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August 26, 2019

Ms. Janice Fulmore
Interim Chief Clerk
North Carolina Utilities Commission
430 N. Salisbury Street
Raleigh, NC 27603

RE: ***In the Matter of Application of Friesian Holdings, LLC for a Certificate of Convenience and Necessity to Construct a 70-MW Solar Facility in Scotland County, North Carolina***
DOCKET NO. EMP-105, SUB 0
PRE-HEARING INITIAL BRIEF OF FRIESIAN HOLDINGS, LLC

Dear Ms. Fulmore:

On behalf of Friesian Holdings, LLC ("Friesian"), we hereby submit **Friesian's Pre-hearing Initial Brief** in the above-referenced docket.

If you have any questions or comments regarding this filing, please do not hesitate to call me.

Thank you in advance for your assistance.

Sincerely,

/s/ Karen M. Kemerait

Karen M. Kemerait

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Enclosures

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. EMP-105, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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

NOW COMES Friesian Holdings, LLC ("Friesian" or the "Applicant"), by and through the undersigned attorneys, and submits this Pre-Hearing Brief ("Brief") to the North Carolina Utilities Commission ("Commission") in the above-captioned docket.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Issuance of CPCN to Friesian in SP-8467, Sub 0

On May 15, 2019, Friesian filed an application pursuant to N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-64 for a certificate of public convenience and necessity ("CPCN") for construction of a 75-MWAC solar photovoltaic ("PV") electric generating facility to be located on Leisure Road near Academy Road, Laurinburg, Scotland County, North Carolina.

On September 16, 2016, the Commission issued an *Order Requiring Publication of Notice*.

On October 4, 2016, Friesian filed a statement from Duke Energy Progress, LLC ("DEP" or "Duke") assessing the facility's impact pursuant to Commission Rule R8-64(b)(6)(i)c. DEP provided the following information:

> For 2018, DEP's forecasted sales are 66,603 GWh. The collective generating impact of this solar facility would represent 0.3% of the forecasted sales. While alone, this facility does not have a significant impact on future DPE capacity needs, when combined with other QF facilities being submitted for CPCN, the

> impact to DEP's future capacity needs are substantial. DEP will continue to study the impacts of the aggregation of the QF facilities to the DEP system.[1]

On October 10, 2016, Friesian filed an affidavit of publication from The Laurinburg Exchange stating that publication of notice was completed on October 8, 2016. The Commission reported that no complaints about the application had been made to the Commission.[2] On November 1, 2016, the State Clearinghouse filed comments and indicated that no further State Clearinghouse review action was required for compliance with the North Carolina Environmental Policy Act.[3]

The Public Staff presented the matter to the Commission at the Commission's Staff Conference on November 7, 2016. The Public Staff stated that it had reviewed the application and determined it to be in compliance with the requirements of N.C. Gen. Stat. § 62-110.1(a) and Commission Rule R8-64. The Public Staff further stated that the registration statement contains the certified attestations required by Commission Rule R8-66(b). The Public Staff recommended approval of the certificate and registration for the facility. Significantly, the Public Staff did not address or raise any concerns about interconnection costs or transmission costs associated with the facility.[4]

On November 7, 2016, the Commission issued an *Order Issuing Certificate and Accepting Registration of New Renewable Energy Facility,* in which the Commission approved the application and issued the CPCN to Friesian for the 75-MWAC facility.

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[1] *See Friesian Holdings Solar CPCN Statement*, filed on October 4, 2016 in Docket No. SP-8467, Sub 0.

[2] *See Order Issuing Certificate and Accepting Registration of New Renewable Energy Facility*, issued on November 7, 2016 in Docket No. SP-8467, Sub 0.

[3] *See id.*

[4] *See id.*

B. Motion to amend Friesian's CPCN to change the site layout

Thereafter, on August 2, 2018, Friesian filed a motion to amend its CPCN in order to change the layout of the site due to an amendment to the City of Laurinburg's ordinance prohibiting the construction of new solar arrays within one mile of an existing or previously permitted solar array within the City's corporate limits or extraterritorial jurisdiction. Friesian stated that because the planned location of the facility is within the extraterritorial limits of the City of Laurinburg, and within one mile of an existing solar facility, the amended ordinance prohibits Laurinburg from issuing the required zoning permit to Friesian. In order to comply with Laurinburg's amended ordinance, Friesian proposed shifting the footprint of the facility slightly to the west, and adding two new parcels of land to the facility site.

On September 7, 2018, the Public Staff filed a response to Friesian's motion to amend its CPCN. The Public Staff stated that publication of notice of the amendment was not required, recommended resubmission of the application to the State Clearinghouse, and requested that Friesian file a revised site plan. The Public Staff did not address or raise any concerns about interconnection or transmission costs.

On September 11, 2018, the Commission issued its *Amended Order Requiring Publication of Notice, Filing of Revised Site Plan, and Further Review by State Clearinghouse*.

On May 15, 2019, in Docket No. SP-8467, Sub 0 (along with Docket No. EMP-105, Sub 0), Friesian filed a statement requesting that it be allowed to withdraw the CPCN amendment in Docket No. SP-8467, Sub 0.[5] Friesian also requested that the Commission consider the new

[5] When Friesian filed its initial, revised CPCN application on May 15, 2019, Friesian proposed to sell the facility's output to DEP pursuant to the mandatory purchase obligation under the Public Utility Regulatory Policies Act ("PURPA") and to interconnect pursuant to the Commission-jurisdictional interconnection process for such PURPA sales. Thereafter, however, Friesian transitioned the facility from the state-jurisdictional interconnection process (*see Order Approving Revised Interconnection Standard* issued on May 15, 2015 in Docket No. E-100, Sub 101) by

application for a CPCN filed in Docket No. EMP-105, Sub 0, as a merchant plant application pursuant to Commission Rule R8-63.

On June 14, 2019, the Commission allowed Friesian's request to withdraw its motion to amend its CPCN, and canceled the CPCN and closed Docket No. SP-8467, Sub 0.

C. Friesian's CPCN application pursuant to Rule R8-63 in Docket No. EMP-105, Sub 0

On May 15, 2019, in Docket No. EMP-105, Sub 0, Friesian filed an application pursuant to N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-63 for a CPCN to construct a 70-MWAC PV electric generating facility ("Facility") to be constructed on 543.71 leased acres of parent tracts totaling 965.89 acres and located in Scotland County, North Carolina ("Application"). In support of its Application, Friesian filed the direct testimony of Brian C. Bednar, the President and founder of Birdseye Renewable Energy, LLC ("Birdseye"), the parent company of Friesian,[6] as well as several exhibits. In the Application, Friesian provided detailed information about the nature of the Facility, including the Facility's interconnection with the FERC-jurisdictional electric transmission system owned by DEP, the permits required for the Facility, and the need for the Facility, among other information. Specifically, Friesian provided the following information:

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to a FERC-jurisdictional interconnection process so that it could sell its output exclusively at wholesale to the North Carolina Electric Membership Corporation, Inc. ("NCEMC"), as discussed herein. Therefore, when the motion to amend the CPCN was filed on August 2, 2018, the motion was mistakenly filed pursuant to Rule R8-64 in Docket No. SP-8467, Sub 0, rather than as a merchant plant application under Rule R8-63. When the mistake was brought to the attention of Friesian, Friesian requested permission from the Commission to withdraw the motion to amend the CPCN and file a new CPCN application pursuant to Rule R8-63.

[6] Birdseye is a greenfield solar developer based in Charlotte, North Carolina, that was founded in 2009 and has built an excellent track record of successfully developing transmission and distribution-scale solar assets. Birdseye leverages funding from independent power producers and regulated utilities to completion. The Birdseye team has developed 424 MWDC of completed and operating utility-scale solar assets, along with a current development pipeline consisting of over 2,000 MWDC.

- Land use. Friesian will lease 543.71 acres of the parent parcels (that total 965.89 acres) that are currently being used for agricultural purposes. The area not included in the leased area will continue to be used for agricultural purposes.
- The Facility's interconnection to DEP's FERC-jurisdictional transmission grid. DEP studied the potential impacts on the Facility's proposed interconnection to the DEP transmission system pursuant to DEP's Large Generator Interconnection Procedures ("LGIP"), which are included as Attachment J to DEP's FERC-jurisdictional Open Access Transmission Tariff ("OATT").[7] The DEP LGIP establishes the detailed process by which DEP studies a proposed project's interconnection with its FERC-jurisdictional transmission system, with the study costs paid for by the interconnection customer. The LGIP produces cost estimates for a proposed generating interconnection including which party – either the interconnecting utility (the "Transmission Provider", in this case DEP) or the developer (the "Interconnection Customer", in this case Friesian) – is responsible for such costs. Pursuant to the LGIP, DEP and Friesian executed a Standard Large Generator Interconnection Agreement on June 6, 2019 (the "Interconnection Agreement"). A form of the Interconnection Agreement is also provided in the LGIP which, as noted above, is part of DEP's FERC-jurisdictional OATT. Pursuant to the Interconnection Agreement, the interconnection facilities necessary to interconnect the Facility to the DEP grid will consist of a new 230 kV breaker station connected to the Bennettsville SS – Laurinburg 230 kV

[7] *Joint Open Access Transmission Tariff of Duke Energy Carolinas, LLC, Duke Energy Florida, LLC and Duke Energy Progress LLC* (available at http://www.ferc.duke-energy.com/Tariffs/Joint_OATT.pdf) (last accessed August 25, 2019).

transmission line. DEP will tap the Bennettsville SS – Laurinburg 230 kV line and construct a short tap to New Breaker Station adjacent to DEP's right-of-way (the "Interconnection Facilities").

- PPA with NCEMC. Friesian and the North Carolina Electric Membership Corporation, Inc. ("NCEMC") executed a purchase power agreement ("PPA") on June 14, 2019.[8] The PPA is a negotiated bilateral agreement between NCEMC and Friesian, and was not entered into pursuant to the mandatory purchase obligation under PURPA.
- Need for the Facility. Friesian and NCEMC have entered into an agreement for Friesian to sell the full output of energy, capacity, and solar renewable energy certificates ("RECS") from the Facility to NCEMC under the PPA. Under North Carolina's Renewable Energy and Energy Efficiency Portfolio Standard ("REPS"), by 2018 and thereafter, electric membership corporations and municipalities are required to meet a minimum of ten percent (10%) of their retail sales through renewable energy resources or energy efficiency measures.[9] The REPS includes solar electric as an eligible renewable energy resource. The Facility will provide a significant amount of RECS for use by NCEMC for compliance with the REPS requirement, and will further NCEMC's goal of creating a low-carbon emissions environment through sustainability and continued investment in low- and zero-emissions resources.[10]

[8] The PPA between Friesian and NCEMC was executed on June 14, 2019, after the Application was filed.

[9] *See* N.C. Gen. Stat. § 62-133.8(c).

[10] *See Initial Comments* with "A Brighter Energy Future", filed by NCEMC on July 18, 2019 in Docket No. EMP-105, Sub 0.

- Local land use permit. On June 5, 2018, the Scotland County Board of Commissioners voted unanimously to approve Friesian's Conditional Use Permit application and issued the Conditional Use Permit on that date.
- Construction of the Facility. Construction of the Facility is anticipated to begin in the summer of 2022, with an expected commercial operation date as early as December 2023. The expected service life of the Facility is thirty-five or more years.

On May 31, 2019, the Public Staff filed a Notice of Completeness, stating that the Public Staff has reviewed the Application as required by Commission Rule R8-63(d) and that it considers the Application complete. In addition, the Public Staff requested that the Commission issue a procedural order setting the Application for hearing, requiring public notice pursuant to N.C. Gen. Stat. § 62-82, and addressing other procedural matters.

On June 13, 2019, the Commission issued an *Order Scheduling Hearings, Requiring Filing of Testimony, Establishing Procedural Guidelines, and Requiring Public Notice* that, among other things, scheduled hearings in this proceeding, established a procedural schedule for the filing of petitions to intervene and testimony, and directed Friesian to publish notice of the public hearing.

On June 21, 2019, NCEMC filed a petition to intervene, which was granted by the Commission on July 2, 2019.[11]

[11] In the NCEMC's petition to intervene, NCEMC stated that it is a generation and transmission cooperative responsible for the power supply of its 26-member distribution cooperatives throughout the State of North Carolina. NCEMC purchases power and energy pursuant to wholesale contracts from DEP, Duke Energy Carolinas, LLC, Dominion Energy, and others, including facilities similar to Friesian's Facility, to supply its members. These members, in turn, supply power to their members, the end-use retail consumers.

On July 18, 2019, NCEMC filed Initial Comments. In its Initial Comments, NCEMC stated:

> As a [generation and transmission] cooperative, NCEMC continuously strives to supply power to its members that is affordable, reliable, and safe. Beginning a decade ago, NCEMC also began assisting its members with their compliance obligations under the North Carolina Renewable Energy and Energy Efficiency Portfolio Standard ("REPS"). This assistance frequently took the form of purchasing renewable energy certificates from utility-scale solar facilities. More recently, NCEMC developed and began to pursue strategic business objectives under an initiative it christened "*A Brighter Future*" ("BEF"), which entails supplying power that is not only affordable, reliable, and safe, but also increasingly low carbon . . . . Once constructed, the [Friesian] Project – specifically, the parties' execution of the Project PPA – will simultaneously advance NCEMC's pursuit of BEF and further its ability to achieve REPS compliance. *For the foregoing reasons, NCEMC supports issuance of a CPCN for the Project.*[12]

On July 23, 2019, DEP filed a petition to intervene, which was granted pursuant to Commission Order dated August 2, 2019.

On July 29, 2019, the North Carolina Sustainable Energy Association filed a petition to intervene, which was granted by the Commission on August 20, 2019.

On August 1, 2019, the Public Staff – about one year after the Public Staff first became aware of Friesian's need to amend its CPCN – filed a *Motion for the Establishment of Due Dates for Pre-Hearing Briefs and Suspension of Evidentiary Hearing.* The Pubic Staff stated that it has identified the following issues that are legal in nature that should be addressed in pre-hearing briefs:

> 1. The appropriate standard of review for the Commission to apply in determining the public convenience and necessity for a certificate to construct a merchant generating facility pursuant to N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-63;

[12] *See Initial Comments* filed by NCEMC on July 18, 2019 in Docket No. EMP-105, Sub 0 (emphasis added).

2. Whether the Commission has authority under state and federal law to consider as part of its review of the CPCN application the costs associated with transmission network upgrades and interconnection facilities necessary to accommodate the FERC-jurisdictional interconnection of the merchant generating facility, and the resulting impact of those network costs on retail rates in North Carolina; and

3. Whether the allocation of costs associated with interconnecting the Facility and any resulting additional capacity made available that is then utilized by State-jurisdictional interconnection projects is consistent with the Commission's guidance in its June 14, 2019 *Order Approving Revised Interconnection Standard and Requiring Reports and Testimony* in which the Commission directed the utilities as follows: "to the greatest extent possible, to continue to seek to recover from Interconnection Customers all expenses … associated with supporting the generator interconnection process under the NC Interconnections Standard."

In the motion, the Public Staff requested that the Commission suspend the evidentiary hearing and allow Friesian and the other parties to file pre-hearing briefs and reply briefs.

On August 5, 2019, the North Carolina Clean Energy Business Alliance filed a petition to intervene, which was granted by the Commission on August 16, 2019.

On August 5, 2019, the Commission issued an Order that suspended the procedural schedule previously established in this proceeding and allowed the filing of pre-hearing briefs and reply briefs. The Commission ordered that the parties may file pre-hearing briefs on or before August 26, 2019, and pre-hearing reply briefs on or before September 9, 2019.

On August 6, 2019, the Commission issued its *Order Cancelling Public Hearing* because the Commission had not received any written complaints regarding the Application.

D. The CPCN application for the Friesian Facility was properly filed as a merchant plant application under Rule R8-63

The "merchant plant" rule, Rule R8-63, applies to "any person seeking to construct a merchant plant in North Carolina."[13] A "merchant plant" is "an electric generating facility, other than one that qualifies for and seeks the benefits of 16 U.S.C. § 824a-3 or G.S. 62-156, the output of which will be sold exclusively at wholesale and the construction cost of which" would not be eligible for inclusion in a public utility's rate base.[14] The cost to construct and operate Friesian's 70-MWAC Facility will be paid for solely by Friesian and its investors, and it will sell its entire output at wholesale to NCEMC under the PPA. Friesian will not sell any output of the Facility pursuant to the mandatory purchase obligation under PURPA. The interconnection process for Friesian is therefore FERC-jurisdictional. As further evidence of this fact, DEP and Friesian entered into a FERC-jurisdictional Interconnection Agreement, pursuant to the LGIP in DEP's FERC-jurisdictional OATT. As a FERC-jurisdictional interconnection process in which Friesian will be paid for by Friesian, Friesian properly re-filed its CPCN application under Rule R8-63.

E. The FERC-Jurisdictional Standard Large Generator Interconnection Agreement between DEP and Friesian

The FERC-jurisdictional Interconnection Agreement, as approved by FERC, specifies the rights and obligations of DEP and Friesian in regard to the "Generating Facility," the "Interconnection Facilities," and the "Network Upgrades," all of which are defined in Article 1

[13] *See* Commission Rule R8-63(a)(1).

[14] *See* Commission Rule R8-63(a)(2).

of the Interconnection Agreement. "Generating Facility" is defined as the "Interconnection Customer's device for the production of electricity identified in the Interconnection Request, but shall not include the Interconnection Customer's Interconnection Facilities." "Interconnection Facilities" are defined as

> [T]he Transmission Provider's Interconnection Facilities and the Interconnection Customer's Interconnection Facilities. Collectively, Interconnection Facilities include all facilities and equipment between the Generating Facility and the Point of Interconnection, including any modification, additions or upgrades that are necessary to physically and electrically interconnect the Generating Facility to the Transmission Provider's Transmission System. Interconnection Facilities are sole use facilities and do not include Distribution Upgrades, Stand Alone Network Upgrades or Network Upgrades.

"Network Upgrades" are defined as "the additions, modifications, and upgrades to the Transmission Provider's Transmission System required at or beyond the point at which the Interconnection Facilities connect to the Transmission Provider's Transmission System to accommodate the interconnection of the Large Generating Facility to the Transmission Provider's Transmission System."

Pursuant to DEP's FERC-jurisdictional LGIP and the Interconnection Agreement, the construction costs of the Friesian Facility and the Interconnection Facilities will be borne *entirely* by Friesian and not by the ratepayers. As such, neither the cost of the Facility nor the Interconnection Facilities (*i.e.*, the facilities needed to connect the Facility to the DEP grid, up to the point of interconnection) will be included in DEP's rate base.

Article 11 of the Interconnection Agreement addresses the requirements for payment for the Interconnection Facilities and the Network Upgrades. Sections 11.1 and 11.2 of the Interconnection Agreement specify that Friesian is responsible for the full payment of the Interconnection Facilities. With respect to the Network Upgrades, Section 11.3 provides that unless the Transmission Provider (*i.e.*, DEP) elects to fund the capital for the Network Upgrades,

they shall be initially funded by the Interconnection Customer (*i.e.*, Friesian). Significantly, Section 11.4 provides that Friesian is entitled to a cash repayment, equal to the total amount paid to the Transmission Provider for the Network Upgrades.

Appendix A of the Interconnection Agreement provides that the total cost estimate for the Interconnection Facilities to be paid by Friesian is $3,953,800. The total cost estimate for the Network Upgrades is $223,553,200.

F. The Public Staff's only objection to the CPCN Application relates to DEP's required reimbursement to Friesian for the Network Upgrades associated with its project

The Public Staff's sole objection to the issuance of a CPCN for the Friesian project is that North Carolina retail ratepayers will be required to pay for the FERC-allocated portion of the "costs associated with the approximately $227 million in transmission network upgrades"[15], which was first raised by the Public Staff almost a year after the CPCN amendment application was originally submitted. To be clear, because the Facility is interconnecting to the transmission grid through the FERC-jurisdictional interconnection process, the Network Upgrade costs at issue were calculated and assigned to the project by Duke pursuant to the applicable processes of Duke's FERC-jurisdictional OATT, including the LGIP and the Interconnection Agreement. As required by the OATT, including the LGIP and the Interconnection Agreement, Friesian will pay for the Network Upgrade costs,[16] and Friesian will be reimbursed for any amounts advanced related to the Network Upgrade costs in accordance with the applicable sections of the Interconnection Agreement.[17]

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[15] Public Staff *Motion for the Establishment of Dates for Pre-Hearing Briefs and Suspension of Evidentiary Hearing*, p. 3.

[16] *See e.g.*, Interconnection Agreement at Section 11.3.

[17] *See e.g.*, *id.* at Section 11.4.1.

To the extent that any costs that are reimbursed to Friesian are eventually allocated to North Carolina retail ratepayers, such costs will be allocated pursuant to Duke's FERC-jurisdictional OATT. It is Friesian's understanding that pursuant to the applicable provisions of Duke's OATT, sixty percent (60%) of the Network Upgrade costs will be allocated to North Carolina retail customers, thirty percent (30%) of the Network Upgrade costs will be allocated to North Carolina wholesale customers, and ten percent (10%) will be allocated to South Carolina retail customers.[18]

II. ARGUMENT

It is undisputed that Friesian will be solely responsible for paying all costs to construct the Facility and the Interconnection Facilities. Nonetheless, the Public Staff is making an unprecedented request that the Commission consider FERC-jurisdictional Network Upgrade costs as part of the CPCN process, despite the fact that doing so will be contrary to both state and federal law. The only question before the Commission is whether the Commission can override the exclusive jurisdiction and authority of FERC and consider FERC-jurisdictional Network Upgrade costs in a state-jurisdictional CPCN proceeding for an electric generating facility.

Specifically, the Public Staff is asking the Commission to usurp FERC's exclusive jurisdiction over the transmission of electric energy in interstate commerce and consider FERC-jurisdictional Network Upgrade costs in a CPCN proceeding. This has never been done in North

[18] Friesian's understanding of how the Network Upgrade costs are allocated is based on informal communications with Duke, as well as a July 14, 2019 communication between Duke's counsel and the Public Staff that was provided to Friesian by the Public Staff pursuant to a data request from Friesian to the Public Staff. On August 7, 2019, Friesian submitted a data request to Duke requesting additional details related to how the Network Upgrades are allocated pursuant to Duke's OATT, and pursuant to what sections of the OATT. However, as of today's date, Duke has not responded to Friesian's August 7, 2019 data request.

Carolina, or, to Friesian's knowledge, any other state.[19] Nor has the Public Staff *ever* taken this position before in *any* CPCN proceeding for a generating facility.[20] Thus, the Public Staff is seeking to have the Commission overrule state law and decades of Commission practice in violation of federal law, to circumvent FERC's exclusive jurisdiction over the costs of facilities used for the transmission of electric energy in interstate commerce, including Network Upgrade costs. The Public Staff's concern about the impact of FERC-allocated Network Upgrades costs to ratepayers is in direct conflict with the fact that the Commission has no authority under state law, and is preempted by federal law, from considering FERC-jurisdictional transmission costs in a CPCN matter related to a generating facility under N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-63.

A. The appropriate standard of review for the Commission to apply for a merchant plant generating facility is the public need for the generating facility

North Carolina law and Commission precedent are clear that the Commission's review of a merchant plant CPCN application is focused on the need for the generating facility itself. The North Carolina Supreme Court has held that the standard for public convenience and necessity

[19] In the Public Staff's response to Friesian's data request, the Public Staff acknowledged that it has not identified any states that explicitly considered this matter as part of its review of a CPCN application. Specifically, the Public Staff stated: "The Public Staff has not conducted a 50-state survey of the generating facility citing requirements and whether any other state has considered the costs associated with transmission network upgrades necessary to accommodate the interconnection of FERC-jurisdictional merchant generating facilities, and the resulting impact of those network costs on retail rates in the state. The Public Staff notes that the regulatory structure in each state or jurisdiction may vary based on the applicable regulatory structure in each state. At this time, the Public Staff has not identified any States that explicitly considered these matters as part of its generating siting authority. To the extent the Public Staff later identifies such states, it will supplement this response accordingly."

[20] In the Public Staff's response to Friesian's data request, the Public Staff stated: "The Public Staff did not oppose or recommend denial of any CPCN application, however, on the basis of the transmission network upgrade costs," when discussing Public Staff's position in previous CPCN proceedings for generating facilities before the Commission.

requires an "element of public need for the proposed service."[21] In compliance with North Carolina Supreme Court decisions, this Commission has held that "[w]ith respect to the applicable standard of need, N.C.G.S. 62-110.1 is intended to provide for the orderly expansion of electric generating capacity in order to create a reliable and economical power supply and to avoid costly over building of generation resources."[22] The Commission further recognized that "[o]ne of the main purposes of avoiding over building is to protect the retail ratepayers from paying for unneeded electric generating capacity."[23] Likewise, the Commission's Order in NTE Carolinas II, LLC's application for a CPCN for its proposed 500-MW combined cycle natural gas-fired merchant electric generating facility in Docket No. EMP-92, Sub 0, primarily addresses the need for the generating facility.[24]

Friesian has satisfied the required showing of need, as Friesian and NCEMC have entered into a PPA for Friesian to sell its full output to NCEMC. As noted previously, NCEMC supports the need for the Facility by stating that its PPA with Friesian will enable it to achieve its business objectives of purchasing affordable, reliable, safe, and low-carbon power from Friesian and achieve REPS compliance obligations. Also, DEP's 2018 Integrated Resource Plan filed in Docket No. E-100, Sub 157, on September 5, 2018 provides the following information of need in DEP's service territory: "In total, customer growth, retirements, contract expirations and additional reserves will result in the need for approximately 6,300 MW of new resources over the

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[21] *See State ex rel. Utilities Comm'n v. Carolina Tel. Tel. Co.*, 267 N.C. 257, 270, 148 S.E.2d 100, 110 (1966).

[22] *Order Granting Certificate with Conditions*, Docket No. EMP-92, Sub 0 (January 19, 2017), p. 17 (*citing State ex rel. Utils. Comm'n v. High Rock Lake Ass'n, Inc.*, 37 N.C. App. 138, 141, 245 S.E.2d 787, 790, *disc. rev. denied*, 295 N.C. 646, 248 S.E.2d 257 (1978)).

[23] *Order Granting Certificate with Conditions*, Docket No. EMP-92, Sub 0 (January 19, 2017), p. 17.

[24] *See id.*, pp. 13-19.

[2019-2033] planning horizon."[25] Due to NCEMC's need for the power and DEP's projected deficit as demonstrated in its Integrated Resource Plan, Friesian has clearly demonstrated the need for the Facility.

B. The Commission lacks authority under state law to consider Network Upgrade costs in a CPCN proceeding

The North Carolina Public Utilities Laws and Regulations preclude the Commission from considering Network Upgrade costs in determining the "public convenience and necessity" of a proposed generating facility in a CPCN proceeding. The fundamental reason why North Carolina laws and regulations do not allow the Commission to consider Network Upgrade costs in a CPCN proceeding is because the Commission is preempted by federal law from doing so, as described in more detail below in Section II.D.

In compliance with federal law, N.C. Gen. Stat. § 62-110.1 ("Certificate for construction of generating facility") governs certificates for construction of generating facilities, and it contains clear and unambiguous language that excludes consideration of Network Upgrade costs as a factor in evaluating a CPCN application. When the language of a statute is clear and unambiguous, the Commission is required to apply the statute to give effect to the plain meaning of the language.[26] Section 62-110.1 requires the applicant to file an estimate of the construction costs of the *generating facility only*. Chapter 62 of the North Carolina General Statutes, and in particular N.C. Gen. Stat. § 62-110.1, confer no authority for the Commission to consider any costs, other than the costs of the generating facility, in a CPCN proceeding. Costs that may be considered are expressly limited to the generating facility itself to ensure that the "construction

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[25] *Duke's Integrated Resource Plan,* filed on September 5, 2018 in Docket No. E-100, Sub 157, p. 8.

[26] *See e.g., Utilities Comm. V. Edmisten, Atty. General,* 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977).

that will be consistent with the Commission's plan for expansion of electric generating capacity."[27] (As explained in Section II.A above, the need for expansion of generating capacity is considered in light of the utility's most recently filed Integrated Resource Plan.)

In addition to expressly allowing the Commission to consider the generating facility's costs, N.C. Gen. Stat. § 62-110.1 permits the Commission to consider other factors that relate to the need for the generating facility. In particular, subsection (d) provides: "In acting upon any petition for the construction of any facility for the generation of electricity, the Commission shall take into account the applicant's arrangements with other electric utilities for the interchange of power, pooling of plant, purchase of power and other methods for providing reliable, efficient, and economical electric service."[28] Given that the PPA between Friesian and NCEMC will provide power to NCEMC and assist with NCEMC's REPS compliance, the Facility will provide needed generating capacity and will serve the public as a whole.

Consistent with N.C. Gen. Stat. § 62-110.1, Commission Rule R8-63 (the rule for a merchant plant CPCN application) excludes Network Upgrade costs from consideration in the CPCN evaluation. Rule R8-63(2) defines the term "merchant plant" as "an *electric generating facility,* other than one that qualifies for and seeks the benefits of 16 U.S.C.A. 824a-3 or G.S. 62-156, the output of which will be sold exclusively at wholesale and the construction cost of which does not qualify for inclusion in, and would not be considered in a future determination of, the rate base of a public utility pursuant to G.S. 62-133." (Emphasis added). Like N.C. Gen. Stat. § 62-110.1, subsection (b)(2)(i) of Rule R8-63 requires the applicant to file "estimated construction costs" of the proposed generating facility. Subsection (b)(2)(iv) of Rule R8-63 requires: "A

[27] N.C. Gen. Stat. § 62-110.1(e).

[28] N.C. Gen. Stat. § 62-110.1(d).

description of the transmission facilities to which the facility will interconnect, and a color map showing their general location. If additional facilities are needed, a statement regarding whether the applicant would need to acquire rights-of-way for new facilities." Notably, and in accordance with Section 62-110.1, Rule R8-63 contains no mention of the cost of Network Upgrades or interconnection facilities.

Further evidence of the fact that Network Upgrade costs cannot be considered in CPCN proceedings under N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-63 is the existence of N.C. Gen. Stat. § 62-101, which governs CPCNs for transmission lines. As discussed further in Section II.D below, states retain certain authority related to the siting and construction of transmission lines, and N.C. Gen. Stat. § 62-101 and Rule R8-62 apply to situations where persons are seeking to build transmission lines. Here, however, Friesian is not seeking to obtain a CPCN for a transmission line under N.C. Gen. Stat. § 62-101 and Rule R8-62, but is instead seeking a CPCN for a generating facility under N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-63.

Accordingly, the Public Staff's position that the Commission should consider the impact to ratepayers of Network Upgrade costs in this proceeding would violate state law. The Public Staff is seeking to create authority under N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-63 that simply does not exist based on the unambiguous language of the statute, the rule, and state precedent.

C. The Public Staff and the Commission have never considered Network Upgrade costs in a CPCN proceeding

The Public Staff seeks a departure from the Commission's long-standing practice of following state and federal law of not including or addressing FERC-jurisdictional Network Upgrade costs in a CPCN matter. A search and analysis of Commission orders and Public Staff

recommendations, affidavits, and testimony in prior EMP dockets demonstrates that the Commission and Public Staff have never before considered such costs in a CPCN context. In fact, the Public Staff has acknowledged in response to a data request that "[t]he Public Staff did not oppose or recommend denial of any CPCN application, however, on the basis of the transmission network upgrade costs."[29] Importantly, in compliance with N.C. Gen. Stat. § 62-110.1 and Rule R8-63 (which requires that the cost of the *electric generating facility* not be included in the utility's rate base), the Public Staff has confirmed that the cost of the generating facility will not impact ratepayers in two EMP dockets. Specifically, in Docket No. EMP-92, Sub 0, on October 16, 2016, Public Staff Witness Dustin R. Metz provided testimony that the cost of NTE Carolinas II, LLC's 500-MW combined cycle natural gas-fired merchant electric generating facility[30] would be financed by private companies rather than ratepayers.[31] In that docket, the Public Staff appropriately did not address cost of the Network Upgrades or the impact of that cost to the ratepayers. Similarly, on January 28, 2019, in Fern Solar, LLC's application for CPCN for a 100-MWAC solar photovoltaic merchant electric generating facility in Docket No. EMP-104, Sub O, the Public Staff filed the affidavit of Evan D. Lawrence, Public Staff engineer.[32] Mr. Lawrence referenced the fact that the generating facility would be privately

[29] Public Staff Response to Friesian Holdings, LLC's Data Request No. 1, p. 6.

[30] NTE Carolinas II, LLC provided information of the cost of the generating facility confidentially and under seal on July 29, 2016 in Docket No. EMP-92, Sub 0.

[31] *See* Testimony of Public Staff Witness Dustin R. Metz, filed on October 18, 2016, in Docket No. EMP-92, Sub 0, p. 6.

[32] *See* Affidavit of Evan D. Lawrence, filed on January 28, 2019, in Docket No. EMP-104, Sub 0. Fern Solar, LLC filed the cost of the electric generating facility confidentially and under seal in the docket.

owned and would thus have no impact to ratepayers.[33] Again, the Public Staff properly limited its consideration to the cost of the electric generating facility itself.

D. The Commission is preempted by federal law from considering Network Upgrade costs in a CPCN proceeding

1. The Public Staff's position conflicts with the clear delineation of power between states and FERC as set forth in the Federal Power Act and associated precedent

In addition to violating the plain language of N.C. Gen. Stat. § 62.110.1, N.C. Gen. Stat. § 62.101, and Rule R8-63, the Public Staff's position violates the Federal Power Act ("FPA") and associated precedent, which clearly delineates responsibilities between states and FERC with respect to the production and transmission of electric energy. Under Section 201 of the FPA, FERC's jurisdiction extends to "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission" and "any rule, regulation, practice, or contract affecting such rate, charge, or classification."[34] FERC has exclusive jurisdiction over the "transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce", and accordingly, has "jurisdiction over all facilities for such transmission or sale of electric energy."[35] By contrast, states retain authority over "any other sale of electric energy" (*i.e.*, retail sales) and facilities used for "generation of electric energy," "local distribution," and "transmission of electric energy in intrastate commerce."[36] Furthermore, while states have

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[33] *Id.*

[34] *See* 16 U.S.C.§ 824e(a).

[35] *See* 16 U.S.C. § 824(b).

[36] *See id.*

jurisdiction over matters such as the construction and siting of most transmission,[37] FERC has jurisdiction over the allocation of interstate transmission costs, transmission planning,[38] and the question of whether interstate transmission costs are recoverable in FERC-jurisdictional rates.[39]

Chapter 62 of the North Carolina General Statutes comports with this decades-old division of responsibilities between FERC and the states. Specifically, N.C. Gen. Stat. § 62-110.1 addresses CPCNs for generating facilities, which aligns with states' jurisdiction over facilities used for the "generation of electric energy" under the FPA.[40] Similarly, N.C. Gen. Stat. § 62-101, which addresses CPCNs related to constructing and siting of new transmission lines, aligns with the traditional role of the states in regulating the siting and construction of transmission facilities.[41] However, the Public Staff's position would effectively rewrite N.C. Gen. Stat. § 62-110.1 to give the Commission jurisdiction over the allocation of FERC-jurisdictional Network Upgrade costs *associated* with a generating facility.

This interpretation is incorrect as a matter of law because (1) the FPA and associated precedent clearly demonstrate that issues related to interstate Network Upgrade cost allocation and associated cost recovery under FERC-jurisdictional tariffs are squarely within FERC's

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[37] *See, e.g., MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016) (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051, Order No. 1000, at P 227 (2011) ("FERC Order No. 1000"); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014)) (noting that FERC Order No. 1000 was not "limit[ing], preempt[ing], or otherwise affect[ing] state or local laws or regulations with respect to construction of transmission facilities," and that "'avoid[ing] intrusion on the traditional role of the [s]tates' in regulating the siting and construction of transmission facilities" was a "proper goal").

[38] *See e.g.*, FERC Order No. 1000 at P 107 (describing how FERC has jurisdiction over cost allocation and transmission planning, while states retain jurisdiction over "siting, permitting, and construction" of transmission facilities."); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d at 76

[39] *See e.g. Nat'l Ass'n of Regulatory Utility Com'rs v. F.E.R.C*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (noting that FERC has "indisputable authority to disallow recovery of costs imprudently incurred by jurisdictional firms.").

[40] *See* 16 U.S.C. § 824(b).

[41] *See MISO Transmission Owners v. FERC,* 819 F.3d at 336.

jurisdiction; (2) the Network Upgrade costs were properly assigned to the Facility in accordance with Duke's OATT, and North Carolina retail customers, to the extent that they will be allocated any costs associated with the Facility, will be allocated such costs in accordance with Duke's FERC-jurisdictional OATT; and (3) to the extent that there could be *any* state jurisdictional issues associated with granting a CPCN for a new transmission line, such issues would be limited to the context of a state's authority in the siting and construction of the transmission line and not related to cost allocation of FERC-jurisdictional Network Upgrade costs, which is properly within FERC's jurisdiction. If the Public Staff had concerns about the siting of transmission lines in a separate and unrelated CPCN proceeding (and to be clear, Friesian is not constructing any new transmission lines), any such concerns would be appropriate to consider in the context of granting a CPCN for the construction of transmission lines pursuant to N.C. Gen. Stat. § 62-101 and Rule R8-62. Accordingly, the Public Staff's position, if adopted by the Commission, would clearly violate the FPA and associated precedent, and would constitute an impermissible intrusion upon FERC's jurisdiction.

2. The Public Staff is attempting to utilize the CPCN process to usurp FERC's cost allocation of the Network Upgrade costs

To the extent that the Public Staff seeks to challenge the amount of the Network Upgrade costs or the allocation of such Network Upgrade costs to North Carolina retail customers, FERC is the appropriate and lawful venue. However, the Public Staff seeks an unlawful change to the merchant plant CPCN requirements which would override the manner in which FERC-jurisdictional Network Upgrade costs are allocated to North Carolina retail customers pursuant to a FERC-jurisdictional tariff. Put succinctly, the Public Staff cannot attempt to override FERC's exclusive jurisdiction as to the rates and allocation of costs that FERC has set for FERC-

jurisdictional transmission facilities in the state-jurisdictional CPCN process simply because it takes issue with the manner in which such costs are allocated.

By challenging Friesian's CPCN Application, the Public Staff is directly contesting the allocation of costs of FERC-jurisdictional transmission facilities to North Carolina retail customers under a FERC jurisdictional tariff outside of an appropriate FERC process. In advocating that the CPCN should be denied so long as North Carolina retail customers are allocated sixty percent (60%) of the Network Upgrade costs, the Public Staff is effectively seeking to allocate a *different percentage* of FERC-jurisdictional transmission costs to North Carolina retail customers than what is provided for in Duke's OATT. For example, the Public Staff is effectively arguing that such percentage would be either zero percent (if the Public Staff opposes the CPCN in its entirety based on the Network Upgrade costs) or some other percentage (if the Public Staff drops its opposition to the CPCN Application so long as Friesian pays a different percentage of the Network Upgrade costs than is required under Duke's OATT). Under either scenario, the Public Staff is seeking to impose a rate and cost allocation for FERC-jurisdictional Network Upgrade costs that would override the rate and cost allocation that has been set by FERC pursuant to the FERC-jurisdictional tariff. As discussed immediately below in further detail, if the Commission were to adopt the Public Staff's position, it would violate longstanding U.S. Supreme Court and federal Circuit Court precedent that clearly demonstrates that the Public Staff's attempt to interfere in a FERC-jurisdictional rate is preempted under federal law.

3. The Public Staff's position conflicts with U.S. Supreme Court and federal Circuit Court law

The Public Staff's position is directly contrary to the FPA, as well as longstanding U.S. Supreme Court and federal Circuit Court precedent related to when state actions attempting to

interfere with FERC-jurisdictional rates are preempted by federal law. Accordingly, if the Commission were to adopt the Public Staff's position, it would be acting in direct conflict with this precedent, including a U.S. Supreme Court case that considered and rejected a Commission action that was nearly equivalent to what Public Staff now proposes, as further described below.

State actions are preempted when they "den[y] full effect to the rates set by FERC, even though [the state] did not seek to tamper with the actual terms of an interstate transaction."[42] Further, FERC's jurisdiction refers not only to rates but "allocations that affect wholesale rates."[43] Here, if the Commission were to adopt the Public Staff's position and deny the CPCN Application, it would interfere with the FERC-approved allocation of Network Upgrade costs to wholesale customers, North Carolina retail customers, and South Carolina retail customers by effectively changing the allocation of the Network Upgrade costs that has been set by FERC. In the event that the Public Staff argues that if the Commission were to deny the CPCN Application, the Commission would not be intruding on FERC's jurisdiction and would simply be protecting the public interest, that contention would be contrary to federal law because "[e]ven where state regulation operates within its own field, it may not intrude indirectly on areas of exclusive federal authority."[44] As a result, states are barred from relying on mere formal distinctions in "an attempt" to evade preemption and "regulate matters within FERC's exclusive jurisdiction."[45] Similarly here, the Public Staff cannot hide behind the guise of opposing

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[42] *See PPL Energyplus, LLC v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014), *aff'd sub nom., Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016) ("*Hughes*") (discussing *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U. S. 354, 373 (1988) ("*Mississippi Power & Light*").

[43] *See Mississippi Power & Light*, 487 U.S. at 371.

[44] *See Pub. Utils. Comm'n v. FERC,* 900 F.2d 269, 274 n. 2 (D.C. Cir. 1990) (internal quotation marks omitted).

[45] *See Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 308 (1988).

Friesian's CPCN Application to protect retail ratepayers when it is attempting to override the FERC-jurisdictional allocation of transmission costs and rates.

Importantly, the Public Staff's position is nearly identical to the position taken by the Commission in a dispute that gave rise to the 1986 U.S. Supreme Court case of *Nantahala Power & Light Co. v. Thornburg*[46], in which the Commission's order, and the North Carolina Supreme Court case upholding it, were both overturned by the U.S. Supreme Court.[47]

In *Nantahala,* appellants Nantahala and Tapoco, Inc., both wholly-owned subsidiaries of appellant Aluminum Co. of America ("Alcoa"), each owned hydroelectric power plants which the Tennessee Valley Authority ("TVA") operated in exchange for providing them jointly with a fixed supply of low-cost "entitlement power". In addition, Nantahala bought a variable amount of high-cost "purchased power" from TVA's power grid. Tapoco sold all of its power to an Alcoa plant in Tennessee, and Nantahala served public customers in North Carolina. For the purpose of calculating the rate to be charged to Nantahala's retail customers, the Commission issued an order allocating entitlement and purchased power between Tapoco and Nantahala *that differed* from the allocation of entitlement power between them ordered by FERC in a wholesale ratemaking proceeding.[48] The Commission order at issue in *Nantahala* was the result of

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[46] 476 U.S. 953 (1986) ("*Nantahala*").

[47] *Nantahala* and the related U.S. Supreme Court precedent discussed herein address FERC and state jurisdiction with respect to sales of power and not transmission, but they are applicable to this proceeding because FERC's jurisdiction over the "transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce" and "all facilities for such transmission or sale of electric energy" stems from the same section of the FPA. *See* 16 U.S.C. § 824(b). In fact, because "[FERC] possesses greater authority over electricity transmission than it does over sales," (*see New York v. FERC,* 535 U.S. 1, 17, 19-20 (2002)), *Nantahala* and the related U.S. Supreme Court precedent discussed herein *are of even greater applicability* here compared to the scenarios addressed in those cases that analyzed FERC's authority over sales of power.

[48] *See Nantahala* at 953.

Nantahala's request to raise its intrastate retail rates that was needed due to the different cost allocation of entitlement power ordered by the Commission as compared to FERC's allocation.[49]

In upholding the Commission's order at issue, the North Carolina Supreme Court noted that the Commission had not expressly required Nantahala to disobey any order entered by FERC. The Supreme Court stated in relevant part:

> [NCUC's] examination of the [contracts at issue] was not undertaken in an effort to either establish wholesale rates or to modify agreements filed with and approved by the FERC. In its order reducing rates [NCUC] expressly rejected the remedy of reforming these agreements to award Nantahala its just level of entitlements and nothing contained in [NCUC's] order purports to change or modify a single word of the several contracts or agreements involved, or the actual flow of power thereunder.[50]

This position — that a state does not impermissibly interfere with FERC's jurisdiction so long as it does not expressly seek to interfere with a FERC-jurisdiction rate — was soundly rejected by the U.S. Supreme Court in *Nantahala*. After an in-depth discussion of the filed rate doctrine,[51] the U.S. Supreme Court held that "[t]he similarity between this case and the more typical application of the filed rate doctrine is apparent from the impermissible interference that enforcement of NCUC's order would create with the scheme of federal regulation."[52] The U.S. Supreme Court further provided:

> When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. Such a "trapping" of costs is prohibited. Here, Nantahala cannot fully recover its costs of purchasing at the FERC-approved rate if NCUC's order is allowed to stand.[53]

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[49] *See id.*

[50] *See Nantahala* at 961-62 (quoting *State ex rel. Utilities Comm'n. v. Nantahala Power & Light Co.,* 313 N.C. 614, 688 332 S.E.2d 397, 440-41 (1985)).

[51] *See Nantahala* at 962-69.

[52] *See id.* at 970.

[53] *See id.* (citations omitted).

Similar to the Commission's position that was overturned by the U.S. Supreme Court in *Nantahala*, the Public Staff is challenging Friesian's CPCN Application in a manner that would prevent Duke from recovering all Network Upgrade costs allocated to its customers pursuant to its OATT. While the specific mechanism that the Public Staff seeks to utilize to interfere with a FERC-jurisdictional rate (the CPCN proceeding) differs from the Commission actions at issue in *Nantahala* (the Commission's retail ratemaking authority), both constitute impermissible encroachments by the state on FERC's jurisdiction.

Since the issuance of *Nantahala* in 1986, the U.S. Supreme Court has further clarified the *Nantahala* decision in other instances in which it has addressed the interaction between state practices and FERC-jurisdictional rates. Notably, in *Mississippi Power & Light*, the Supreme Court held:

> Our decision in *Nantahala* relied on fundamental principles concerning the pre-emptive impact of federal jurisdiction over wholesale rates on state regulation. First, FERC has exclusive authority to determine the reasonableness of wholesale rates. It is now settled that " 'the right to a reasonable rate is the right to the rate which the Commission files or fixes, and, ... except for review of the Commission's orders, [a] court can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.'" This principle binds both state and federal courts and is in the former respect mandated by the Supremacy Clause. Second, *FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates*. Third, States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates.[54]

More recently, in *Hughes v. Talen Energy Mktg., LLC*, the U.S. Supreme Court opined that "*Mississippi Power & Light* and *Nantahala* make clear that States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just

[54] *Mississippi Power & Light*, 487 U. S. at 371-72 (emphasis added, internal citations omitted).

and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation."[55]

As discussed, the Public Staff's opposition to Friesian's CPCN Application is based entirely on the allocation of the Network Upgrade costs to North Carolina retail customers that are in compliance with Duke's FERC-jurisdictional OATT. The Public Staff is attempting to co-opt this CPCN process in order to change the allocation of Network Upgrade costs to North Carolina retail customers. This is *precisely* what the Commission attempted to do in changing the allocation of entitlement and purchased power between Tapoco and Nantahala that differed from the allocation of entitlement power ordered by FERC, which was overturned by the U.S. Supreme Court in *Nantahala*. Accordingly, even assuming *arguendo* that the Commission was authorized by a statute or regulation (which does not exist) to interfere with a FERC-jurisdictional rate in a CPCN proceeding, such state-based authorization would be preempted by federal law. However, as discussed previously, the Public Staff is not authorized to consider FERC-jurisdictional Network Upgrade costs when analyzing a CPCN application pursuant to N.C. Gen. Stat. § 62-110.1 or Commission Rule R8-63, meaning that its position is even less permissible than the Commission's order in *Nantahala* because at least there, the Commission's actions were in line with its power under applicable state law to engage in retail ratemaking (even though such efforts were preempted by federal law under the circumstances).

[55] *Hughes,* 136 S.Ct. at 1299.

For the foregoing reasons, the Public Staff's position violates well-established U.S. Supreme Court and federal Circuit Court precedent and must be rejected by the Commission.

E. The Commission does not have authority to consider the cost of Interconnection Facilities in a CPCN proceeding

It is important to again point out that Friesian will bear one-hundred percent (100%) of the costs associated with the Interconnection Facilities, as well as of the Facility itself, as is required by the Interconnection Agreement. As the Interconnection Agreement requires Friesian to pay the entire cost of the Interconnection Facilities, those costs will not be included in DEP's rate base or paid for by the ratepayers. However, to be clear, as discussed in Section II.B above, North Carolina law permits the Commission to consider the cost of a generating facility in a CPCN proceeding – and not the cost of Interconnection Facilities. The cost of Interconnection Facilities, which are not considered under N.C. Gen. Stat. § 62-110.1 or Commission Rule R8-63, and which are paid for by the interconnection customer are irrelevant to the question of the public convenience and necessity.

F. The Commission's Interconnection Order addressed the costs of the state-jurisdictional interconnection process for PURPA facilities, not the FERC-jurisdictional interconnection process for generators making non-PURPA wholesale sales

The Public Staff's request that Friesian not be allowed to seek reimbursement of Network Upgrade costs from Duke under Duke's OATT is controlled by federal law, rather than language in the Commission's June 14, 2019 *Order Approving Revised Interconnection Standard and Requiring Reports and Testimony* ("Interconnection Order"). In the Interconnection Order, the Commission directed the state-jurisdictional utilities, "to the greatest extent possible, to continue to seek to recover from Interconnection Customers all expenses (including reasonable overhead

expenses) associated with supporting the generator interconnection process *under the NC Interconnection Standard*"[56] The Interconnection Order did not address the costs arising under FERC's interconnection processes; nor could it, as FERC has exclusive jurisdiction with respect to the costs of the interconnection of a merchant plant to the grid.

The Commission's directive to the utilities in the Interconnection Order is related to recovering from interconnection customers all interconnection fees and overheard costs (pre-application report fees, interconnection request deposits and fees, and interconnection overhead costs) in connection with the state-jurisdictional interconnection process, and in no way suggests that utilities should recover FERC-jurisdictional Network Upgrade costs from interconnection customers. The Commission's directive also has no bearing on the Commission's consideration of Friesian's CPCN application because it is not legally permissible (*i.e.,* possible) for Friesian to pay for the Network Upgrade costs under federal law, as established in DEP's FERC-jurisdictional LGIP. Accordingly, the Commission's directive in its Interconnection Order does not apply to the issues of state and federal law raised by the Public Staff in regard to Friesian's CPCN application.

III. CONCLUSION

For all of the reasons set forth above, Friesian respectfully requests that the Commission enter an order ruling that it does not have the authority to consider the impact of FERC-jurisdictional Network Upgrade costs in this CPCN proceeding.

[56] *Interconnection Order*, p. 18 (emphasis added).

Respectfully submitted this the 26th day of August, 2019.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Pre-Hearing Initial Brief of Friesian Holdings, LLC upon all parties of record by electronic mail.

This 26th day of August, 2019.

Karen M. Kemerait