deny the allocation

1 of the network upgrades that has been set up by FERC by
2 opposing the CPCN on the -- on the sole basis of the fact
3 that this agrees -- is concerned about the FERC-
4 jurisdictional cost allocation to North Carolina retail
5 ratepayers, which as I mentioned for the sake of argument
6 on the merits, and they have a valid concern, but FERC is
7 the proper venue for it to bring those concerns, not
8 before the Commission and certainly not in a CPCN
9 proceeding.

10 So next I want to briefly describe some of the
11 applicable case law related to preemption that's been
12 discussed previously in the briefs. So state law is
13 preempted where, under the circumstances of a particular
14 case, the law -- the state law stands as an obstacle to
15 the accomplishment and execution of the full purposes and
16 objectives of Congress. And the reason I mentioned this
17 at the outset is that what we are talking about here is
18 what's referred to as conflict preemption as opposed to
19 field preemption, because states and FERC have a dual
20 responsibility in regulating the nation's power sector.
21 This is not a case of field preemption where Congress has
22 legislated that FERC is the sole regulator of the
23 nation's power sector. So I think at the get-go it's
24 important to know we're talking -- when we're talking

1 about preemption, I'm talking about conflict preemption.

2 Importantly, as part of the Commission's
3 analysis, it's important to note that states are barred
4 from relying on mere formal distinctions in an attempt to
5 evade preemption and regulate matters within FERC's
6 exclusive jurisdiction. That is from the Schneidewind v.
7 ANR Pipeline case, 1988 case from the U.S. Supreme Court
8 that's cited in our briefs. And as I mentioned, our
9 position is that Public Staff is seeking to effectively
10 run an end around and is seeking to rely on the
11 distinction of opposing the CPCN under its authority
12 under -- related to -- citing generating facilities, when
13 in reality it's seeking to disregard FERC-jurisdictional
14 rate, and pursuant to the Supreme Court you can't do
15 that.

16 And further, while we believe that -- as Ms.
17 Kemerait mentioned, while we believe that Public Staff's
18 position is not in line with the plain language of the
19 state law and regulations on point, state actions are
20 preempted when they deny full effect to the rates set by
21 FERC, even when the state did not seek to tamper with the
22 actual terms and -- of an interstate transaction. And
23 further, even when state regulation operates with its own
24 field, it may not intrude indirectly on areas of

1 exclusive federal authority.

2 So accordingly, even if the Commission were to
3 disagree with our position and were to find that Public
4 Staff's position would not violate the plain language of
5 the state laws -- pardon me -- statutes and regulations
6 at issue that were previously discussed by Ms. Kemerait,
7 just for the record we do believe they violate the plain
8 language of that, of the state law -- Public Staff would
9 still be preempted in -- because it impermissibly seeks
10 to regulate and interfere with the FERC's-jurisdictional
11 allocation of network upgrades.

12 And additionally, it's important to note that
13 the U.S. Supreme Court has acknowledged that FERC
14 possesses greater authority over electricity transmission
15 than it does sales. So in the case of New York v. FERC,
16 which is in the briefs, 2002 case, it's pretty important
17 to note that under the Federal Power Act, FERC's
18 jurisdiction over the sale of power has been specifically
19 confined to the wholesale market, but FERC's jurisdiction
20 of transmission contains no such limitation.

21 So given that this proceeding involves FERC's
22 jurisdiction over transmission rather -- of power rather
23 than the sale of power, and given that the Public Staff's
24 position is not in accordance with any state law, our

1 position is that of all the cases we're going to discuss,
2 Public Staff's position is an even more egregious
3 overstep and infringement upon exclusive jurisdiction
4 than any other -- any of the other cases that have been
5 raised in this proceeding that we'll be discussing today,
6 because at least in all of those cases, first of all,
7 they all predominantly involve FERC's jurisdiction over
8 sales of power and could at least be read to be
9 permissible with state law. Neither of those factors is
10 present here.

11 So I'd like to talk next about preemption and
12 how it applies to the specific facts of this case. So at
13 the outset it's important to note that a state may take
14 actions that are properly within its jurisdiction that
15 will invariably impact wholesale rates that are subject
16 to FERC's exclusive jurisdiction and vice versa. This
17 happens all the time and is an inevitable consequence of
18 states and the federal government having a dual
19 responsibility to regulate the electricity sector.

20 However, what Public Staff and Duke do not
21 accurately describe is how the Commission should
22 undertake its analysis of whether the Public Staff's
23 position is preempted. For example, Duke states on its
24 reply brief at page 4 that "FERC has approved a

1 prospective allocation of costs under a FERC
2 jurisdictional tariff, but there will be no costs to
3 allocate if the state uses its lawful jurisdiction to
4 prohibit the generator from being built." And this
5 statement, on its face and in a vacuum, actually is
6 correct.

7 If a state, for example, were to deny the CPCN
8 for the Friesian facility because of a wetlands issue,
9 that is firmly within the state's jurisdiction under the
10 FPA related to siting the generation facility, and the
11 state would cause the facility not to be built, it would
12 cause the associated network upgrades not to be built,
13 and accordingly there would be no FERC-jurisdictional
14 network upgrade costs to allocate, and this would be fine
15 because the state would be acting within its jurisdiction
16 under the Federal Power Act.

17 However, what states may not do is act in a
18 manner that is not within their jurisdiction under the
19 Federal Power Act in order to impermissibly interfere
20 with FERC's exclusive jurisdiction and with the express
21 aim -- and I'll get into that a little bit later -- with
22 the express aim of overriding FERC's jurisdiction. This
23 means that the key question that the Commission needs to
24 ask itself when deciding whether Public Staff's position

1 is preempted is not whether a state action impacts a
2 FERC's jurisdictional rate or affects the FERC -- FERC
3 jurisdictional rate, because this happens all the time,
4 and as stated in the EPSA v. Star decision, it's an
5 inevitable consequence of a system in which power is
6 shared between state and national governments, but rather
7 the key question the Commission needs to ask itself is
8 whether the manner in which the state action impacts
9 FERC's-jurisdictional rates is permissible under federal
10 law. And in this case, if the Commission were to adopt
11 Public Staff and Duke's position, the Commission would
12 not be acting within its jurisdiction under the Federal
13 Power Act nor under state law.

14 And I'd like to talk next about some of the
15 applicable case law that has been raised in the
16 proceeding in some more detail and describe why applying
17 it to the facts at case -- applying this case law to the
18 facts at hand, this helps to reinforce our conclusion.

19 So the first case I'd like to briefly discuss
20 is Nantahala, which is briefed thoroughly by all parties
21 in the initial reply briefs. But Nantahala and the
22 associated precedent stand for the proposition that a
23 state cannot exercise its jurisdiction in the manner that
24 overrides a FERC-jurisdictional rate for practice. In

1 Nantahala, for the purpose of calculating the rate to be
2 charged to Nantahala's retail customers, the Commission
3 -- this Commission issued an Order allocating entitlement
4 and purchase power between Tampoco and Nantahala that
5 differed from the allocation of low cost power --
6 entitlement power -- pardon me -- between them ordered by
7 FERC in an associated wholesale ratemaking proceeding.
8 And this Commission took the position that it did not
9 impermissibly interfere with FERC's jurisdiction because
10 it did not expressly seek to interfere with a FERC-
11 jurisdictional rate. This position was soundly rejected
12 by the Supreme Court.

13 And in the Nantahala decision, the Supreme
14 Court opined that when FERC sets a rate between a seller
15 of power and the wholesaler's buyer, the state may not --
16 may not exercise its undoubted jurisdiction over retail
17 rates to prevent the wholesaler or seller from recovering
18 the cost of paying the FERC-approved rate.

19 And the takeaway from that case and application
20 to here is that while the specific mechanism the Public
21 Staff seeks to utilize to interfere with the FERC-
22 jurisdictional rate is its novel interpretation of state
23 statutes in its attempt to seek -- to deny the CPCN
24 proceeding, it is, in reality, seeking to over--- it is,

1 in reality, seeking to disregard and override a FERC-
2 jurisdictional practice, and both constitute
3 impermissible encroachments by the state on FERC's
4 exclusive jurisdiction. And further, Public Staff's
5 position, because it is not acting within its authority
6 under state law, for example, it's not -- in Nantahala
7 the Commission was acting within its authority under --
8 pursuant to retail ratemaking; it just happened to
9 impermissibly interfere with FERC's exclusive
10 jurisdiction, here Public Staff cannot even point to
11 state law that supports its position. So it's -- as I
12 mentioned, it's a greater infringement upon FERC's
13 exclusive jurisdiction.

14 And further, it's important to note that Duke
15 does not correctly interpret Nantahala nor apply to the
16 facts at hand, and additionally, FERC's view of how the
17 Commission should interpret -- pardon me -- should
18 undertake a preemption analysis is fundamentally flawed.
19 So in its reply brief at page 4 and throughout its reply
20 brief Duke argues what supposed analogous situations
21 would have looked like in the Nantahala case, but their
22 example simply describes a state acting within its proper
23 authority over generation, meaning that their supposed
24 analogous example is not on point. So on page 4, reading

1 from Duke's brief, it says, "The Nantahala case" -- this
2 is from Duke -- "The Nantahala case would be analogous
3 if, for example, North Carolina had prohibited Nantahala,
4 before it contracted with TVA, from buying non-
5 entitlement power from TVA on the grounds that such power
6 was sourced from coal." Now, under that scenario the
7 state would be acting within its proper authority,
8 really, to generate facilities. States can have a
9 jurisdiction over their resource portfolio. States can
10 enact renewable portfolio standards. There's nothing
11 prohibiting them from doing that. Public Staff in this
12 proceeding is not opposing the CPCN for the Friesian
13 facility because it's a solar facility; it's opposing the
14 CPCN because of the FERC-jurisdictional network upgrades,
15 and that's the key distinguishing characteristic between
16 Duke's example and what's actually happened here. So its
17 analogy and its discussion of Nantahala is not on point.

18 And further, as we discuss, Duke's position
19 effectively focused solely on the effects of state
20 actions to see whether what -- such actions are
21 preempted, but as explained, this is not a proper
22 analysis. And Duke's misunderstanding of how to analyze
23 whether a state law is preempted is most apparent in its
24 reply brief on page 5, and I'd like to read from the

1 reply brief. Duke states, "It is instructive to consider
2 other theoretical bases for denial of siting
3 authorization. For instance, if the Friesian facility
4 were proposed to be sited atop a protected wetland or
5 sacred Native American burial site. In this
6 hypothetical, assuming the CPCN request was denied as a
7 result, such action would arguably similarly 'interfere'
8 with prospective FERC-approved cost allocation scheme for
9 the network upgrades under the LGIA and OATT," the
10 tariff. "However, there would be no such basis for a
11 preemption claim." Now that, in and of itself, is
12 correct.

13 The next sentence is the problem. "The fact
14 that, in this case, the Commission could choose to deny
15 the CPCN based on the results of the" -- FERC juris---
16 "FERC-mandated cost allocation regime itself is a
17 distinction without a difference." And Duke's statement
18 on this, respectfully, is completely and utterly wrong.
19 The distinction between a case -- between a state acting
20 in a manner that was within its lawful authority under
21 the Federal Power Act and which happens to impact a FERC-
22 jurisdictional rate, which the aforementioned wetland and
23 burial site examples, and a state not acting within its
24 lawful authority in a manner and interfering with a FERC-

1 jurisdictional rate, which in the example is based solely
2 over concerns of FERC's cost allocation regime, is the
3 essence of why the latter type of action, which is what
4 the Public Staff is seeking to do here, is preempted.
5 It's not a distinction without a difference. It's the
6 entire reason that Public Staff's position is preempted
7 under federal law. And so it's important that the
8 Commission, just to reemphasize, doesn't look at the
9 effects of the state action or wholesale rate when
10 determining whether there's preemption or not. And
11 recent Supreme Court and Circuit Court precedent from the
12 last few years from the U.S. Supreme Court and Circuit
13 Court has actually helped to reemphasize this point, and
14 I'd like to go through this briefly because it is
15 important because it -- it also is illustrative of why
16 Public Staff's position is -- is preempted.

17 So the main case I'd like to discuss is a 2016
18 U.S. Supreme Court -- Supreme Court case of Hughes v.
19 Talen, and all these cases address state actions that
20 interfered or were -- seemed to interfere with the
21 clearing prices of PJM's capacity market. And while this
22 is -- these cases deal with jurisdiction over wholesale
23 rates rather than transmission, they're illustrative of
24 and show, and really have helped define, better define --

1 pardon me -- the boundaries between permissible state
2 actions and actions that are preempted.

3 So in Hughes v. Talen, Maryland was concerned
4 that clearing prices in PJM -- in FERC -- in PJM's FERC-
5 jurisdictional capacity market were not encouraging
6 sufficient in-state generation. And in 2009, Maryland
7 filed a proposal at FERC that they thought would remedy
8 the situation, but FERC rejected it. Maryland, in turn,
9 with the aim of trying to encourage more clean in-state
10 generation, went and set up another state program whereby
11 it guaranteed certain payments to in-state generators,
12 provided that they offered their resources into PJM's
13 capacity market. Now, this had the economic effect of
14 depressing the FERC-jurisdictional capacity prices
15 because if I'm a generator and I offer my resources into
16 the capacity market and I'm -- and I know I'm entitled to
17 a subsidy, I can lower my price, and then the overall
18 price in the wholesale clearing market can be lowered.

19 Now, that's not as applicable to this case, but
20 what is applicable is why the Supreme Court found that
21 Maryland's program was preempted. And specifically, the
22 Supreme Court found that Maryland's program was preempted
23 because Maryland, in setting up its second program,
24 doubted and second-guessed FERC's judgment and sought to

1 substitute its own judgment for what it thought the
2 appropriate wholesale rate would be. And its decisions
3 effectively adjusted the wholesale rate and invaded on
4 FERC's regulatory turf. And the Supreme Court said that
5 Maryland was attempting to encourage construction of new
6 in-state generation, does not save its program. States,
7 of course, may regulate within the domain Congress
8 assigned to them even when their laws incidentally affect
9 areas within FERC's domains.

10 The Supreme Court went on to cite several cases
11 and noted the distinction between measures aimed directly
12 by states, indirectly, FERC-jurisdictional practice, and
13 those aimed at subjects left to the state to regulate.
14 So in other words, the aims of the state action at issue
15 are indicative of whether state -- a state action is
16 preempted. The Supreme Court further noted that the
17 Maryland program was impermissibly tethered to the
18 wholesale market and it was also preempted.

19 So how does that apply to this case? Well,
20 it's well established that Public Staff's only issue with
21 the CPCN is the manner in which the FERC-jurisdictional
22 network upgrades are assigned to North Carolina retail
23 customers. It is clear that Staff's concerns are
24 directed at the FERC-jurisdictional cost allocation to

1 retail ratepayers and to seek -- and that Staff is
2 seeking to disregard the FERC allocation of cost to
3 retail ratepayers set by the FERC-jurisdictional tariff.
4 In other words, Public Staff doubts FERC's judgment with
5 respect to the way that the network upgrade costs are
6 allocated and is seeking to second guessed -- pardon me
7 -- second guess FERC's cost allocation regime and
8 substitute its own judgment for FERC's with respect to
9 how the network upgrade costs will be allocated. They're
10 just doing it through this mechanism of denying the CPCN.

11 Further, Public Staff's new and flawed
12 interpretation of the North Carolina regulations --
13 statutes and regulations in opposition to the CPCN are
14 directly tethered to the FERC-jurisdictional rate. These
15 are the same reasons that the Maryland program was found
16 to be preempted. Now, two cases that interpreted Talen
17 v. Hughes show -- and this goes back to why Duke's --
18 affects the analysis of whether the preemption is flawed
19 -- two subsequent cases interpreting other state programs
20 that were found not to be preempted show permissible
21 state actions. So these are the cases of EPSA v. Star, a
22 7th Circuit case, and the Coalition for Competitive
23 Energy v. Zibelman, a 2nd Circuit case, and both cases .
24 are in the materials that we provided. So both of these

1 cases, Illinois and New York sought to encourage in-state
2 generation by providing subsidies directly to nuclear
3 resources that were not tied to the participation in the
4 wholesale market. And both subsidies were upheld because
5 despite the fact they had the exact same economic impact
6 of -- as the Maryland program, they were not tethered and
7 tied impermissibly to the wholesale market. So the key
8 takeaway -- and they were found not to be preempted or
9 upheld by both the 2nd and 7th Circuit. So the key
10 takeaway from these cases is that state actions are not
11 preempted if they are not aimed at the FERC-
12 jurisdictional practice and are untethered from such
13 practices.

14 So if the CPCN were to be denied because of a
15 reason within the Commission's jurisdiction, such as the
16 wetlands issue or the cost of the generating facility,
17 that would not be preempted; however, the Commission
18 cannot deny the CPCN solely due to concerns associated
19 with the allocation of the network upgrades. And
20 further, you cannot look merely to the effects of state
21 actions when undertaking an analysis of whether the state
22 action is preempted, as Duke erroneously argues.

23 So finally, I'd like to remark briefly on the
24 Orangeburg case and how that case is applicable here. So

1 Orangeburg, once again, addressed the State's and FERC's
2 jurisdiction over sales of power, and like in Nantahala
3 addressed the Commission actions that were initially
4 thought to be permissible exercise of retail ratemaking
5 authority, but actually infringe upon FERC's exclusive
6 jurisdiction. Most relevant, as Ms. Kemerait mentioned
7 earlier, was Orangeburg stands for the proposition that a
8 state cannot act as a de facto gatekeeper or impediment
9 to the effectuation of FERC-jurisdictional practice.

10 To briefly summarize Orangeburg, the factual
11 background, there's a Joint Dispatch Agreement, a JDA,
12 that's bound to be problematic because it is hitting
13 several provisions of the Commission for North Carolina
14 retail ratemaking purposes to determine whether customers
15 would be considered native load and, therefore, whether
16 they would have access to lower cost wholesale power, in
17 this dynamic the power of the Commission to act as the
18 gatekeeper for low cost wholesale power for North
19 Carolina based utilities because it would have to
20 effectively control which wholesale customers enjoy the
21 benefits of native load status.

22 Now, while FERC initially approved the JDA, the
23 D.C. Circuit found that FERC's Order approving the JDA
24 was unsound and arbitrary and capricious, vacated the

1 FERC's Order and remanded it for further proceedings.

2 But what's telling and what's most -- I -- in
3 my mind, what's most important about this case is what
4 this Commission, Duke, and Public Staff and Orangeburg
5 did in response to it. Inately, they voluntarily decided
6 to eliminate the provisions of the JDA that gave rise to
7 the preemption issues, and most relevant they agreed to
8 revise the JDA to eliminate the gatekeeping provisions
9 that required advance Commission proceedings to approve,
10 reject, or modify companies' filings at FERC.

11 And the key lesson from Orangeburg and its
12 application to this case is that Public Staff is seeking
13 to create a gatekeeping function for itself by standing
14 in the way of Friesian having costs for its project
15 allocated in a manner that's consistent with a FERC-
16 jurisdictional rate. It is seeking to do -- it is
17 seeking to do so by effectively giving itself a de facto
18 veto whether FERC -- over whether FERC-jurisdictional
19 costs are allocated pursuant to a FERC-jurisdictional
20 tariff and pursuant to a FERC-jurisdictional rate by
21 seeking to deny the CPCN for the generating facility
22 based solely on the fact that it disagrees with the
23 implications of the FERC-jurisdictional rate. As I
24 mentioned, we don't have a problem with Public Staff

1 bringing these concerns. They are entitled to bring them
2 to FERC, but they're not appropriate for this proceeding.

3 So with that we'd like to, first of all, thank
4 everyone for their time and conclude our opening
5 statement, and we welcome questions later.

6 CHAIR MITCHELL: Questions for the Applicant?

7 MR. SHPARBER: Or now.

8 CHAIR MITCHELL: Commissioner Clodfelter?

9 COMMISSIONER CLODFELTER: Mr. Shparber, did I
10 get that right?

11 MR. SHPARBER: Yeah. You got it.

12 COMMISSIONER CLODFELTER: I want to ask you a
13 couple of questions about what I call the Grand Gulf
14 case. You know the case I'm referring to? That's the --
15 I think it's -- the actual title is Mississippi Power &
16 Light v. Moore.

17 MR. SHPARBER: Yes. Correct. Yeah.

18 COMMISSIONER CLODFELTER: I call it Grand Gulf
19 because that's what the power plant was called, okay?

20 MR. SHPARBER: Yeah.

21 COMMISSIONER CLODFELTER: It's a little shorter
22 title. I want to -- I want to be sure I know your
23 position here. Is it the Applicant's position that if
24 the Mississippi Public Service Commission in that case

1 had known in advance of its decision how FERC was going
2 to allocate power among the participating utilities in
3 the Grand Gulf project, that the Commission would not
4 have been allowed to consider that in making its decision
5 about whether to grant a CPCN to Mississippi Power &
6 Light to participate?

7 MR. SHPARBER: So the -- the Mississippi Power
8 & Light case I talk -- is talking about retail rates.
9 Was there an allocation to nuclear power plant? Is this
10 what you're referring to?

11 COMMISSIONER CLODFELTER: Right. And FERC
12 allocated power among the participants in the joint
13 development --

14 MR. SHPARBER: Yeah.

15 COMMISSIONER CLODFELTER: -- of that plant in a
16 certain way that caused cost to follow accordingly.

17 MR. SHPARBER: Yeah.

18 COMMISSIONER CLODFELTER: The cost followed the
19 allocation of power.

20 MR. SHPARBER: Uh-huh.

21 COMMISSIONER CLODFELTER: And before it got to
22 that point, the Mississippi Public Service Commission had
23 to grant a CPCN to Mississippi Power & Light to
24 participate in the joint project. And so my question

1 really is, is if Mississippi Public Service Commission
2 had known how FERC was going to allocate the power among
3 the participating utilities, would they not have been
4 allowed to consider that in deciding whether Mississippi
5 Power & Light could participate?

6 MR. SHPARBER: So what I would -- my -- my
7 answer would be no because it's a state commission
8 exercising its authority. It's not a matter of
9 sequencing. It's not a matter of knowing what the
10 implications of a FERC-jurisdictional practice are before
11 acting. You either can or cannot act in accordance with
12 -- with either jurisdiction.

13 COMMISSIONER CLODFELTER: But -- but if they
14 knew it at the time they made their decision. Not a
15 sequencing question. If they knew at the time they made
16 their decision how FERC was going to allocate the power,
17 could they have considered that?

18 MR. SHPARBER: In the CPCN for their generating
19 facility?

20 COMMISSIONER CLODFELTER: Yes.

21 MR. SHPARBER: I would say no.

22 COMMISSIONER CLODFELTER: In the CPCN allowing
23 Mississippi Power & Light to participate in the
24 generating facility.

1 MR. SHPARBER: Yeah. So -- okay. So I
2 understand your question better now. Yeah. So with
3 respect to -- and this gets to the essence of Public
4 Staff's position as well. So, you know, in the context
5 of the state's authority related to facilities used for
6 the generation of power, the state has authority over
7 siting of that. The allocation of transmission costs
8 that are FERC jurisdictional should not play into that
9 analysis. That differs from -- and, you know, admittedly
10 differs from a state's jurisdiction over transmission
11 siting, where the cost of transmission could come into
12 play.

13 Now, admittedly, as a practitioner, it's a
14 blurrier line between what is within the state's
15 authority with respect to transmission siting versus what
16 is in FERC's authority with respect to cost of the
17 allocation of interstate transmission cost, but that's
18 not a question we have to answer here because this isn't
19 an CPCN proceeding for a -- for a transmission facility.

20 COMMISSIONER CLODFELTER: Well, no. There was
21 no transmission facility in -- in the Grand Gulf case.

22 MR. SHPARBER: No.

23 COMMISSIONER CLODFELTER: But if the
24 Mississippi Public Service Commission had looked at the

1 allocation of power and said, whoa, FERC has allocated
2 too much power and, therefore, the costs that follow that
3 power allocation to Mississippi Power & Light, and we
4 just don't think Mississippi Power & Light should
5 participate in that -- in that venture, would they have
6 been allowed to do that or would that have impermissibly
7 interfered with FERC's allocation of power among the pool
8 of participants?

9 MR. SHPARBER: So with respect to the pool,
10 right, no -- so you're talking about something that's
11 slightly different, so -- because you're talking about
12 participating in the power pool?

13 COMMISSIONER CLODFELTER: Right.

14 MR. SHPARBER: So the question there of whether
15 Mississippi -- so it's similar to actually whether you
16 want to join an RTO. So the question of whether
17 generation facilities want to join a power pool, for
18 example, and whether the state mandates generating
19 facilities join RT-- you know, a power pool or not,
20 that's something that is within the state's authority.
21 However, once the allocation is set, once they're
22 participating, in that instance it's -- the state would
23 be beholdng to the FERC-jurisdictional cost allocation.
24 However, the state could, if they have concerns with the

1 allocation that's within a FERC-jurisdictional rate,
2 raise those concerns at FERC.

3 COMMISSIONER CLODFELTER: All right. Let me
4 leave that question and -- and I want to read you a quote
5 from the Grand Gulf decision of the Supreme Court. It's
6 on -- you've got your notebook there. It's -- it's on
7 page 374 of the opinion.

8 MR. SHPARBER: Pardon me?

9 COMMISSIONER CLODFELTER: 373 and 374 of the
10 opinion.

11 MR. SHPARBER: Find it, 373. What paragraph,
12 sir?

13 COMMISSIONER CLODFELTER: It's the paragraph
14 that starts "Appellees" at the bottom of page 373,
15 "Appellees seek to characterize this case as falling
16 within facts distinguished in Nantahala."

17 MR. SHPARBER: I think I have it. Where -- I'm
18 just -- sorry, I'm just, you know --

19 COMMISSIONER CLODFELTER: I'm sorry. I'm
20 reading it from my copy of the case and not your notebook,
21 copy, so --

22 MR. SHPARBER: Okay. Yeah. Proceed, though.
23 I can -- I can pick it up.

24 COMMISSIONER CLODFELTER: Okay. The quote is

1 "Appellees seek to characterize this case as falling
2 within facts distinguished in Nantahala. Without
3 purporting to determine the issue, we stated in Nantahala
4 'We may assume that a particular quantity of power
5 procured by a utility from a particular source could be
6 deemed unreasonably excessive if lower cost power is
7 available elsewhere, even though the higher cost power
8 actually purchased is obtained at a FERC approved and,
9 therefore, reasonable price, as we assume it might well
10 be unreasonable for a utility to purchase unnecessary
11 quantities of high-cost power even at FERC approved rates
12 if it had the right to refuse to buy that power.'" What
13 does that mean? What's the Supreme Court saying there?

14 MR. SHPARBER: So I'd say there it really
15 pertains to the state's authority to decide where to
16 purchase power from, effectively.

17 COMMISSIONER CLODFELTER: Isn't it really
18 saying that the state would retain jurisdiction over
19 whether or not to enter into the transaction in the first
20 place?

21 MR. SHPARBER: Correct. Yes.

22 COMMISSIONER CLODFELTER: That what's protected
23 is the FERC's determination of the price; not the wisdom
24 of the transaction, but the determination of the price.

1 Isn't that what the Supreme Court is saying?

2 MR. SHPARBER: Yes, but it's in the context of
3 whether -- and I think the distinguishing characteristic
4 between here and this case, respectfully, is what's going
5 on there. So FERC -- and I think this goes also to
6 actually Duke's example, the example about purchasing --
7 over whether to purchase coal or not, power from coal.
8 That relates to the state's authority over generating
9 facilities under the Federal Power Act. And certainly
10 the state has the authority to determine where it
11 purchases power from, from what sources, based on what
12 resource, et cetera. The interstate rate, though, and
13 the price, as you point out, is within FERC's authority.

14 I think the key distinguishing characteristic,
15 though, is what's occurred here is that the CPC--- pardon
16 me -- the facility is being built. The facility is being
17 built pursuant to -- and the -- well, the question that,
18 you know -- pardon me. Let me take a step back.

19 The Commission's review of the CPCN here is
20 related to the generating facility, and as we mentioned,
21 we believe we've checked all those boxes. The question
22 about whether the rate associated with the interstate
23 FERC-jurisdictional network upgrades are just and
24 reasonable is a question for FERC, so the -- I believe

1 the analogy to your case and what's happening in the
2 Mississippi Power & Light case would be the following:
3 so the state could have the ability at the get-go to
4 decide whether to enter into power contracts or not or
5 buy power from different places. Once the rate is set,
6 though, the rate is set by FERC. So in that case if
7 Staff -- pardon me -- if the state had an issue with an
8 interstate rate, they could go petition FERC review.

9 Here, though, what's happened is -- and it's
10 important because we're mixing -- and this is Public
11 Staff and Duke's position -- they're mixing and matching
12 what's appropriate for the State to consider in the
13 context of its authority under generating facilities
14 versus FERC's authority over interstate FERC-
15 jurisdictional transmission. So here, while the
16 Commission is -- from a federal preemption standpoint,
17 the Commission is certainly free to deny the CPCN on
18 grounds such as wetland issues, cost of the generation
19 facility, et cetera, the project is being built and the
20 Commission grants the CPCN at that point.

21 Once it is built -- and, further, if there were
22 any State-jurisdictional distribution costs, for example,
23 that were not appropriate and there would be some -- you
24 know, for example, the cost of the generating facility,

1 anything that was in the State's jurisdictional
2 redistribution, the State would have authority to deny
3 rate recovery or approve those -- the CPCN on those
4 grounds. However, that's not what is applicable here.

5 What they cannot do here is deny the CPCN and
6 stop the transaction from taking into effect because of
7 its concerns over FERC's-jurisdictional practice over
8 interstate transmission. That's different than the --
9 respectfully, that is different than the question of
10 whether to allow a utility to enter into Power Purchase
11 Agreements of different generation from in the first
12 instance because that relates to the -- the State's
13 jurisdiction over generating facilities.

14 COMMISSIONER CLODFELTER: So I -- I think I
15 understand what you're saying.

16 MR. SHPARBER: Yeah.

17 COMMISSIONER CLODFELTER: Whether I agree with
18 it is a different matter, please --

19 MR. SHPARBER: That's --

20 COMMISSIONER CLODFELTER: -- understand, but --

21 MR. SHPARBER: Yeah.

22 COMMISSIONER CLODFELTER: -- but -- so could
23 the State not say -- again, I'm trying to follow the
24 logic of the Supreme Court in Grand Gulf. Could the

1 State not say, gee, the all-in cost of these electrons
2 coming out of this facility is just too great, period,
3 full stop?

4 MR. SHPARBER: So --

5 COMMISSIONER CLODFELTER: We don't set those
6 costs, by the way. We're not attempting to say what
7 those costs are. We don't really care.

8 MR. SHPARBER: Uh-huh.

9 COMMISSIONER CLODFELTER: Somebody else has set
10 what that package of cost is. But the all-in costs are
11 just too great of this power.

12 MR. SHPARBER: So it's important to recognize
13 in your statement, is that the all-in cost consists of
14 some costs that were properly within the State's
15 jurisdiction and some costs that are probably within
16 FERC's jurisdiction. So for everything -- all the costs
17 that are within the State's jurisdiction, such as the
18 cost of the generating facility, distribution, anything
19 like that, then if the CPCN were to be denied on those
20 grounds, then from a federal preemption standpoint that
21 would be okay, but there's a whole other bucket of those
22 costs which are the network upgrade costs that are FERC
23 jurisdictional.

24 COMMISSIONER CLODFELTER: Well, let me stay

1 with your wetlands example.

2 MR. SHPARBER: Yes.

3 COMMISSIONER CLODFELTER: I mean, the
4 destruction -- the siting of a power plant in a place
5 that destroys wetlands, that's a cost. The destruction
6 of the wetlands is a cost.

7 MR. SHPARBER: Correct.

8 COMMISSIONER CLODFELTER: Right. You've
9 conceded that I consider that cost.

10 MR. SHPARBER: Correct, because it -- yes.

11 COMMISSIONER CLODFELTER: It's not the cost of
12 the generating plant. It's the cost of the destruction
13 and the loss of the wetlands.

14 MR. SHPARBER: Well, that's because wetlands
15 and environmental, you know, issues are firmly within and
16 historically have been within the State's jurisdiction.

17 COMMISSIONER CLODFELTER: Within the State's
18 jurisdiction. So in the end what I'm trying to get you
19 to is does your preemption argument really depend upon
20 your State law argument, that if we -- if we find we have
21 State statutory or other authority, case law authority,
22 to consider these issues, then no preemption?

23 MR. SHPARBER: No. Incorrect. So --
24 respectfully. So if you were to find that under the

1 plain letter of 10---

2 MS. KEMERAIT: Section 101.1.

3 MR. SHPARBER: -- Section 101.1 -- pardon me --
4 and Rule 63 that you had authority to deny this, again,
5 under the plain letter of the State laws and regulations,
6 which we do not believe that the Commission does,
7 respectfully, but if you were to find that, then it would
8 still be preempted because under the Federal Power Act
9 the State does not have authority to disregard FERC-
10 jurisdictional cost -- FERC-jurisdictional rates or cost
11 associated with a facility that is FERC jurisdictional.

12 It's important, and just to reemphasize this,
13 the network upgrades are FERC-jurisdictional costs. They
14 are interstate transmission costs. So in the total
15 bucket of -- so, you know, if you have a dividing line of
16 all the costs associated with the project, wetlands,
17 environmental issues for moving the State's jurisdiction,
18 the cost of the generating facility for moving the
19 State's jurisdiction, network transmission -- network
20 upgrades, the interstate transmission costs, that's FERC
21 jurisdictional. So you cannot be acting -- respectfully,
22 you cannot purportedly be acting in a manner that is in
23 line with your authority under the Federal Power Act if
24 you think you're acting within your requirement.

1 A state would not be acting in its authority
2 under the Federal Power Act with respect to siting or --
3 pardon me -- with respect to generation -- the generation
4 facilities if it were to disregard -- pardon me -- if its
5 sole basis for stopping the construction of a generation
6 facility were because of concerns related to facilities
7 used in the transmission of interstate commerce which is
8 FERC jurisdictional. Does that make sense?

9 Whether you disagree with me or not, I want to
10 make sure you understand.

11 COMMISSIONER CLODFELTER: I take your answer.

12 MR. SHPARBER: Okay. Thank you, sir.

13 COMMISSIONER CLODFELTER: Let me ask you this,
14 would you -- would you agree that if the CPCN is denied
15 in this case, that there would not be any trapping of
16 federally-approved costs as there was in the Nantahala or
17 the Gulf -- Grand Gulf cases? There wouldn't be any cost
18 trapping. If we -- if we deny the CPCN, no costs are
19 trapped, are they?

20 MR. SHPARBER: Well, it's a different scenario
21 because --

22 COMMISSIONER CLODFELTER: I --

23 MR. SHPARBER: Yeah. So correct. Well, there
24 would be no costs to allocate. But the trapping,

1 respectfully, dealt with a particular issue with respect
2 to how rates are recovered by a utility between retail
3 and the wholesale cost.

4 Now, the trapping here would be the fact that
5 there would be, you know -- or I'd say the equivalent
6 here is that there would be no cost to allocate at all,
7 even though they should be allocated. So while -- you
8 know, if the CPCN were to be denied, and let's assume
9 that the project network upgrade costs were not built,
10 the trap would be that the Friesian project, which has
11 the right to be built under -- our position is has the
12 ability to be built and has to comply with all State law
13 would not be built and no network upgrades there. But it
14 wouldn't be an issue of cost recovery like what was
15 issues in Nantahala and what -- what was at issue in
16 Nantahala, but we're also dealing with authority related
17 to sales of power versus transmission of power, so
18 they're different scenarios, just factually.

19 COMMISSIONER CLODFELTER: I'm going to ask you
20 one more federal question --

21 MR. SHPARBER: Yeah.

22 COMMISSIONER CLODFELTER: -- then I've got a
23 bunch of state law questions. On remand in the
24 Orangeburg case FERC, again, approved the JDA

1 agreement --

2 MR. SHPARBER: Correct.

3 COMMISSIONER CLODFELTER: -- on remand, and
4 they did what the D.C. Circuit told them that they should
5 do, which is articulate the basis for approving the
6 provisions of the JDA that were under consideration. And
7 as I read the Order on Remand by FERC, one of the things
8 FERC says is proper is -- that can properly be considered
9 is whether or not a customer is native load or non-native
10 load. And, of course, what was objectionable was that
11 this Commission was attempting to determine who among the
12 -- the pool of wholesale customers was native and non-
13 native --

14 MR. SHPARBER: Uh-huh.

15 COMMISSIONER CLODFELTER: -- and that was
16 objectionable. That went away --

17 MR. SHPARBER: Uh-huh.

18 COMMISSIONER CLODFELTER: -- but the basic fact
19 that a customer was or was not native load could be
20 considered was perfectly proper in considering the
21 provisions of the JDA. Do you agree with that?

22 MR. SHPARBER: Correct, because the offending
23 provisions were eliminated.

24 COMMISSIONER CLODFELTER: And the offending

1 provisions were this Commission was making that
2 determination.

3 MR. SHPARBER: Correct.

4 COMMISSIONER CLODFELTER: Right.

5 MR. SHPARBER: And similarly here, the analogy
6 is that the Commission, if it were to adopt Public
7 Staff's position, would be making the decision about
8 whether -- effectively making the decision about whether
9 the network upgrade costs should be allocated or not
10 pursuant to the FERC-jurisdictional tariff. That's the
11 analogy to Orangeburg.

12 COMMISSIONER CLODFELTER: Well, does -- does
13 the FERC decision on remand give this Commission
14 permission to consider whether or not this plant is
15 serving native load or not, native load for a regulated
16 utility?

17 MR. SHPARBER: I believe that it does because
18 -- yes --

19 COMMISSIONER CLODFELTER: Okay.

20 MR. SHPARBER: -- because the offending
21 provisions that were related to preemption were removed.

22 COMMISSIONER CLODFELTER: I've got some state
23 law questions. Ms. Kemerait, do you want to field those?
24 I'm looking at G.S. 62-110.1(d).

1 MS. KEMERAIT: (e)? Okay.

2 COMMISSIONER CLODFELTER: (d).

3 MS. KEMERAIT: I'm sorry. (d)?

4 COMMISSIONER CLODFELTER: (d). "In acting upon
5 any petition for the construction of any facility for the
6 generation of electricity, the Commission shall take into
7 account the Applicant's arrangements with other electric
8 utilities for interchange of power, pooling of plant,
9 purchase of power and other methods for providing
10 reliable, efficient, and economic electric service."
11 What does that mean? How do we take those things into
12 account?

13 MS. KEMERAIT: So that is some information, I
14 think, that was provided in the Public Staff's initial
15 brief or reply brief, and that information is related to
16 -- so there are separate rules for a utility's CPCN for
17 one of its own facilities under Rule R8-61, and then a
18 merchant plant facility under R8-63.

19 COMMISSIONER CLODFELTER: The statute doesn't
20 differentiate between merchant plants and regulated
21 utilities. It says "any petition."

22 MS. KEMERAIT: Right. And some of the
23 provisions do not specifically state that it is specific
24 to a public utility's CPCN application, but I think

1 you're referring to the other methods for providing
2 reliable, efficient, and economical electric service.

3 COMMISSIONER CLODFELTER: And economical
4 electric service.

5 MS. KEMERAIT: And in our CPCN application we
6 have provided information about reliable, efficient, and
7 economical electric service, and specifically we have the
8 PPA. We have provided information. And 62-110.1 is a
9 CPCN statute related to the generating facility, and
10 we've provided information about how the cost of the
11 generating facility will be borne exclusively and
12 entirely by Friesian and not by the ratepayers, and that
13 is something that would be different under a CPCN
14 application for an electric public utility under Rule R8-
15 60--- R8-61.

16 COMMISSIONER CLODFELTER: Okay. I'm referring
17 to the statute, not the rules.

18 MS. KEMERAIT: Right. Correct.

19 COMMISSIONER CLODFELTER: So the statute says I
20 should take into account Friesian's arrangements with
21 Duke to the end of being sure that we are providing
22 reliable, efficient, and economical electric service. So
23 if I conclude that Friesian's arrangements with Duke
24 cause Duke's electric service to be less economical, less

1 efficient, or less reliable, the statute allows me to
2 consider that, doesn't it?

3 MS. KEMERAIT: So, again, this is for the
4 statute that deals with a generating facility.

5 COMMISSIONER CLODFELTER: And that's what this
6 is.

7 MS. KEMERAIT: Right. And the generating
8 facility and the cost of the generating facility will not
9 be borne by Duke, and so that the cost will not be passed
10 on by the -- to the ratepayers. So we provided that
11 information in our application and provided that
12 information to Duke, so there would be no cost for the
13 generating facility to Duke or to the ratepayers because
14 that is -- that is a cost that would not be borne by
15 Duke. It would not be included in Duke's rate base.

16 COMMISSIONER CLODFELTER: All right. Let me
17 move to a different section of the statute. (b) (sic)
18 says that in considering the application we are required
19 to consider the long-range generating needs of the state.
20 I have some hypothetical questions for you because I just
21 want to explore the Applicant's understanding of -- of
22 what we are to consider.

23 Would it be proper for this Commission to have
24 a policy that merchant generating plants don't comport

1 with the long-range generating needs of the state unless
2 they are resources that are identified as needed
3 resources in a utility's Integrated Resource Plan?

4 MS. KEMERAIT: No. I don't think that that
5 would be appropriate for the Commission to do.

6 COMMISSIONER CLODFELTER: Why?

7 MS. KEMERAIT: Because the --

8 COMMISSIONER CLODFELTER: Under state law why?

9 MS. KEMERAIT: Okay.

10 COMMISSIONER CLODFELTER: Why would that be
11 inappropriate?

12 MS. KEMERAIT: Under -- well, for one thing you
13 would have to change the statute and the rules, and that
14 is not what we're here today to be doing, but also it
15 would not be appropriate because you would be determining
16 what would be occurring for a FERC-jurisdictional project
17 that has a PPA with a wholesale customer.

18 And so Duke's generating -- so Duke's -- so it
19 talks about -- it says that "In making the determination,
20 the Commission shall consider resource and fuel diversity
21 and reasonably anticipated future operating costs" and
22 that no -- and it goes on to say "No public utility shall
23 cancel construction of a generating facility without
24 approval from the Commission." And it -- this is also

1 limited to the certificate for the construction of a coal
2 or nuclear facility.

3 COMMISSIONER CLODFELTER: I'm looking at
4 110.1(c).

5 MS. KEMERAIT: Okay. Okay. Can you state
6 again specifically where -- what your question is with
7 that?

8 COMMISSIONER CLODFELTER: Well, it says that in
9 considering an application for a Certificate of Public
10 Convenience and Necessity to construct a new generating
11 facility we are to consider our analysis of the long-
12 range generation needs for electricity in North Carolina,
13 including probable future growth and the use of
14 electricity, probable needed generating reserves, extent,
15 size, mix, general location of generating plants, et
16 cetera and so on, all to the end of achieving maximum
17 efficiencies for the benefit of the people of North
18 Carolina. And we are to consider that in granting the
19 certificate.

20 So if the Commission says that the way we
21 consider that is that we look to the Integrated Resource
22 Plans and see whether or not this generating resource is
23 identified as a need. Is that improper under state law?

24 MS. KEMERAIT: So -- well, for one thing, this

1 particular subsection of the statute refers to the
2 utility's CPCN application because as you'll note, that
3 it talks about that it shall consider an analysis in
4 acting upon any petition by any utility for construction.
5 So the merchant plant, so that -- the merchant plant is
6 not going to be a public utility.

7 And so -- and also talking -- even if you were
8 to consider that, you look again about the probable need
9 for future generating facilities, and we've already
10 determined the probable need for the future generating
11 facilities due to the PPA with the North Carolina EMCs,
12 so --

13 COMMISSIONER CLODFELTER: So you read
14 subsection (c) as not applying to the universe of persons
15 identified as requiring a CPCN in subsection (a)?

16 MS. KEMERAIT: I think that subsection (c) is
17 related to the public utility's CPCN application.

18 COMMISSIONER CLODFELTER: Although it's
19 interesting, it doesn't use the word "public utility,"
20 does it? It uses a word that's not used anywhere else.
21 It uses the single word "utility."

22 MS. KEMERAIT: Right.

23 COMMISSIONER CLODFELTER: Odd, isn't it?

24 MS. KEMERAIT: It is, but I think that that's

1 consistent. So it does use the word "utility." However,
2 a merchant plant facility has never been considered to be
3 a utility or a public utility, and this is consistent
4 with the consideration of ensuring that when public
5 utilities -- so this -- this subsection is consistent
6 with in considering public utilities, ensuring that the
7 CPCN applications that they would have for natural gas,
8 coal, or a nuclear facility is in accordance with
9 ensuring that there's going to be the maximum
10 efficiencies for the benefit of the people of North
11 Carolina, and this is related specifically to the public
12 utilities of North Carolina and Section R8-61. That's
13 how it's been interpreted for -- in the merchant plant
14 applications as well.

15 And it also talks about probable need for
16 future generating facilities, and that's related to the
17 utility's need in their IRP, so this is -- this is
18 specific to the public utilities and not to merchant
19 plant facilities.

20 COMMISSIONER CLODFELTER: Let me -- I
21 understand your answer.

22 MS. KEMERAIT: Right.

23 COMMISSIONER CLODFELTER: Let me ask you
24 another question. Is the Commission permitted to

1 consider the impact of this proposed project on other
2 projects currently in the interconnection queue awaiting
3 connection to the power grid?

4 MS. KEMERAIT: I don't think that would be
5 appropriate. I think that this CPCN application is a
6 standalone CPCN application. And what the Commission
7 should be doing is looking at the CPCN application to
8 determine whether it meets the requirements of 62-110.1
9 and R -- and Rule R8-63, and that the analysis is in
10 compliance with state and federal law, and that what the
11 Commission should not be doing is considering there's --
12 there will be CPCN applications for projects that are
13 farther back in the queue, but I don't think that that's
14 appropriate, to be considering impact to other projects
15 based upon this CPCN application. This -- this --

16 COMMISSIONER CLODFELTER: Can you point me to
17 something in the statute that says I shouldn't consider
18 that?

19 MS. KEMERAIT: There's nothing in the statute
20 that says you should not consider it. However, I don't
21 think that there is anything that -- the CPCN statute is
22 for the Commission to be considering the CPCN application
23 that is specific and in front of the Commission. So
24 there is -- there --

1 COMMISSIONER CLODFELTER: Can I not consider
2 under 110.1 the relationship and the effect of this
3 generating facility on the entire electrical system in
4 North Carolina? I can't consider that?

5 MS. KEMERAIT: And which subsection are you
6 referring to now?

7 COMMISSIONER CLODFELTER: In the statute read
8 as a whole.

9 MS. KEMERAIT: Uh-huh.

10 COMMISSIONER CLODFELTER: Read it all.

11 MS. KEMERAIT: Okay.

12 COMMISSIONER CLODFELTER: I'm not allowed to
13 consider the impact of that generating plant on the
14 system as a whole?

15 MS. KEMERAIT: I don't think that you're
16 authorized by this -- this statute or the rule to be
17 considering the impact. You are -- it is an application,
18 that you are to be considering the requirements of 62-
19 110.1 and R8-63 based upon the application that's in
20 front of the Commission, so I don't think that there's
21 any authority to be considering other projects that might
22 or might not be dependent upon this application or that
23 might benefit or not benefit by the application.

24 COMMISSIONER CLODFELTER: But I can consider

1 the cost of the generating plant even though that doesn't
2 affect any ratepayer in North Carolina?

3 MS. KEMERAIT: So I'd like to provide a little
4 bit of clarification about that. So under R8-63, and
5 that would be based upon what Steve had stated, is that
6 under R8-63, and this is (b)(2)(i), one of the -- the
7 information that is to be included in the CPCN
8 application would be the estimated construction costs of
9 the generating facility itself, but there would be no
10 basis for denying -- denying a CP--- so that would be --
11 so my response to information about the estimated
12 construction costs of the generating facility is that
13 that is information that would be provided to the
14 Commission for informational purposes or transparency
15 purposes, like some of the other information that would
16 be included in the application under this rule, and that
17 there would not be a basis for denying the CPCN
18 application based upon the cost of the generating
19 facility because there could be no impact to ratepayers
20 due to the cost of the generating facility --

21 COMMISSIONER CLODFELTER: How do I know which
22 of the items -- 10 or more items that are in that
23 subsection are just for informational purposes and which
24 are to be considered in making a decision?

1 MS. KEMERAIT: So the information that would be
2 -- that the Commission could consider in making a
3 decision would be the need for the facility, and then we
4 -- I talked about that during the -- my initial
5 presentation -- also, the siting of the location of the
6 facility that would potentially impact information such
7 as -- as we mentioned, wetlands or Native American burial
8 grounds, those types of issues.

9 However, for informational purposes would be
10 information about, for example, the cost of the
11 generating facility because that would be information
12 that -- for transparency that the Commission or the
13 Public Staff might want to have, but that it could have
14 no impact on the CPCN application or the ratepayers of
15 the state because it would be borne entirely by Friesian.

16 Also, there's information under section (b) (2)
17 which requires information about the color map and
18 information about the facility. That information is not
19 a basis for denying a CPCN -- CPCN application based upon
20 information about the, for example, the generator, the
21 startup equipment, the planned and existing roads. If
22 those types of issues do not impact siting issues, for
23 example, we keep talking about this, but like wetlands or
24 Native American burial grounds, that information is for

1 informational purposes. For example, what the Commission
2 is seeing is that there's a number of CPCN amendment
3 applications that are being filed, and by having this
4 type of information about the boundaries of the project,
5 for example, what the buffers will be that the Commission
6 is -- the Public Staff has been asking for, then the --
7 if the project changes, then the Commission has
8 information to determine whether a CPCN amendment would
9 be required.

10 So this would be transparency informational
11 purposes, but not for denial of a CPCN application unless
12 it impacts siting authority of something that would be
13 impermissible.

14 COMMISSIONER CLODFELTER: Look at (b) (2) (iv).
15 Is that informational or is that criteria for a decision?

16 MS. KEMERAIT: Well, to state the obvious, this
17 is not a natural gas fired facility.

18 COMMISSIONER CLODFELTER: I understand that.

19 MS. KEMERAIT: Yes.

20 COMMISSIONER CLODFELTER: I -- I'm just trying
21 to take the principle that you're getting me to -- asking
22 me to buy and see how I would make that principle
23 actually work in practice.

24 MS. KEMERAIT: Right. And so that information

1 also would be a basis for information or transparency,
2 but not for denial of a CPCN application.

3 COMMISSIONER CLODFELTER: And, again, my
4 question to you is where do I find out which of these
5 things are informational purposes only and which are
6 decision criteria?

7 MS. KEMERAIT: So -- and I think that that is
8 where -- the case law that Steve was talking about,
9 because they -- I agree that the statute and the rule
10 does not state that what information is -- the rule
11 describes information that's required to be included in a
12 CPCN application, but the rule does not state what
13 information the Commission can deny a CPCN application on
14 and which is for informational purposes only. And that
15 is where the -- the case law about the jurisdiction of
16 the Commission is important because the case law about
17 where the Commission has jurisdiction is its -- is its
18 siting authority and dealing with issues about location
19 of the facilities and like we talked about, the wetlands
20 or the Native American burial grounds.

21 And, again, this rule provides no information
22 about the cost of network upgrades in the rule
23 whatsoever. It is simply -- it is simply the cost of the
24 generating facility.

1 COMMISSIONER CLODFELTER: Okay. We'll let you
2 alone.

3 CHAIR MITCHELL: Additional questions for the
4 Applicant?

5 (No response.)

6 CHAIR MITCHELL: I have two just very quick
7 questions. I believe I heard you all state that there
8 are provisions in the OATT, separate and apart from the
9 LGIA, that govern transmission credits or repayment. Can
10 you please direct me to those provisions if they are
11 separate and apart from the LGIA?

12 MS. KEMERAIT: It is Section 11.4.1. Excuse
13 me. I'll let Steve answer.

14 MR. SHPARBER: And so -- pardon me -- 11.4.1 is
15 the section of the OATT that requires a reimbursement for
16 the network upgrades. And also you want to look
17 Attachment A of the LGIA as well which actually
18 delineates the -- delineates those costs. Did that
19 answer your question, ma'am, or --

20 CHAIR MITCHELL: It does. And then I believe I
21 also heard you say that -- and I may have misunderstood,
22 but while you're up there, just --

23 MR. SHPARBER: Yeah.

24 CHAIR MITCHELL: -- stay there for one second

1 -- that the FERC would conduct some sort of prudence
2 review of the costs associated with the FERC-
3 jurisdictional --

4 MR. SHPARBER: So --

5 CHAIR MITCHELL: -- piece of the
6 interconnection costs?

7 MR. SHPARBER: Yeah. So this actually goes to
8 how the rates are done. And just as a point of
9 information, we have asked Duke repeatedly, both before
10 this proceeding started, about additional information
11 related to exactly how their rates are done, and also we
12 sent a data request -- what was the date --

13 MS. KEMERAIT: It was in June.

14 MR. SHPARBER: -- in June.

15 CHAIR MITCHELL: And can you specify what you
16 mean by "rates"?

17 MR. SHPARBER: So we asked Duke for information
18 on precisely how the costs are allocated pursuant to
19 their -- pursuant to their tariff. So, for example, Duke
20 has stated to us, and what's in the record is that about
21 60 percent of the network upgrade costs are based on --
22 are allocated to North Carolina retail customers. We
23 wanted some additional information from Duke exactly how
24 that's broken out, and also bridge back to its FERC rate

1 how these costs flow through the FERC -- through its FERC
2 formula rates.

3 So my understanding of Duke's tariff, although
4 it's not complete because Duke has not -- did not answer
5 our data request and we sent a follow-up request last
6 Thursday to Mr. Jirak -- I'm asking for additional
7 clarity -- but my understanding, which is admittedly
8 incomplete, or at least not complete -- not complete
9 because we don't have more information from Duke, is that
10 essentially the FERC-jurisdictional rates will flow
11 through the -- its formula rate as they're wholesale, but
12 -- so it's not like there is a -- necessarily a rate
13 case; however, any party that has issue with the amount
14 of the network upgrade costs is free to start a -- bring
15 some sort of petition to FERC if it wished to, including
16 a review of whether the costs were prudently incurred.
17 I'm not saying that they were not prudently incurred, but
18 if any party were to have that sort of question, it could
19 bring its concerns to FERC.

20 CHAIR MITCHELL: So is it your explanation,
21 then, that there is no review of the costs incurred,
22 absent a petition of a third party for review of those
23 costs?

24 MR. SHPARBER: I would direct the question to

1 Mr. Jirak, as we've -- if we had his -- the answer to his
2 data request, we would be in a position to answer that.

3 CHAIR MITCHELL: Well, understood. And I'll
4 ask Mr. Jirak. I just -- I asked you because you
5 indicated it in your argument.

6 MR. SHPARBER: Yeah.

7 CHAIR MITCHELL: I just wanted to --

8 MR. SHPARBER: My understanding is that, I
9 mean, there are a few different ways this -- to go about
10 it. My understanding would be that, you know, it is
11 assumed the costs are prudently incurred; however, if a
12 party were to initiate a proceeding before FERC, that
13 would be one of the vehicles they could bring. However,
14 I would defer to Mr. Jirak on exactly how Duke recovers
15 its wholesale costs.

16 CHAIR MITCHELL: Okay. Thank you.

17 MR. SHPARBER: Thank you.

18 CHAIR MITCHELL: Commissioner Clodfelter?

19 COMMISSIONER CLODFELTER: Ms. Kemerait, I'm
20 sorry to bother you again, but let me just -- let's just
21 talk for just a second here about 110.1(e). We were
22 talking about (c), and I understood your interpretation
23 of (c). (e) says that "As a condition for receiving a
24 certificate, the Applicant" -- doesn't say public utility

1 -- it says the Applicant; and, of course, under (a)
2 applicants can be public utilities or other persons --
3 "the Applicant shall file an estimate of construction
4 costs in such detail as the Commission may require. The
5 Commission shall hold a public hearing" and "no
6 certificate shall be granted unless the Commission has
7 approved the estimated construction costs and made a
8 finding that construction will be consistent with the
9 Commission's plan for expansion of generating capacity."
10 That's not confined to public utilities, is it?

11 MS. KEMERAIT: So that language does not state
12 public utility. However, this -- the language, if you
13 look at the preceding to the last sentence of that
14 subsection (e), it does refer to public utility. So --

15 COMMISSIONER CLODFELTER: With respect to
16 cancellation.

17 MS. KEMERAIT: Correct. With respect to
18 cancellation.

19 COMMISSIONER CLODFELTER: Once you've got the
20 certificate a public utility can't cancel without the
21 Commission's approval, but apparently, as I read the
22 plain language of the statute, an applicant who is not a
23 public utility could cancel even after receiving a CPCN.
24 So the last sentence doesn't tell me anything about the

1 first sentence.

2 MS. KEMERAIT: Okay.

3 COMMISSIONER CLODFELTER: I'm asking you about
4 the first sentence.

5 MS. KEMERAIT: Right. So the first sentence
6 does refer to "applicant shall file an estimate" for its
7 "construction costs in such detail as the Commission
8 shall require." And 62.110.1 is referring to -- the
9 title of it is the Certificate for Construction of
10 Generating Facility. And so under -- so under Commission
11 Rule R8-63, the Commission could provide specificity of
12 the detail of the construction costs of the generating
13 facility that the Commission is requiring. And, in fact,
14 the merchant plant rule does require that the
15 construction costs be provided. It does not have any
16 specificity about the detail of which, but that is in
17 response to the construction costs of the generating
18 facility.

19 COMMISSIONER CLODFELTER: Well, but to our
20 earlier discussion, then, that requirement that
21 construction cost estimates be provided in the
22 application, that's not just for informational purposes,
23 is it? It's for decision making purposes because the
24 statute says we have to approve the costs, right?

1 MS. KEMERAIT: So I would -- so I think that
2 what I would disagree with is that that subsection is
3 applicable for the public utilities because the
4 construction costs of the generating facility for the
5 public utilities will be included in the utility's rate
6 base, but for a merchant plant facility, the construction
7 costs of the generating facility will not be included in
8 the utility's rate base. And I agree with you that the
9 -- that that particular section does not specify public
10 utility versus merchant plant application -- excuse me --
11 versus merchant plant applicant. But the construction
12 costs of a generating facility are not applicable to any
13 impact to the ratepayers because it's not going to be
14 included in the utility's rate base.

15 COMMISSIONER CLODFELTER: I understand that,
16 but your position is the word "applicant" here means
17 public utility.

18 MS. KEMERAIT: I'm sorry. Can you repeat that?

19 COMMISSIONER CLODFELTER: I understand your
20 explanation, but your fundamental position here is that
21 the word "applicant" means public utility.

22 MS. KEMERAIT: Well, my fundamental position is
23 that the word "applicant" means public utility and that
24 the construction costs, in such detail as the Commission

1 may require --

2 COMMISSIONER CLODFELTER: Right.

3 MS. KEMERAIT: -- so they -- the Commission
4 Rule R8-63 does require construction costs of a
5 generating facility, but I think that where -- the next
6 sentence is what is really, I think, what you're
7 concerned about, is that there should be a public hearing
8 on the application and no certificate shall be granted
9 unless the Commission has approved the estimated
10 construction costs of the generating facility and be
11 consistent -- and make a finding the construction will be
12 consistent with the Commission's plan for expansion of
13 electric generating capacity. That sentence, I believe,
14 is related specifically to a public utility's application
15 under R8-61 as opposed to a merchant plant facility.

16 COMMISSIONER CLODFELTER: Can you cite me any
17 case law that reads the word "applicant" in subsection
18 (e) to mean public utility and not any person? I'll take
19 it if you've got it.

20 MS. KEMERAIT: So in the case of High Rock Lake
21 Association, which is the 87 N.C. App. case that was
22 actually cited in the Public Staff's brief, and that case
23 talked about the costly overbuilding of electric
24 generating facilities, and that reference was to the

1 generating facilities and talking about costly
2 overbuilding, which I think would be related to the
3 requirement under subsection -- subsection (e), and that
4 is a public utilities -- a case of a public utility for
5 an application for a generating facility.

6 COMMISSIONER CLODFELTER: The case involved a
7 public utility.

8 MS. KEMERAIT: Right. Correct.

9 COMMISSIONER CLODFELTER: Right.

10 MS. KEMERAIT: And I would say that there is no
11 case law -- that there is no case law that provides
12 information to the Commission that the Commission should
13 be able to consider and deny a CPCN application for a
14 merchant plant facility based upon the costs of the
15 generating facility that will be borne entirely by the --
16 by the merchant plant facility and not by the ratepayers.
17 There is -- there is no case law that states that -- in
18 fact, the Commission and the Public Staff have never
19 taken the position that they should look at the costs of
20 the generating facility in -- that will be borne
21 exclusively by the merchant plant facility in considering
22 whether to grant or deny a CPCN application.

23 And in the Public Staff's testimony and
24 affidavits that it's filed in a number of the EMP

1 docket, what the Public Staff has stated about the cost
2 of the generating facility is that there's been no
3 concern about the cost of the generating facility because
4 it will be borne by the -- the lenders and also by the --
5 by the developer as opposed to the ratepayers. And in
6 those EMP dockets there has been no -- there has been no
7 specific determination that the Commission has approved
8 the estimated construction costs and made a finding that
9 the construction of the merchant plant facility will be
10 consistent with the Commission's plans for expansion of
11 electric generating facilities.

12 So I think that what the Commission -- an
13 analysis that the Commission should consider is the
14 historical practice of the Public Staff's testimony and
15 affidavits and consideration for -- consideration of
16 CPCNs in the EMP dockets.

17 COMMISSIONER CLODFELTER: I respect that.
18 Historical practice has its place, but the question we're
19 talking about this afternoon is what's the scope of our
20 statutory authority.

21 MS. KEMERAIT: Uh-huh.

22 COMMISSIONER CLODFELTER: And I don't think the
23 Public Staff's historical practice can put glosses on the
24 statute or take them away. We've been talking about cost

1 because it's discrete, but the -- (e) also says we must
2 make a finding that construction is consistent with the
3 plan for expansion of electric generating capacity. Is
4 it your position, the Applicant's position, that that
5 finding applies only in the case of public utilities and
6 not in the case of other persons who are applicants for
7 CPCNs?

8 MS. KEMERAIT: Yes. That's my position.

9 COMMISSIONER CLODFELTER: Well, then I've got
10 to ask you one final question --

11 MS. KEMERAIT: Okay.

12 COMMISSIONER CLODFELTER: -- because given
13 where we are with these positions, I just -- can you tell
14 me what the Legislature's intent was in including other
15 persons than public utilities in 110.1(a)?

16 MS. KEMERAIT: I don't know what the
17 Legislature's intent was, but I would agree that this is
18 not a particularly clear statute. Maybe I could have
19 said that from the beginning.

20 COMMISSIONER CLODFELTER: We both agree on
21 that.

22 MS. KEMERAIT: Yeah. It's not a particularly
23 clear statute; however, this subsection (e) has always
24 been -- historically has been related to the utility's

1 own generating facilities and not to the merchant plant
2 facilities.

3 COMMISSIONER CLODFELTER: That's all.

4 MS. KEMERAIT: And --

5 COMMISSIONER CLODFELTER: This time I mean it.
6 I'll leave you alone.

7 MS. KEMERAIT: Okay. But I would say, though,
8 that in the CPCN application for the finding of need, we
9 have provided the information about the PPA and then also
10 information about the increased need for electricity
11 within the state.

12 COMMISSIONER CLODFELTER: So that's something
13 that we'll consider at the --

14 MS. KEMERAIT: Right.

15 COMMISSIONER CLODFELTER: -- evidentiary
16 hearing.

17 MS. KEMERAIT: Right.

18 COMMISSIONER CLODFELTER: Thank you.

19 MS. KEMERAIT: So we have gone above what we
20 think is necessary in our prefiled testimony.

21 CHAIR MITCHELL: Any additional questions?

22 (No response.)

23 CHAIR MITCHELL: All right. You may step down.
24 Thank you very much. Mr. Jirak, you're up next. Mr.

1 Jirak, before you start, we're going to take a five-
2 minute recess. We'll go off the record. We'll be back
3 on at 3:45.

4 (Recess taken from 3:39 p.m. to 3:46 p.m.)

5 CHAIR MITCHELL: All right. Let's go back on
6 the record, please. Mr. Jirak, you're up.

7 MR. JIRAK: Good afternoon, Chair Mitchell,
8 Commissioners. Jack Jirak, again, on behalf of Duke
9 Energy Progress. I'm not sure if this mic is high
10 enough. I'll try to lean over if I need to.

11 Before diving into the legal issues, I think it
12 might be helpful to provide some general background on
13 this particular case. As was discussed extensively in
14 the recent interconnection proceeding in Docket E-100,
15 Sub 101, Duke has achieved nation-leading interconnection
16 success. And a substantial portion of these
17 interconnected generators are in the southeast part of
18 the state. So specifically in the geographic area in DEP
19 East in which the Friesian project is located, there are
20 over 100 in-service or under construction solar
21 generating facilities totaling more than 1,300 MW in
22 capacity.

23 To put this number in perspective, this amount
24 of solar generation that's installed in this one

1 particular geographic area of the DEP East service
2 territory exceeds the amount of solar generation
3 installed in the states of Kentucky, Tennessee,
4 Mississippi, Alabama, Arkansas, and Louisiana combined.

5 But as this Commission is well aware, the
6 capacity of the Company's transmission and distribution
7 lines that transmit energy is not unlimited, and new
8 transmission lines or significant transmission line
9 upgrades become necessary when the existing transmission
10 distribution lines do not have sufficient capacity to
11 transmit electricity from the generation sources to the
12 load. So due to the Company's success in interconnecting
13 new solar generation, it has become more and more common
14 that substantial distribution or transmission network
15 upgrades are required in order to accommodate additional
16 generation.

17 So as a general matter, Duke certainly views
18 the facilitation of the interconnection to more solar and
19 other renewable resources as a positive outcome and
20 consistent with Duke's and the State's long-term
21 objectives of reducing carbon emissions by, in part,
22 increasing the amount of renewable energy resources on
23 the system.

24 As the Commission is well aware, there are a

1 number of different avenues for the development of new
2 generation in the state, and that includes CPRE, GSA,
3 PURPA, and net metering, among others. Each of these
4 programs has a different framework, process, and cost
5 allocation approach, but all are designed to create more
6 renewable energy in the state. However, once again, in
7 light of the amount of solar generation already
8 successfully interconnected, accommodating additional
9 renewable resources will undoubtedly require additional
10 transmission and distribution capacity.

11 And that takes us to the rather unique facts in
12 this case. As we've indicated in our filings, Duke's
13 primary interest in this proceeding is ensuring that the
14 Commission is fully informed regarding the costs that
15 will be borne by retail customers as a direct result of
16 the construction of this project. Again, as further
17 background, as this Commission is aware, all -- is
18 already aware, all projects seeking interconnection are
19 assessed through a system impact study in order to
20 determine what upgrades are necessary for a project to
21 safely and reliably interconnect.

22 In the case of the Friesian project, this study
23 identified the need to upgrade more than 60 miles of
24 transmission lines in the southeast part of the state in

1 order for this -- for the Friesian project to
2 interconnect in a safe and reliable manner.

3 Now, not only will these upgrades allow the
4 Friesian project to interconnect, it will also allow the
5 interconnection of hundreds of megawatts of additional
6 generation facilities queued behind Friesian. And Duke
7 has exerted quite substantial amount of efforts in
8 working not only with Birdseye, but with the developer
9 that owned the project before and has, in my view, you
10 know, gone out of its way to find ways to make this
11 project work, and so I think that should be taken into
12 account in this overall.

13 And I want to say as an aside, I kind of took
14 umbrage a little bit at the criticism of the information
15 provided with respect to the formula OATT tariff because
16 we have exerted a tremendous amount of resources working
17 with Birdseye in trying to find a path forward for this
18 project under the existing FERC procedures.

19 Now, the need for these Friesian-triggered
20 upgrades was certainly not a surprise. Again, because we
21 have so much interconnected solar generation in that part
22 of the state, it was simply common sense that we were
23 going to come to this point on the system where very
24 substantial upgrades to the transmission system are

1 needed.

2 Now, what's unique about this proceeding and
3 this case is that the generator that has been assigned
4 these upgrades intends to sell its output at wholesale to
5 NCEMC. And this fact makes the interconnection FERC
6 jurisdictional, and with that comes the different cost
7 allocation structure that we've been discussing here this
8 afternoon.

9 So as we start to reach the point on our system
10 where Duke has identified the need for these more
11 substantial upgrades, Duke believes it is imperative that
12 the Commission makes fully informed decisions in this
13 respect. And as was described in our reply brief and as
14 I will now briefly summarize, it is clear that in
15 exercising this Commission's undisputed generation siting
16 authority in this CPCN proceeding, the Commission does
17 have the authority to consider the costs of network
18 upgrades that will be incurred under a FERC-
19 jurisdictional LGIA.

20 So once again, the fact pattern in this case is
21 relatively unique because it is a generation siting
22 decision that is being considered by the Commission, even
23 though the impact to retail customers will occur not due
24 to the costs of construction of the generating facility

1 or the PPA cost which will be borne by NCEMC, but
2 instead, due to the costs of the transmission upgrades
3 that are necessary to interconnect the project.

4 And now at the outset it's important to keep in
5 mind one overarching jurisdictional reality that is
6 equally true in both the transmission and generation
7 context, and that overarching jurisdictional reality is
8 this, FERC is not in a transmission or generation siting
9 business, so to speak. So that jurisdictional divide
10 between FERC and state, that states retain full
11 generation and transmission siting authority, could not
12 be more clear in the enumerable FERC Orders and Federal
13 Court decisions.

14 Now I'm going to walk through some of these
15 examples, but as we heard from counsel for Friesian, the
16 way you describe your siting authority as it relates to
17 transmission assets and generation assets really seem --
18 sounded to narrow the scope of your review, and I don't
19 believe that that's consistent with case law.

20 So to take just one example, consider FERC's
21 Order 1000 by analogy. And in FERC's Order 1000, which
22 I'm certainly no expert in, but I've learned a little bit
23 in preparation for this -- this case, and FERC's Order
24 1000 established a regional transmission planning process

1 and it required -- it required a cost allocation be
2 determined in advance for certain types of transmission
3 projects. And in a 2014 decision that -- in which
4 petitioners were challenging the legality of FERC's Order
5 1000, the D.C. Circuit Court actually upheld Order 1000
6 in large part on the basis that Order 1000 did not
7 interfere with the state's transmission siting authority.

8 In the D.C. Circuit Court's decision, the Court
9 observed that Order 1000 and related orders expressly and
10 repeatedly disclaim authority over transmission siting
11 decisions. In other words, in issuing Order 1000, FERC
12 went out of its way to disclaim transmission authority
13 because had it not done so, Order 1000 would likely not
14 have survived legal challenge.

15 And, again, while the issue in this case is a
16 generation siting decision, the clarity of the
17 jurisdictional divide with respect to both generation and
18 transmission siting decisions is abundantly clear.
19 States retain full jurisdiction over all generation and
20 transmission siting decisions.

21 Now, no parties to this proceeding are
22 challenging the Commission's generation siting authority
23 at a general level. That is, no party is simply stating
24 the Commission should not even be making this siting

1 decision in a CPCN proceeding. Instead, however,
2 Friesian and other parties have effectively argued that
3 there is a somewhat odd exception to the Commission's
4 generation siting authority, namely, that you, the
5 Commission, can make siting decisions on any basis
6 authorized under the statute, except you can't consider
7 the cost of network upgrades that will result from
8 approving this generation facility.

9 And as I understand it, the argument is the
10 reason you must not base your decision on the costs of
11 such network upgrades is that the upgrades have been
12 assigned under a FERC LGIA, and the costs, when they are
13 incurred -- and that's important, they have not been
14 incurred -- costs, when they are incurred, will be
15 allocated under a FERC OATT.

16 So boil it down, the formula appears to be that
17 if you have two ingredients, right, cost assignment under
18 a FERC-approved process is ingredient one and FERC-
19 mandated cost allocation is ingredient two, then the
20 Commission simply can't consider those factors as it
21 makes its decision, as it exercises its siting authority.

22 Now, no party has cited a single FERC Order
23 that would suggest this limit in the state's clear
24 transmission and generation siting authority, and none

1 has been cited because none exists.

2 As we described in our brief, there are a
3 myriad of bases on which a state commission can choose
4 whether to grant a generation or transmission siting
5 request, and any such decision will likely have a
6 tangential impact about -- on some issue under FERC's
7 authority, whether potential future cost allocation under
8 the FERC OATT, as is the case here, or some indirect
9 impact on wholesale power rates or other impact, but that
10 tangential impact alone is not sufficient to preempt this
11 Commission's clear generation and transmission siting
12 authority.

13 Again, it's instructive to consider FERC's own
14 pronouncements on this issue. FERC approved the current
15 LGIP, the Large Generator Interconnection Procedures,
16 that govern the interconnection process for large
17 generators. FERC approved the current LGIP in Order 2000
18 and the series of follow-on orders. In one of those
19 orders -- one of those related orders, Order 2003-A, FERC
20 specifically considered cost and efficiency issues in its
21 relationship to the state's undisputed siting authority.
22 Petitioners in that case were asserting network upgrade
23 crediting provisions, these refund provisions that we're
24 talking about here this afternoon. Petitioners were

1 arguing that those provisions would result in inefficient
2 generation siting decisions.

3 In response to this very specific concern that
4 related to cost, FERC noted a number of factors that
5 would influence those siting decisions, but they very
6 importantly concluded by pointing to one thing. They
7 pointed to the authority of state commissions to make the
8 ultimate siting decisions. Specifically, and I quote,
9 FERC said "There are a number of factors that influence
10 siting decisions that are beyond the control of both the
11 interconnection customer and FERC, most importantly, the
12 approval and siting of new generation facilities
13 ultimately under the fact that the approval and siting of
14 new generating facilities is ultimately under the control
15 of state authorities."

16 Again, simply stated, in the very portion of
17 FERC's order addressing the cost of network upgrades and
18 in thinking about whether there would be inefficiencies
19 resulting from this refund provision, FERC pointed to
20 states as the final authority on siting decisions for
21 interconne--- for transmission upgrades resulting from
22 the FERC LGIP process.

23 Clearly, had FERC intended that the generation
24 siting authority of states would be circumscribed such

1 that a state commission could not consider the cost of
2 network upgrades in making these types of siting
3 decisions, it would have stated so in this context, but
4 it did not.

5 So once again, the question -- the question in
6 front of us that seems to be being posed by Friesian or
7 the position taken by Friesian is whether the two --
8 these two ingredients I talked about are present in this
9 proceeding. Are there costs being assigned through a
10 FERC-approved process and are there -- and once those
11 costs are incurred, are they being allocated according to
12 a FERC-approved process?

13 So let's give another example where FERC has
14 clearly said that states retain siting authority,
15 notwithstanding the presence of those two factors. So
16 let's turn back now to Order 2000 -- I mean, excuse me --
17 Order 1000. And it's instructive, again, to consider the
18 parallels to the LGIP process, and I want to really draw
19 the line very directly from the Order 1000 issues to the
20 LGIP issues that we're considering here today.

21 Again, in Order 1000 FERC requires utilities to
22 adopt the process by which regional transmission upgrades
23 may be identified. So FERC has approved a process for
24 identifying upgrades. So, too, under the LGIP, FERC has

1 approved a process for identifying upgrades, so there's
2 commonality there.

3 In Order 1000 FERC also require -- also
4 requires that a preapproved cost allocation be
5 established in advance of those costs being incurred.
6 So, too, under the FERC LGIP, there is a preapproved
7 prebate cost allocation methodology that's applicable to
8 those -- to the costs that will be incurred under the
9 LGIP.

10 So in both the FERC Order 1000 world that I've
11 just described and in the large generator interconnection
12 procedures they both check both of those boxes, FERC-
13 approved assignment of costs and FERC-approved allocation
14 of costs in advance of those costs being incurred.

15 Nevertheless, in the context of transmission
16 projects approved through the FERC Order 1000 process,
17 FERC has unambiguously authorized states to have ultimate
18 siting authority on whatever basis each state deems
19 reasonable, and so that same principle also holds true in
20 the LGIP context.

21 If one accepts Friesian's proposition that a
22 state siting decision could be preempted simply by the
23 fact that FERC has preapproved an assignment and
24 allocation process for the costs, then this Commission

1 would effectively lose all siting authority over Order
2 number -- Order 1000 projects. That's simply not what
3 FERC has intended, and it's certainly not what they have
4 described in their Orders and what's been found by the
5 courts to be applicable to those Orders.

6 So one more sort of real-world example might be
7 helpful for this Commission as we think about these
8 issues. In our brief we described a substantially
9 similar situation involving a transmission project that
10 was identified through a FERC-approved process with a
11 specific FERC-defined cost allocation methodology. So
12 this was a FERC-approved process that predated Order
13 1000, but looked a lot like Order 1000 in that there was
14 a process for identifying projects in a prebate cost
15 allocation methodology that also had been approved by
16 FERC.

17 And so, again, we describe this case in -- this
18 proceeding in our filing, and specifically, the Wisconsin
19 Public Service Commission, a state utility commission,
20 was considering whether to approve the siting of these --
21 of transmission assets that had resulted from this FERC
22 process. So the state commission had in front of it a
23 siting decision that specifically related to a FERC
24 process that had identified the upgrades and determined a

1 cost allocation methodology for those upgrades.

2 Now, when we filed a reply brief in this
3 proceeding, the state -- the Wisconsin State Commission
4 had not yet issued its decision and, interestingly, the
5 Wisconsin Commission did issue its decision on September
6 26, 2019, and reviewing it is very instructive in this
7 case. Now with the benefit of the Wisconsin Commission
8 Order in hand, it is crystal clear that the cost of the
9 transmission asset was front and center in that
10 proceeding and central to the Wisconsin PSC's
11 determination, which in the end was approval of the
12 project. But, again, the Wisconsin Commission was very
13 clearly analyzing the cost impact of that project in its
14 determining whether it was in the public interest and --
15 excuse me -- public convenience and necessity to approve
16 that project.

17 So, again, just like here, in the Wisconsin you
18 had a state commission looking at a transmission asset
19 that had been identified through a FERC-approved process
20 at a FERC -- a prebate FERC cost allocation methodology,
21 and yet that state commission still deemed it appropriate
22 to consider the cost of the project, of the transmission
23 asset itself.

24 One final issue to consider, and we've made

1 this point in our brief, is that the interconnection
2 costs associated with Duke-owned generating facilities
3 are also assigned under the LGIP process, so all Duke-
4 owned assets also go through the FERC LGIP process.

5 And the sort of odd logical extension of
6 Friesian's position is that this Commission would be, in
7 future generation CPCN proceedings, prohibited from
8 considering the associated transmission upgrades that
9 would be associated with a project. And from our
10 perspective, that would not give the Commission a
11 holistic view of the value of that project relative to
12 other available assets.

13 And so I think that's instructive to see that
14 taken to its extreme, Friesian's position does not really
15 comport with the rest of the practical ways in which this
16 Commission has applied its statutory mandates.

17 So Duke's other primary interest in this
18 proceeding is ensuring that there is full clarity about
19 the retail ratemaking impacts that will arise if this
20 CPCN is granted and the Friesian upgrades are then
21 constructed.

22 Again, as background, it's important to
23 remember the greater context here. DEP is required under
24 federal law to evaluate generation interconnection

1 requests submitted in the FERC LGIP. Duke is required to
2 offer an option for interconnection, required -- it's
3 required to have the interconnection customer fund the
4 construction upgrades, and then it's required to refund
5 those costs after commercial operation back to the
6 customer. These are clear and unambiguous obligations
7 regarding which DEP simply has no discretion. And
8 thereafter, as we discussed at a high level this
9 afternoon, a share of the transmission costs will be
10 allocated to wholesale transmission customers under the
11 joint OATT, and the remainder of the costs are then
12 allocated to retail customers.

13 So because DEP is required under federal law to
14 incur the cost of such network upgrades, DEP -- again, if
15 the CPCN is approved, DEP would be required under federal
16 law to incur those costs and, therefore, DEP is entitled
17 to recover all such costs or unconstitutional takings
18 would occur.

19 So, again, if and when DEP refunds those
20 amounts paid by Friesian for the network upgrades, these
21 costs will represent costs associated with transmission
22 service that DEP is mandated by FERC to pay and,
23 therefore, when DEP seeks to include the appropriate
24 allocation of such costs in retail rates, such costs must

1 be treated as reasonably incurred. Any other result
2 would violate the supremacy clause in controlling Supreme
3 Court precedent by trapping the cost that DEP is mandated
4 to refund under the OATT.

5 In the end, the distinction is one of timing
6 and, with all due respect, I disagree with the statements
7 earlier that sequencing doesn't matter. In this
8 particular instance sequencing is quite important.

9 As discussed above, the Commission is free to
10 exercise its siting authority at this time and may take
11 into account the FERC-mandated cost allocations in
12 exercising that authority prior to the point in time in
13 which the costs are actually incurred. But once the --
14 once the wheels are set in motion and the costs are
15 incurred, from that point on there are necessary
16 follow-ons from a regulatory perspective that will take
17 place with respect to retail ratemaking.

18 I want to briefly address the Orangeburg
19 decision, as the Commission requested the parties
20 consider addressing that. And the City of Orangeburg
21 decision has its roots in a decade old decision of the
22 Commission that made clear that if DEC provided service
23 to Orangeburg as if it were a native load customer, the
24 Commission, the State Commission, would for retail

1 ratemaking purposes credit the revenues earned as if Duke
2 had sold power at a higher incremental cost rate,
3 treating it as a non-native load -- excuse me --
4 customer.

5 Orangeburg argued this approach to retail
6 ratemaking caused unreasonable disparate treatment
7 between native load and non-native load wholesale
8 customers. And this treatment to which Orangeburg
9 objected was effectively embodied in the FERC-filed Joint
10 Dispatch Agreement when Duke merged with Progress.
11 Orangeburg challenged FERC's approval of the JDA as
12 condoning disparate rate treatment of similarly-situated
13 wholesale customers which harmed Orangeburg's ability to
14 get a better deal from Duke. Orangeburg argued that the
15 Commission policy was directly impacting the rate at
16 which Duke would be willing to sell FERC-jurisdictional
17 wholesale power.

18 The specific finding, though, of the D.C.
19 Circuit Court in that decision was that FERC had failed
20 to adequately justify the disparate treatment of
21 interstate wholesale ratepayers. Here, in contrast,
22 there is no disparate impact on wholesale customers that
23 requires justification.

24 Furthermore, there is no preemption issue.

1 Duke fully agrees that if the Commission approved the
2 CPCN, but then required Friesian to pay for network
3 upgrades with no credits or required Duke to allocate a
4 larger percentage of cost to wholesale customers, the
5 Commission's actions likely would be preempted. But here
6 the question is not about altering FERC's cost allocation
7 policy as to network upgrades because the decision has
8 been made in advance of those costs being incurred. The
9 Commission here would not be taking actions that directly
10 impacted FERC-jurisdictional rates, which drove
11 Orangeburg's concerns in the City of Orangeburg and, more
12 famously, was really at the heart of Nantahala decision.

13 As I get close to closing here, I want to --
14 our brief addressed the sort of state law issue as to
15 whether the Commission is authorized under the relevant
16 statute to -- to consider network upgrade costs in this
17 proceeding. And I'll just say very briefly, we laid it
18 out pretty clearly in our reply brief, we think there's
19 plenty of breadth in the terms of the stat--- to only in
20 the terms of the statute, but also in case law with
21 respect to what precisely the standard of public
22 convenience and necessity means.

23 In a North Carolina Supreme Court case, the
24 North Carolina Supreme Court held that the standard of

1 public convenience and necessity is relative or elastic,
2 rather than abstract or absolute, and the facts of each
3 case must be considered. So while, yes, we concede there
4 is not a specific line item in the Statute 62-110. --
5 let's see here -- 110.1 that identifies the requirement
6 of the Commission to consider network upgrades, we
7 certainly think that it's within the authority of the
8 Commission to do so, given the breadth of the statute, as
9 well as the breadth of the North Carolina Supreme Court
10 statement regarding what the -- what the public
11 convenience and necessity constitutes.

12 So in summary, Commissioners, DEP appreciates
13 this opportunity to provide its perspective to the
14 Commission. We certainly recognize that this case
15 presents a unique and complex set of facts that touches
16 on a number of interrelated and sometimes competing and
17 conflicting policy goals. As discussed above,
18 transmission upgrades will undoubtedly be needed in the
19 future to accommodate new renewable generation, and there
20 are certainly some potential benefits that would flow
21 from the completion of these upgrades if the Commission
22 were to grant the CPCN.

23 That concludes my remarks, and I welcome
24 questions that the Commission has.

1 CHAIR MITCHELL: Commissioner Clodfelter.

2 COMMISSIONER CLODFELTER: Mr. Jirak, I'll ask
3 you a question, the same question I asked the Applicant's
4 counsel. Do you believe the Commission has authority
5 under state law and federal law to consider the impact of
6 this generating facility on other projects in the
7 interconnection queue?

8 MR. JIRAK: Yes, I do.

9 COMMISSIONER CLODFELTER: On projects that have
10 not yet entered the interconnection queue that may be
11 able now to materialize in this geographic area?

12 MR. JIRAK: Yes, I do. Again, given the broad
13 language of the statute, as well as what the Supreme
14 Court has said about what constitutes public convenience
15 and necessity, we -- I think that would be a factor the
16 Commission would be free to consider.

17 COMMISSIONER CLODFELTER: The location of the
18 siting of generation can affect power flows on the entire
19 grid, can it not?

20 MR. JIRAK: Absolutely. I mean, you know,
21 impacts tend to be local until there is enough generation
22 in a particular area to start to flow out from that area,
23 and so over time, a particular interconnection of a
24 facility can have impacts in a geographically --

1 COMMISSIONER CLODFELTER: So --

2 MR. JIRAK: -- different area.

3 COMMISSIONER CLODFELTER: So a concentration of
4 distributed generation in one particular region can
5 affect system operations and how the grid has to be
6 managed?

7 MR. JIRAK: Absolutely. And a large part of
8 the system impact study process is taking the time to
9 assess how the grid in a particular geographic area will
10 be impacted by the interconnection of an additional
11 generating facility, whatever type of generating facility
12 that is.

13 COMMISSIONER CLODFELTER: And --

14 MR. JIRAK: And when we -- sorry -- apologize.

15 COMMISSIONER CLODFELTER: No. Go ahead.

16 MR. JIRAK: And when the utility identifies a
17 set of upgrades that will allow a generator to
18 interconnect safe and reliably, you know, that -- I think
19 Duke is at that point confident that that particular
20 generator can, in fact, interconnect.

21 COMMISSIONER CLODFELTER: This particular
22 project, if approved, will result in an increase in the
23 capacity in the -- in that geographic region and may
24 foster, as I think you said, additional distributed

1 generation resources in that particular area.

2 MR. JIRAK: That's right. So --

3 COMMISSIONER CLODFELTER: Has Duke done any
4 analysis of the operational impact of that scenario?

5 MR. JIRAK: Well, let me say -- say a couple
6 things first.

7 COMMISSIONER CLODFELTER: Do you know?

8 MR. JIRAK: Well, let me say generally, just
9 like transmission additions, I refer to them as being
10 lumpy, right, you never precisely line up a new -- a need
11 on the system with a perfect amount of generation when
12 you're adding new generation. The same thing is true
13 adding transmission capacity. And in this case the
14 upgrade, that the next sort of level up upgrade for this
15 transmission line will have sufficient capacity to allow
16 additional generators to interconnect in this region of
17 the state.

18 We have not done any sort of -- Duke has not
19 done any sort of comprehensive study to say -- that we
20 can say with absolute certainty this amount of generation
21 will be able to interconnect and we can accommodate this
22 much more solar facilities until we need the next
23 upgrade, but we are confident, sort of just engineering
24 judgment, that there -- that there will be sufficient

1 capacity for a substantial amount of additional
2 generation.

3 Now, keep in mind, as we all know, the
4 interconnection queue is quite large, and there are
5 already projects in the queue waiting to consume that
6 capacity. So it's not like this will necessarily provide
7 sufficient capacity for a bunch of future CPRE projects
8 or anything like that. These are -- there are projects
9 already in line with their hand up wanting to consume
10 that capacity if it's made available to them.

11 CHAIR MITCHELL: Additional questions for Mr.
12 Jirak?

13 (No response.)

14 CHAIR MITCHELL: Mr. Jirak, one question for
15 you. I'm looking at the LGIA that was attached to the
16 Public Staff's brief, and you don't -- you might not need
17 to look. My question is fairly basic. Exhibit A -- oh,
18 no. I'm sorry. Exhibit B sets forth the milestones
19 related to construction obligations and payment
20 obligations as well, but the way I understand, sort of, I
21 guess it's a note at the bottom of that at the end of
22 that appendix -- I'm sorry -- it's Appendix B. Let me be
23 clear. I'm looking at Appendix B to the LGIA.

24 MR. JIRAK: I don't have it in front of me, but

1 I'll be glad to --

2 CHAIR MITCHELL: Okay.

3 MR. JIRAK: -- hear the question.

4 CHAIR MITCHELL: Fair enough. So just answer
5 the question if you can.

6 MR. JIRAK: Yeah.

7 CHAIR MITCHELL: It looks like the -- that
8 DEP's repayment obligation is -- ripens at the -- at
9 DEP's retail case next occurring after the achievement by
10 the interconnection customer of COD or by 12/31/2027. So
11 do I understand correctly that even if the facility is
12 never placed in service, DEP would still have a repayment
13 obligation by 12/31/2027?

14 MR. JIRAK: No. That's not correct.

15 CHAIR MITCHELL: Okay.

16 MR. JIRAK: If the facility does not achieve
17 commercial operation, the payment obligation that's
18 identified in the LGIA would not arise.

19 Now, there's a difference of opinion. We've
20 had some discussions with Friesian about this, and I
21 won't go into all the details, but currently Duke's view
22 is that -- that if the commerc--- if commercial operation
23 is not achieved under the LGIA, no repayment obligation
24 arises. I don't want to speak on behalf, but Friesian

1 has a slight differently view that says that if -- even
2 if their facility doesn't achieve commercial operation,
3 if a later facility achieves commercial operation that
4 utilizes those upgrades, then there's a repayment
5 obligation that arises. And that's a subtle difference
6 of opinion, but fundamentally, to answer your question,
7 if commercial operation doesn't occur, then Friesian
8 doesn't get repaid for the --

9 CHAIR MITCHELL: Okay.

10 MR. JIRAK: -- for the upgrades.

11 CHAIR MITCHELL: One additional question. I'm
12 looking at Section 11.4.1 of the LGIA which is the
13 section of the agreement that governs repayment of
14 amounts provided for the network upgrades. And it
15 references -- it specifies that payments are to be made
16 under the transmission provider's tariff for transmission
17 services. I assume that's the OATT. Is my assumption
18 correct?

19 MR. JIRAK: That's right.

20 CHAIR MITCHELL: And so are there provisions in
21 the OATT that speak to -- separate and apart from the
22 LGIA, that speak to DEP's repayment obligation?

23 MR. JIRAK: I don't believe so. Subject to
24 check, I don't believe so. I think there are some

1 circumstances in which rather than full repayment being
2 made, transmission customers can get repaid through
3 credits, so I think that happens in a certain unique
4 context. In this particular context, though, the
5 repayment is going to happen in a lump sum.

6 CHAIR MITCHELL: Okay. Pursuant to the
7 language in Appendix --

8 MR. JIRAK: Pursuant to the timing laid out in
9 the appendix you referenced.

10 CHAIR MITCHELL: Okay. I have nothing further
11 for Mr. Jirak. Any additional questions?

12 (No response.)

13 CHAIR MITCHELL: Thank you, Mr. Jirak. Okay.
14 Mr. Ledford, you're up.

15 MR. LEDFORD: Thank you Madam Chair, members of
16 the Commission. My name is Peter Ledford, and I'm
17 general counsel for the North Carolina Sustainable Energy
18 Association.

19 I want to start by saying that NCSEA agrees
20 with the legal arguments that were made by Friesian. As
21 such, we only plan to address two of the Commission's
22 questions in our argument, the appropriate standard of
23 review and consistency with the Commission's June 14th
24 interconnection Order.

1 I want to start by quoting language from a
2 Commission Order. "Therefore, his interest in the
3 subject matter of this proceeding, increased rates, is
4 incidental to the current CPCN proceeding and his
5 Petition to Intervene shall be denied." This quote is
6 from a Commission Order not from years ago, but from just
7 last week in Docket E-2, Sub 1215. That proceeding
8 involves a CPCN for a transmission line pursuant to Rule
9 R8-62.

10 Rule R8-62 explicitly requires that the
11 Applicant provide a showing of the projected cost of the
12 line. In comparison, Rule R8-63, the controlling rule
13 for this proceeding, requires only an estimation of the
14 construction cost of the generating facility.

15 By the Commission's own logic that was shown in
16 Docket E-2, Sub 1215, the Public Staff's argument that
17 Friesian's FERC-jurisdictional interconnection costs will
18 put pressure on retail rates is inapplicable for
19 discussion in a transmission CPCN proceeding in which the
20 context of the rule explicitly allows for the
21 consideration of transmission costs. The Public Staff's
22 arguments are even less applicable in the incident
23 proceeding where Rule R8-63 requires only consideration
24 of generation costs.

1 Moreover, as a matter of good public policy,
2 sweeping changes to the standard of review should not be
3 made in an individual CPCN proceeding. All entities
4 appearing before the Commission need regulatory
5 certainty. We hear about regulatory certainty from Duke
6 on a routine basis, but the need also exists for
7 independent power producers like Friesian. Changing the
8 rules of the road midway through a CPCN proceeding would
9 be extremely harmful to independent power producers.
10 Such a change would essentially render the requirements
11 of Rule R8-63 moot. The Public Staff could demand
12 anything not required in R8-63 at any point in the CPCN
13 process.

14 The Public Staff has been on notice for at
15 least two years about the magnitude of the upgrades
16 needed in southeastern North Carolina. These issues have
17 been discussed in both proceedings related to Duke's grid
18 modernization proposals and the interconnection standard
19 docket. In fact, the interconnection costs at issue here
20 would represent less than 2 percent of the cost of Duke's
21 proposed grid modernization investments, which I would
22 note do not require CPCNs from the Commission.

23 The Public Staff notes that Friesian's upgrades
24 have not been discussed at Duke's transmission

1 collaborative. If anything, this highlights the need for
2 improved transmission planning. Duke has known about
3 this constrained area for years, but has not even raised
4 it in its own collaborative planning process.

5 In its initial brief, NCCEBA noted that
6 requiring detailed information related to interconnection
7 network upgrades in a CPCN proceeding would be
8 impracticable for merchant generating facilities. As an
9 initial matter, interconnection costs for some projects
10 have doubled or tripled since estimates were first
11 received.

12 Accordingly, there's a high likelihood that the
13 best information submitted by an applicant at the time of
14 a CPCN application -- at the time a CPCN application is
15 submitted would change substantially before a merchant
16 generating facility actually comes online. This would
17 significantly frustrate the Commission's examination
18 should the Commission determine it has the legal ability
19 to rely upon this information.

20 Furthermore, it is impracticable for the
21 Commission to base a decision on FERC-jurisdictional
22 interconnection costs given interdependencies between
23 various interconnecting projects.

24 If you look at Duke Energy Progress'

1 interconnection queue reports, you'll see that Duke has
2 two natural gas units planned for Cumberland County.
3 Looking at Duke's identified constrained areas in the
4 CPRE docket, you can see that Cumberland County is in the
5 same constrained area as the Friesian solar project.

6 Should the Commission adopt the Public Staff's
7 argument, assuming for a moment that it is legally
8 permissible to do so, the Commission would have to
9 disentangle the upgrades for these two projects in order
10 to determine whether to grant Friesian's CPCN. This
11 would only make the Commission's life even more
12 difficult.

13 Moving on to consistency with the June 14th
14 Order, the Public Staff asks whether the allocation of
15 costs associated with interconnecting the Friesian
16 project is consistent with the Commission's guidance "To
17 seek to recover from interconnection customers all
18 expenses associated with supporting the generator
19 interconnection process under the North Carolina
20 Interconnection Standard."

21 The Commission's June 14th Order is quite
22 simply inapplicable to the current proceeding. That June
23 14th Order dealt with interconnection customers, as that
24 phrase is defined in the North Carolina Interconnection

1 Standard, and costs, also under the North Carolina
2 Interconnection Standard.

3 It is undisputed that the costs in the current
4 proceeding are FERC jurisdictional. No party has
5 contested that. In essence, the Commission's decision
6 regarding cost allocation under the North Carolina
7 Interconnection Standard and the FERC's decision
8 regarding cost allocation under the Large Generation
9 Interconnection Procedures put the cost burden on
10 different parties. However, the proper venue for the
11 Public Staff's disagreement with the FERC's decision is
12 not at the North Carolina Utilities Commission. It's
13 with the FERC. Just as amendments to Rule R8-63 could --
14 should be considered in a rulemaking proceeding before
15 the Commission, the Public Staff should raise its
16 concerns about the LGIP in a proceeding before FERC.

17 Friesian complied with Rule R8-63, as it was
18 written, when it applied for its CPCN. No one has
19 disputed that. The Public Staff seeks to, as a practical
20 matter, amend Rule R8-63 after Friesian has filed its
21 CPCN application. The merits of the Public Staff's
22 argument should be examined in a rulemaking docket, not
23 in an individual CPCN proceeding. Thank you.

24 CHAIR MITCHELL: Questions for Mr. Ledford?

1 Commissioner Clodfelter.

2 COMMISSIONER CLODFELTER: Mr. Ledford, I want
3 to be sure I understand your position here. R8-63 sets
4 out what is to be in an application for a so-called
5 merchant plant. Is it your position that the contents of
6 the application exhaust all of the things that may be
7 considered by the Commission under G.S. 62-110.1?

8 MR. LEDFORD: That is not my contention.

9 COMMISSIONER CLODFELTER: Okay. So if the
10 statute says we must consider things that are not
11 included in the materials required by R8-63, we follow
12 the statute, don't we?

13 MR. LEDFORD: I don't believe there's any
14 tension between the statute and the rule. I believe the
15 ambiguity of the statute could be interpreted to allow
16 additional requirements by the Commission, but that any
17 additional requirements should be added via a rulemaking
18 proceeding instead of in a CPCN docket.

19 COMMISSIONER CLODFELTER: So when the statute
20 says that we shall make a finding that this is consistent
21 with the long-range generating plan for electricity in
22 North Carolina, and that's not listed anywhere in the
23 rule, we are to ignore the statute?

24 MR. LEDFORD: Not for a utility CPCN

1 application, but for --

2 COMMISSIONER CLODFELTER: Where is the word
3 "applicant" defined as public utility? Where?

4 MR. LEDFORD: So it's not the word "applicant"
5 as is used in the first sentence of subsection (e), but
6 if you go on to read the second section -- sentence, "The
7 Commission shall hold a public hearing on each
8 application" -- not at issue in this discussion -- "and
9 no certificate shall be granted unless the Commission has
10 approved the estimated construction costs and made a
11 finding that the construction will be consistent with the
12 Commission's plan for expansion of generating capacity."

13 So I would direct you instead to subsection (b)
14 of Rule -- excuse me -- General Statute 110.1, which says
15 that "'public utility' shall include any" -- EMC --
16 excuse me -- "For the purpose of subsections (a) and (d)
17 of this section, 'public utility' shall include any
18 electric membership corporation operating within this
19 State."

20 And if you look at the legislative history,
21 prior to 2013, EMCs were required to provide IRPs
22 pursuant to subsection (c). Once that was removed by the
23 General Assembly in 2013, I think if you look at
24 subsection (b) along with the requirement of the

1 Utilities Commission report to the General Assembly in
2 subsection (c), that issue of complying with the
3 Commission's long-term plan, read together, only applies
4 to regulated public utilities.

5 COMMISSIONER CLODFELTER: Well, these refer to
6 the application of subsections (a) and (d), but we were
7 working on section (e) which says "the applicant,"
8 period, not qualified.

9 MR. LEDFORD: Correct.

10 COMMISSIONER CLODFELTER: Right.

11 MR. LEDFORD: But I think in that second
12 sentence, by tying together the cost of the -- the
13 estimated construction costs and a finding of consistency
14 with the long-term plan, since the long-term plans are
15 only applicable to electric -- regulated electric public
16 utilities, I think that is where the application is used
17 to define only -- excuse me -- to apply only to a
18 regulated utility.

19 COMMISSIONER CLODFELTER: Go back to (a).

20 MR. LEDFORD: Yes.

21 COMMISSIONER CLODFELTER: "...no public utility
22 or other person shall begin the construction of any
23 steam, water, or other facility for the generation of
24 electricity to be directly or indirectly used for the

1 furnishing of public utility service..." This proposed
2 facility, the energy production is going to be purchased
3 by NCEMC or its members.

4 MR. LEDFORD: That's my understanding, yes.

5 COMMISSIONER CLODFELTER: And they are going to
6 do what with that electricity?

7 MR. LEDFORD: They will provide it, presumably,
8 at retail to their customers.

9 COMMISSIONER CLODFELTER: As a utility service.

10 MR. LEDFORD: Yes.

11 COMMISSIONER CLODFELTER: Indirectly, this
12 generating facility is providing electricity indirectly
13 for the furnishing of the utility service; is that not
14 correct?

15 MR. LEDFORD: Yes, but --

16 COMMISSIONER CLODFELTER: Yeah.

17 MR. LEDFORD: -- the EMCs are not subject to
18 the requirement of (c) and the Utilities Commission's
19 report to the General Assembly.

20 COMMISSIONER CLODFELTER: Doesn't say they're
21 not subject to requirements of (e), though, correct?

22 MR. LEDFORD: No, but I don't believe there's
23 any dispute that the Applicant, in this case Friesian,
24 filed an estimate of construction costs in such detail as

1 the Commission may require at the time -- in the form
2 that R8-63 took at the time they filed their application.

3 COMMISSIONER CLODFELTER: It didn't file any
4 explanation of how its facility is consistent with plan
5 for expansion of generating capacity because the rule
6 didn't require it.

7 MR. LEDFORD: Correct.

8 COMMISSIONER CLODFELTER: And, therefore, even
9 though the statute says we are to consider both cost and
10 consistency with the long-range plan, we're just supposed
11 to consider cost?

12 MR. LEDFORD: Well, I don't see how an
13 independent power producer such as Friesian could have to
14 argue that it complies with a utility-run integrated
15 resource planning process over which they have no
16 control.

17 COMMISSIONER CLODFELTER: Thank you. I
18 understand your position.

19 MR. LEDFORD: Thank you.

20 CHAIR MITCHELL: Any additional questions for
21 Mr. Ledford?

22 (No response.)

23 CHAIR MITCHELL: Thank you, Mr. Ledford. You
24 may be seated. Mr. Dodge, you are up.

1 MR. DODGE: I don't quite have the height issue
2 that Mr. Jirak has here. Hope you can hear me all right.
3 Good afternoon, everyone. I'm Tim Dodge with the Public
4 Staff. We represent the Using and Consuming Public in
5 this proceeding.

6 The Public Staff is specifically directed by
7 statute G.S. 62-15(d) to intervene in all applications
8 for CPCNs for construction of generating facilities.
9 This includes CPCNs for qualifying facilities pursuant to
10 Commission Rule R8-64, utility generating facilities
11 under Commission Rule R8-61, competitively procured
12 projects pursuant to Commission Rule R8-71, as well as
13 merchant plants under Commission Rule R8-63 that we're
14 discussing here today.

15 All of these rules, however, are derived from
16 the Commission's authority under -- over the siting of
17 general -- generating facilities in G.S. 62-110.1 that
18 we've mostly been discussing so far today.

19 A few specific points I just want to make
20 before I get started. One, is the Public Staff hasn't
21 taken a position at this point on the CPCN. Again, we
22 requested the suspension of the Procedural Order to
23 clarify these questions that were raised and brief those
24 issues, and so that's why we're here today, and we

1 appreciate the Commission's willingness to consider this
2 and allow us to discuss these issues further.

3 No parties, in their briefs or in the
4 discussions today, have contested the Commission's
5 jurisdiction over the siting of generation and
6 transmission lines under the Federal Power Act and by
7 general statute.

8 What we're here today to talk about is whether
9 or not the scope of the Commission's authority and the
10 review of costs in CPCN applications is so -- is narrowly
11 constrained to just the construction cost of the
12 generating facilities or whether it's reasonable and
13 appropriate for the Commission to consider the cost of
14 interconnection of those facilities as well, both the
15 interconnection facilities and the network upgrades to
16 the utility's grid.

17 Regardless of the type of facility that we're
18 talking about, whether it's a QF, a merchant, or utility
19 owned, the answer to that is not only is it reasonable,
20 but it's squarely within the Commission's statutory role
21 in promoting the development of adequate, reliable, and
22 economic utility service to all citizens of this state,
23 while preventing costly overbuilding of generating
24 resources.

1 If the Commission's review were limited only to
2 the costs incurred by a developer as opposed to the
3 impact of those costs on the public interest, its siting
4 authority would be rendered meaningless.

5 Commissioner Clodfelter, I appreciate your
6 focus on G.S. 62-110.1(e). I think that does address a
7 lot of the basis for the question about the consideration
8 of cost by the Commission.

9 Now, again, keep in mind Friesian started
10 before the Commission as a QF project. It originally
11 received a CPCN as a QF in 2016, and then it later
12 amended its application to, instead, seek a certificate
13 as a merchant facility.

14 As we've talked about today, one of the biggest
15 differences between those two approaches for projects
16 based in the Duke Carolinas or Duke Progress service
17 territory is who ultimately will bear the responsibility
18 to pay for those network upgrades assigned to the
19 project. As a QF, the Applicant is responsible for the
20 upfront payment of those costs and is not entitled to
21 reimbursement by the utility. If it's a merchant
22 facility under Duke's FERC-jurisdictional LGIA, the
23 Applicant initially pays those network upgrade costs, but
24 then as Mr. Jirak described, is eligible to have those

1 costs refunded with interest over time.

2 The costs provided to the Friesian project in
3 early system impact studies started high, but as Mr.
4 Ledford indicated, like many other projects in the
5 interconnection process, those costs have escalated and
6 the project is now, estimated cost, approximately \$225
7 million, not including interest, for those network
8 upgrades.

9 Now, again, we're not here today to represent
10 our recommendation or argue the merits of the project.
11 Due to some different perspectives, as we've talked
12 about, during our investigation I think these questions
13 arose, and that's why we wanted to bring this issue
14 before the Commission prior to the evidentiary hearing.

15 The Friesian project in some ways exemplifies
16 some of the challenges we've faced here in North Carolina
17 as a result of the growth in distributed generation. The
18 grid has been -- was built and paid for over time by
19 Duke's customers, both retail and wholesale customers.
20 In recent years, however, demand for the grid has surged,
21 and as more of this distributed generation has been sited
22 on the system, we began to reach those functional
23 capacity limits to allow further projects to interconnect
24 without triggering upgrades. So more significant costs

1 have been assigned and will continue to likely be
2 assigned to prospective projects moving forward.

3 That's how the system is designed to work, to
4 some extent. It provides a natural check on costly
5 overbuilding and prevention of inefficient projects from
6 moving forward. If project developers couldn't justify
7 the upgrade costs, then they wouldn't normally be built.
8 Or in the CPRE context, for example, if a project, when
9 the network upgraded costs associated with that project
10 were assigned and it exceeded the avoided cost threshold,
11 that project wouldn't be selected in the program.

12 The Friesian project, however, I think, tests
13 this model since its biggest single expense, the network
14 upgrade costs associated with the project, are subject to
15 repayment under Duke's Open Access Transmission Tariff,
16 or OATT, as we've been describing.

17 The Public Staff doesn't dispute that if the
18 project is granted a CPCN by the Commission, Duke's
19 ability to recover those costs is subject to the refund
20 and cost allocation provisions under the OATT, and that
21 we're not taking issue with those FERC-jurisdictional
22 allocation determinations. We recognize that if those
23 allocations were to be challenged, as Mr. Ledford
24 indicated, that would be appropriate -- appropriately lie

1 with FERC.

2 It's -- nonetheless, we feel it's appropriate
3 for the Commission, in its siting authority, to consider
4 these broader costs. And keep in mind as we've talked
5 about today, too, the Commission's review is just one
6 part of this -- of a facility being sited in the state of
7 North Carolina. Other agencies are generally charged
8 with environmental permitting, there may be zoning or
9 permitting issues that are also left to local
10 governments, for example. But the Commission, as the
11 economic regulator, is in the best position to consider
12 whether the total cost, the all-in cost associated with
13 siting the facility in North Carolina which would
14 ultimately be borne by both retail and wholesale
15 customers, are in the public interest.

16 The Commission may consider other factors as
17 well, of course, such as whether or not the project would
18 help to address transmission constraints or reliability
19 needs. As Mr. Jirak quoted the Casey decision, the
20 standard of public convenience and necessity is relative
21 and elastic rather than abstract or absolute, and the
22 facts in each case must be considered.

23 I think the key point to keep in mind for the
24 Commission in this case is where we are procedurally

1 right now. This is really a timing issue. The
2 sequencing of events is key for us to consider. We are
3 still at the siting stage which is wholly within the
4 Commission's jurisdiction. And while the Friesian
5 project does have a PPA with North Carolina EMC for the
6 sale of power and RECs from the facility, the PPA is
7 still subject to the Commission finding that the public
8 convenience supports the construction of the facility in
9 North Carolina. Until that time there's no reasonable
10 expectancy to recover the network upgrade costs
11 associated with the project.

12 I also want to touch briefly on the Orangeburg
13 case the Commission requested the parties discuss in its
14 October 3rd Order. The Commission asked whether or not
15 the findings of the Orangeburg case applied in this
16 context, and we believe the short answer to that is no.

17 In the Orangeburg case there was an existing
18 contract between Duke Carolinas and Orangeburg that
19 provided for a specific rate treatment. The D.C. Circuit
20 found that the Commission's review process for
21 determining which similarly situated wholesale customers
22 qualified as native load customers, as they were
23 characterized in the regulatory conditions at that time,
24 acted as a functional veto over the wholesale ratemaking

1 authority of FERC, since that determination to grant or
2 deny native load status could form the basis for denying
3 rate recovery to Duke in a state jurisdictional
4 proceeding. At that point in the Orangeburg case there
5 was an established rate impact in question, and losing
6 the right to that desired product was not merely
7 hypothetical or conjectural.

8 Here, we are still at the siting stage for the
9 generating facility, and not until the Commission grants
10 a CPCN and costs are incurred by Duke would a potential
11 question of disparate ratemaking treatment between retail
12 and wholesale customers arise. You have to bake the pie
13 before you can start arguing over who determines the size
14 of those slices.

15 The Public Staff, in its initial request to
16 brief these issues, also raised issues regarding the
17 linkage between State-jurisdictional queues and the FERC-
18 jurisdictional queue. Commissioner Clodfelter, you've
19 also raised that question about considering other
20 projects when considering the CPCN for this the impact on
21 other interconnection projects.

22 The Public Staff has spent significant time
23 over the past three years working to ensure that the
24 costs associated with State-jurisdictional

1 interconnections have been appropriately assigned to
2 those projects, consistent with the guidance provided by
3 the Commission. In this case we wanted to highlight for
4 the Commission the linkage between the state and federal
5 queues and then indicate our general support for Duke's
6 queue reform efforts that will seek to reduce some of the
7 misalignment between the cost allocation mechanisms in
8 state and federal -- for state and federal projects.

9 The Public Staff is not recommending the
10 Commission to adjust the allocation of interconnection
11 costs for this project. However, we do have some
12 concerns that if the Commission finds it cannot consider
13 the network upgrade costs as part of a CPCN proceeding
14 for a merchant facility, we will likely see more projects
15 using this approach to socialize network upgrade costs
16 when the capacity to the grid to accommodate additional
17 distributed generation is reached.

18 In closing, I wanted to note the Public Staff
19 is not seeking to keep merchant facilities or QF
20 facilities from being built in the state. Clearly, if
21 you look at the number of CPCN applications we've
22 submitted or we've made recommendations to the Commission
23 over the past six years on Monday morning staff
24 conferences, I think it's clear that we have been trying

1 to move those through and support the utilities and the
2 QF's efforts to move those projects through in a timely
3 fashion.

4 We're just simply seeking to ensure that the
5 facilities are built in alignment with the Commission's
6 authority to ensure the orderly expansion of electric
7 service in the state and that the costs associated with
8 interconnected -- interconnection of State-jurisdictional
9 projects continues to be appropriately assigned.

10 At the end of the day, it's really as simple as
11 is it in the public interest to build this project at
12 this location. In making that determination, we believe
13 the Commission should consider the total cost associated
14 with constructing the facility and connecting it to the
15 grid as part of the CPCN process. If the current
16 proposed location cannot accommodate the facility without
17 triggering substantial interconnection costs, the
18 application or -- excuse me -- the Applicant may need to
19 seek a location that can more reasonably accommodate the
20 additional capacity.

21 Just a couple other points. I wanted to follow
22 up on a couple of items that were stated. There -- I
23 agree that we didn't point in our brief -- either of our
24 briefs to a case where a commission has denied an

1 application for a CPCN as a result of network upgrade
2 costs, but I would also submit that we're not aware of
3 another solar facility or project triggering the network
4 upgrade costs we've seen for this facility. We are,
5 again, as I indicated, approaching points where the
6 demand or the capacity for the grid is likely to trigger
7 additional upgrades, so I think we will see these costs
8 -- higher costs increasing for projects going forward.

9 And while -- historical practice before the
10 Commission, we recognize the importance of that and
11 regulatory certainty, when in the face of new
12 circumstances I think it's appropriate for the Commission
13 to ensure that it's considered all the information that
14 it has the statutory authority to do in-making its CPCN
15 determinations.

16 Happy to answer any questions.

17 CHAIR MITCHELL: Commissioner Clodfelter?

18 COMMISSIONER CLODFELTER: Mr. Dodge, I'm -- I
19 wasn't really following the point you were trying to make
20 with your reference to the CPRE program. Can you walk me
21 back through that again so I understand what you were
22 telling me?

23 MR. DODGE: Well, just I think I referenced it
24 twice. First, is that that is, again, a -- the statute

1 does provide for expedited review and approval of CPCNs
2 for projects -- utility self-build projects selected in
3 the CPRE process, so those are being -- from Tranche 1
4 being filed.

5 I think the other point I was trying to make is
6 that we are considering the network upgrade costs in
7 those projects, too, and the Commission has made a
8 determination that those network costs should be
9 considered for projects that are -- for the cost
10 effectiveness limitation of those projects.

11 COMMISSIONER CLODFELTER: Would it be your
12 view, then, that if we were to decide that we should not
13 consider in this application the network upgrade costs in
14 deciding whether to grant the CPCN, that we should also
15 not consider those for any LGIP connection projects in
16 the CPRE bidding queue?

17 MR. DODGE: So all CPRE projects are required
18 to be in the State-jurisdictional queue, so they would
19 be --

20 COMMISSIONER CLODFELTER: Okay.

21 MR. DODGE: -- assigned those network upgrade
22 costs.

23 COMMISSIONER CLODFELTER: All right. Thank
24 you.

1 MR. DODGE: Yeah.

2 CHAIR MITCHELL: Mr. Dodge, a few questions for
3 you.

4 MR. DODGE: Sure.

5 CHAIR MITCHELL: In its reply brief, DEP made
6 reference to a decision of the Virginia State Corporation
7 Commission of 2018 --

8 MR. DODGE: Yes.

9 CHAIR MITCHELL: -- in which it issued a CPCN
10 for a solar facility, and there was a condition placed on
11 that CPCN related to the Applicant's responsibility for
12 the, you know, for the -- for the network upgrade costs,
13 understanding that that facility was interconnecting in
14 PJM, which is a different regulatory framework than we
15 have here. What can you tell me, if anything, about that
16 condition that was placed on the CPCN? Is that something
17 that typically happens in Virginia or was this an unusual
18 event?

19 MR. DODGE: I can't speak as to whether it was
20 unusual. I did look at that application in the docket
21 for the -- I think it was the Pleinmont Solar facility.
22 It was a 500-MW facility, was expected to trigger about
23 \$50 million in upgrade costs. The Commission Staff did
24 recommend that they file the -- a copy of the LGIA once

1 it was executed, and they have done so, so the LGIA is
2 filed.

3 There were some concerns raised in the
4 Commission Staff testimony regarding the upgrades that
5 the project were likely to trigger; however, they also
6 indicated that they were satisfied that those costs were
7 going to be assigned to the custo--- the Applicant, and
8 so that they would not be impacting rate -- the
9 ratepayers.

10 CHAIR MITCHELL: And that is pursuant to PJM's
11 tariff?

12 MR. DODGE: Correct. Yeah. Under PJM's tariff
13 for generator interconnections, generally the costs are
14 assigned to the interconnection customer.

15 CHAIR MITCHELL: Okay. And what can you tell
16 me, if anything, and if the answer is nothing, that's
17 perfectly acceptable, about why FERC treats ISOs and RTOs
18 differently than it would treat jurisdictions such as
19 ours where we have sort of non-independent transmission
20 providers when it comes to the allocation of network
21 upgrade costs?

22 MR. DODGE: And I don't have a strong
23 background in the area so I can't give you a lot of
24 detail, other than to say I think that the parties have

1 made filings consistent with FERC's Orders and mandates
2 under FERC Order 1000 in other proceedings to present
3 plans that comply, and FERC made determinations as to
4 whether those plans were reasonable, so I think there was
5 -- there is some federalism at play there with different
6 approaches being taken.

7 CHAIR MITCHELL: But as to the policy here,
8 potential policy issues underlying the decision to treat
9 those types of jurisdictions separately -- okay.

10 MR. DODGE: I'm not sure.

11 CHAIR MITCHELL: Can you -- do you have any
12 thoughts on the applicability of the Empire Power case in
13 this situation?

14 MR. DODGE: So -- and I will refresh my memory
15 of the Empire Power. So the Empire Power case originally
16 was the basis that for CPCNs there was an implied need
17 met for QF projects, so they were not viewed as having to
18 make the same demonstration of need that other utility
19 projects would necessarily have to make.

20 I think part of that, you know, is under the
21 PURPA requirements, the obligation to purchase, I think
22 that's really what Empire Power was basing that on. Is
23 -- am I getting to the point you're asking about Empire
24 Power?

1 CHAIR MITCHELL: Well, the issue of whether and
2 the extent to which additional statutory provisions may
3 be appropriately considered by the Commission beyond
4 those specific to the CPCN statutory provision.

5 MR. DODGE: Yeah. I mean, I think the -- you
6 know, the Commission's authority is broad, as we talked
7 about, it's -- that you want to look at the facts and
8 circumstances in each case. And so to the extent that
9 the Commission is looking at what's in the public
10 convenience, I think that it can look at other provisions
11 beyond what may be -- I mean, I think the statutory
12 authority in G.S. 62-110.1 helps provide that broad
13 authority to the Commission.

14 With regard to the rules, one thing I did mean
15 to point out, Mr. Ledford talked about, you know, the
16 Public Staff's position may more -- be more appropriately
17 considered in a rulemaking proceeding. We did lay out in
18 page 6 and 7 of our Initial Reply Comments that we think
19 R8-63, as approved by the Commission, does provide a
20 suitable basis for the Commission to consider these kinds
21 of costs already. So I think we view that this is the
22 kind of information the Commission can already currently
23 consider under R8-63 as well.

24 CHAIR MITCHELL: Any additional questions?

1 Thank you, Mr. Dodge. Any additional questions?

2 Commissioner Brown-Bland?

3 COMMISSIONER BROWN-BLAND: Mr. Dodge, how does
4 the Public Staff reconcile its position with regard to
5 the NTE facility with the position it's taken here with
6 regard to the Friesian or -- I mean, do you reconcile
7 that or is it a departure or a change?

8 MR. DODGE: Yeah. It's -- I think it's a great
9 question and one -- really, the two merchant facilities
10 that are sited in the DEC/DEP service territory that were
11 subject to this similar repayment process under Duke's
12 open access tariff for the two NTE facilities. In our
13 testimony, as Ms. Kemerait pointed out, we did note that
14 the construction costs were borne by the developer, by
15 the project applicant, and that there was not a risk to
16 ratepayers.

17 I can't speak for the folks that worked on
18 those issues. I know the transmission costs were
19 discussed and evaluated, but we -- that was not included
20 in our testimony. Again, looking back at the scale, the
21 magnitude of those costs relative to what we see here, I
22 think they are of a different magnitude for the nature of
23 that project compared to what's being proposed here for
24 the Friesian facility.

1 COMMISSIONER BROWN-BLAND: All right. Thank
2 you.

3 CHAIR MITCHELL: Any additional questions?

4 (No response.)

5 CHAIR MITCHELL: Thank you, Mr. Dodge. All
6 right. Ms. Kemerait, you all may have a few minutes for
7 rebuttal.

8 MS. KEMERAIT: We recognize that we are nearing
9 the end of the afternoon, but I would like to just spend
10 just a minute, and then Steve has got a couple of
11 comments to hopefully better answer Commissioner
12 Clodfelter's questions about 62.110.1.

13 And I -- at the end of our, I believe, question
14 and answer, I agreed that 62.110.1 is not -- has not been
15 written to be in an entirely clear manner about very
16 directly stating which of the requirements are applicable
17 to utility projects under 62 -- excuse me -- R8-61, and
18 then which are applicable to merchant plants under R8-63,
19 but I think that what I -- what I think is important is
20 that the rules have been adopted, and the rules provide
21 clarity and clarification about which requirements are
22 applicable to utility projects and which are applicable
23 to merchant plant projects.

24 And specifically, one of the questions that you

1 had related to 62.110.1(c), and I think that you had
2 asked about the future growth of the use of electricity,
3 and as you look -- as you'll note under R8-61(b)(1),
4 R8-61(b) talks about resource planning information, and
5 then the merchant plant rule does not provide any
6 information requirements about resource planning
7 information.

8 And then you also, under that same section,
9 62.110.1(c), you talked about -- you asked questions
10 about requirement to achieve maximum efficiency for the
11 benefit of the people of North Carolina and shall
12 consider such analysis in acting upon any petition by any
13 utility for construction.

14 And then again, under Commission Rule
15 R8-61(b)(3) you will note that that information that is
16 required by the rule for a CPCN for a utility requires
17 cost information for the facility and also requires final
18 alternatives that the applicant considered. And then
19 under (i) it talks about the estimate of the construction
20 costs. And then the last provision of that subsection
21 requires information about cost information and final
22 alternatives, including the anticipated impact that the
23 facility will have on customer rates. And, again, the
24 merchant plant rule requires none of that information.

1 And then in regard to your question about
2 110.1(e), and you specifically noted that no certificate
3 shall be granted unless the Commission has approved the
4 estimated construction costs and made a finding that
5 construction will be consistent with the Commission's
6 plan for expansion of the electric generating capacity.
7 And, again, if you refer to R8-61, and this will be
8 (b)(1), and that information, again, requires resource
9 planning information with five subsections of
10 information, and then the merchant plan rule does not
11 require any of that information.

12 So that was a long, detailed response to your
13 previous question, but I think that the rules provide
14 direction and clarification about which requirements are
15 applicable to utilities, CPCN applications, and which are
16 applicable to merchant plant applications. And all of
17 that information that I just discussed is not included
18 under Rule R8-63.

19 MR. SHPARBER: Thank you, everyone. And once
20 again, I appreciate everyone's time and attention as we
21 look at these issues. I will be brief.

22 First of all, Chairman Mitchell, I wanted to
23 respond to your question earlier to Mr. Dodge about the
24 policy ramifications of why FERC has determined that in

1 RTOs interconnection customers bear the cost ultimately.
2 So I -- just as my background, I've been a FERC
3 practitioner my entire career. I was also in-house
4 counsel at PJM for four years before I joined Nelson
5 Mullins a little over two years ago.

6 My understanding is that FERC made the policy
7 call because it wanted to encourage -- and I actually did
8 talk to a few people prior to coming here to answer that
9 question in anticipation of that. My understanding is
10 the policy call FERC made is they were trying to
11 encourage participation in RTOs by vertically integrated
12 utilities and also to ensure competition.

13 So in a state such as South -- North Carolina
14 -- pardon me -- where most of the state is vertically
15 integrated, there are limited ability -- there's limited
16 ability for competition, and so for merchant plants part
17 of the reason they are ultimately reimbursed for cost is
18 to make them more cost competitive, whereas if you have a
19 customer that is interconnecting in an RTO where everyone
20 has free -- free access to the open market or if under
21 the state-jurisdictional process under PURPA where the
22 state is getting the -- the QF is getting the ability to
23 interconnect and get access to competition, then they
24 have to bear their costs. So that is my understanding.

1 It's subject to check. But I just wanted to make that
2 clear. Once again, not a pertinent issue for -- on the
3 legal merits, but that's my understanding of the policy.

4 Turning briefly to the legal merits, I do want
5 to reiterate another point. And Commissioner Clodfelter,
6 you spent -- we talked a lot about the State statute and
7 what's allowed under the statute, but I want to reiterate
8 that the Federal Power Act is what is controlling here.
9 Any reading of the State statute cannot impermissibly --
10 it cannot conflict with the Federal Power Act. And quite
11 simply, just to reiterate, FERC's jurisdiction extends to
12 -- over facilities versus transmission or sale of
13 electric energy and extends to any rate charge or
14 classification related to anything within its
15 jurisdiction.

16 So respectfully, Mr. Jirak, the question of
17 timing is not applicable here. A state's action either
18 is preempted or is not preempted. I think what's a more
19 accurate characterization of our disagreement is -- and
20 also Mr. Dodge said this -- hearkened to this -- pardon
21 me -- is whether what the State would be doing here in
22 denying the CPCN application would be a valid exercise of
23 its authority under the FPA pursuant to generating
24 facilities. Our position is that it is not. And that is

1 obviously a decision for you to make, but the issue of
2 timing, for example, isn't really applicable. It's
3 whether the exercise of authority is appropriate or not
4 and allowable under the Federal Power Act.

5 Further, with respect to the Order 1000 cases
6 and Order 1000 that deals with -- and the interaction
7 between State siting authority and those cases, that
8 deals with transmission. If we were in a proceeding
9 pursuant to Rule 8-62, some of those considerations may
10 be valid, but they're not here. We're talking about the
11 State's siting authority with respect to generation
12 facilities.

13 And while Mr. Jirak's position -- and I
14 apologize if I misconstrued this -- but it seems to be
15 that the State has authority over siting, which is true,
16 the State's authority over siting cannot in any -- cannot
17 contradict FERC's authority and cannot supersede FERC's
18 authority over the allocation of cost pursuant -- related
19 to facilities that are in express jurisdiction. And I
20 think no -- so no reading of State authority can allow
21 that.

22 And I think, quite candidly, the reason that
23 there is no case law directly on point where -- and we
24 admit this -- where -- there is no case law we were able

1 to find where a state has denied a CPCN for a generating
2 facility based solely due to concerns over FERC-
3 jurisdictional network upgrades. I think, candidly, the
4 reason there is no case on point is because, quite
5 simply, no state has attempted this because -- and has
6 gone so far as to try to do that, apparently, anywhere in
7 the United States because it is well understood that
8 allocation and recovery of FERC-jurisdictional network
9 upgrades costs are a FERC-jurisdictional matter, and any
10 concerns related to such issues should be brought before
11 FERC and not decided before a CPC--- related to a CPCN
12 proceeding for a generating facility.

13 And I'd like to reiterate that no parties have
14 -- while there is no case law, no parties have expressed
15 -- cited any case law on point supporting that position.

16 And further, last thing I'd like to conclude
17 with is just with one -- one comment to Mr. Dodge's
18 previous comment about how in North Carolina the impact
19 on a policy matter with respect to North Carolina
20 ratepayers, could similar tactics be used where -- or not
21 tactics -- pardon me -- but could a similar approach be
22 used and this concern that developers would start
23 developing merchant plants. The truth of the reality --
24 the truth of the matter -- pardon me -- is that in North

1 Carolina there are limited abilities for independent
2 power producers, solar or otherwise, to enter into
3 wholesale jurisdictional merchant plant applications
4 precisely because we're in a vertically integrated --
5 most of the state is in a vertically integrated
6 jurisdiction.

7 So I think the concern that Mr. Dodge has, from
8 a practical perspective, will not really come to bear in
9 most instances.

10 But with that, that concludes our rebuttal.
11 And we're happy to take any other questions.

12 CHAIR MITCHELL: Any questions for the
13 Applicant?

14 (No response.)

15 CHAIR MITCHELL: Okay. Thank you all very much
16 for your presentations today. We appreciate it, and
17 we'll be adjourned. Thank you.

18 (The proceedings were adjourned.)

19

20

21

22

23

24

STATE OF NORTH CAROLINA

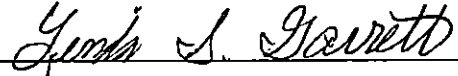
COUNTY OF WAKE

C E R T I F I C A T E

I, Linda S. Garrett, Notary Public/Court Reporter, do hereby certify that the foregoing hearing before the North Carolina Utilities Commission in Docket No. EMP-105, Sub 0, was taken and transcribed under my supervision; and that the foregoing pages constitute a true and accurate transcript of said Hearing.

I do further certify that I am not of counsel for, or in the employment of either of the parties to this action, nor am I interested in the results of this action.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 3rd day of November, 2019.



Linda S. Garrett
Notary Public No. 19971700150

FILED

NOV 04 2019

**Clerk's Office
N.C. Utilities Commission**