STATE OF NORTH CAROLINA
UTILITIES COMMISSION RALEIGH

DOCKET NO. EMP-105, SUB 0

In the Matter of the Application of Friesian Holdings, LLC for a Certificate of Public Convenience and Necessity	)	**NORTH CAROLINA CLEAN ENERGY BUSINESS ALLIANCE'S INITIAL PRE-HEARING BRIEF**

INITIAL PRE-HEARING BRIEF OF NORTH CAROLINA CLEAN ENERGY BUSINESS ALLIANCE

Pursuant to the Commission's *Order Suspending Procedural Deadlines and Allowing Filing of Pre-Hearing Briefs,* issued on August 5, 2019 ("Briefing Order"), the North Carolina Clean Energy Business Alliance ("NCCEBA") files the following brief on the issues identified by the Commission.

I. BACKGROUND

A. Procedural background

On May 15, 2019, Friesian Holdings, LLC ("Applicant"), filed an application ("the Application") pursuant to Gen. Stat. § 62-110.1 and Commission Rule R8-63 for a certificate of public convenience and necessity ("CPCN") to construct a 70-MWAC solar photovoltaic electric generating facility located in Scotland County, North Carolina ("the Facility"). The facility will interconnect with the electric transmission system owned by Duke Energy Progress, LLC ("DEP"). Because the Facility is interconnecting with the DEP system but is planning to sell its output to the North Carolina Electric Membership Corporation ("NCEMC"), its interconnection is governed by the provisions of DEP's Open Access Transmission Tariff ("OATT") rather than the North

Carolina Interconnection Procedures for State-Jurisdictional Generator Interconnections ("NCIP").

Pursuant to the *pro forma* Large Generator Interconnection Agreement ("LGIA") included in DEP's OATT, Applicant will be required to pay all costs to construct the Facility and any associated Interconnection Facilities. The Applicant is also required to provide sole funding for Network Upgrades under Section 11.3 of the LGIA.[1] However, the Applicant is ultimately entitled to repayment of the cost of the Network Upgrades, to be paid as either as an offset to transmission charges or under an alternative payment schedule mutually agreeable to the Applicant and DEP. LGIA Sec. 11.4.1.

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 the Public Staff considers the application to be complete. In addition, the Public Staff requested that the Commission issue a procedural order setting the application for hearing, requiring public notice pursuant to Gen. Stat. § 62-82, and addressing other procedural matters.

On June 13, 2019, the Commission issued an Order that, among other things, scheduled hearings in this proceeding, established a procedural schedule for the filing of petitions to intervene and of testimony, and directed the Applicant to publish notice of the public hearing once a week for four consecutive weeks, beginning at least 30 days prior to July 26, 2019.

[1] "Network Upgrades" are defined in the OATT 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."

On August 1, 2019, the Public Staff filed a motion seeking the establishment of a date for the filing of pre-hearing briefs and the suspension of the current schedule for the filing of expert witness testimony. In its motion, the Public Staff identified several legal issues that issues that bear on the Commission's consideration of the Application. The Public Staff's motion suggested that pre-hearing briefs address the following issues:

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

(b) 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 the approximately $227 million dollars in 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

(c) whether the allocation of costs associated with interconnecting the Friesian project 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, "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 Interconnection Standard."

On August 5, 2019, NCCEBA filed a Petition to Intervene in this matter. The Commission granted NCCEBA's petition on August 26.

On August 5, 2019, the Commission issued the Briefing Order, granting the Public Staff's motion, suspending the deadlines established in the Commission's June 13 Order, and authorizing the parties to file pre-hearing briefs by August 26, 2019, and reply briefs by September 9.

B. NCCEBA's interest in this matter

NCCEBA is a non-profit trade association created to promote the common interests of clean energy businesses in North Carolina. It represents all types of businesses in the clean energy sector including developers, manufacturing, engineering, construction, professional and financial services, and non-energy businesses wishing to purchase clean energy. NCCEBA's members include a number of independent power producers ("IPPs") that are seeking to develop generating facilities that require CPCNs under Gen. Stat. § 62-110.1 and the Commission's rules.

Until recently, most solar projects in North Carolina sought CPCNs pursuant to Rule R8-64 because they were PURPA Qualifying Facilities ("QFs") selling to their interconnecting utility. Increasingly, however, the regulatory structures for renewable energy in North Carolina have pushed projects away from the PURPA "must-take" model, under which IPPs sell directly to their interconnecting utility, and towards a more diverse range of offtake and interconnection models. This move has been driven in large measure by HB 589, and by the Commission's October 11, 2017 Order in the E-100 Sub 148 avoided cost docket, which implemented provisions of HB 589 limiting PURPA sales and made other regulatory changes that also disincentivized IPPs from pursuing PURPA sales. See *Order Establishing Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100 Sub 148 (Oct. 11, 2017) at 15-18.

In addition to the CPRE and GSA programs specifically authorized by HB 589, developers have explored other offtake options, such as wholesale sales to buyers other than the interconnecting utility (such as NCEMC), or selling to retail customers in the PJM Interchange pursuant to freely-negotiated bilateral contracts. Projects pursuing either of these options generally seek interconnection pursuant to the FERC-jurisdictional Large Generator Interconnection Procedures ("LGIP"), meaning that (as with the Friesian project) the cost of Network Upgrades

would be refundable pursuant to the utility's OATT.[2] Such projects are, like Friesian, required to obtain merchant plant CPCNs under Rule R8-63, rather than under R8-63.

NCCEBA submits that the continued development of merchant plants with FERC-jurisdictional interconnections is important to the continued development of the clean energy projects in North Carolina – projects that drive down the cost of energy and bring substantial benefits not only to ratepayers but also to local communities.

II. ARGUMENT

NCCEBA generally supports the arguments made by the Applicant in its Initial Pre-Hearing Brief (filed this same day) with regard to the issues raised by the Public Staff, and incorporates those arguments by reference. On behalf its members with an interest in the certification of additional merchant generating plants under Rule R8-63, NCCEBA also makes the following arguments: (1) the proper scope of review on a merchant plant CPCN is limited, and should not extend to considering the cost of Network Upgrades associated with an applicant's project; (2) as a matter of federal law, the Commission lacks jurisdiction to affect FERC's thoroughly-considered decisions to authorize the repayment of Network Upgrade costs to FERC-jurisdictional Interconnection Customer such as the Applicant; (3) requiring consideration of the cost of Network Upgrades on a CPCN application is generally impracticable given the typical development cycle of a generating project interconnecting under the OATT, and requiring such consideration would be highly disruptive to such projects; and (4) it would be inappropriate and

[2] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 at P 813 (interconnection of QFs selling to non-interconnecting utility is subject to FERC jurisdiction).

unreasonable for the Commission to consider the "resulting additional capacity made available" by Friesian to State-jurisdictional interconnection projects in this CPCN proceeding.

A. The scope of Commission review of a merchant plant CPCN application is limited.

Based on North Carolina statutes, Commission Rules, and past Commission practice, the scope of review for a CPCN application is relatively narrow and does not include consideration of the potential interconnection costs of a proposed generating facility, whether those costs are (as in the case of Interconnection Facilities) paid for solely by the applicant or (in the case of Network Upgrades) potentially refundable and thus recoverable from ratepayers.

Gen. Stat. § 62-110.1(a) provides that no public utility or other person:

> shall begin the construction of any steam, water, or other facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility service. . . without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction.

Consistent with the statute's focus on the "necessity" for the facility, that same section requires the Commission to develop and update "an analysis of the long-range needs for expansion of facilities for the generation of electricity in North Carolina." In addition, the statute requires the applicant to file, as a condition of receiving a certificate, an estimate of construction costs "in such detail as the Commission may require." Gen. Stat. § 62-110.1(c). Although that subsection does not specifically define the scope of "construction costs" that must be provided, other subsections speak solely with reference to the "construction *of the facility*," without any reference whatsoever to Network Upgrades or any work on the utility's transmission system. *See, e.g.*, Gen. Stat. §§ 62-110.1(f) ("the Commission may conduct an ongoing review *of construction of the facility* as the construction proceeds"), 62-110.1(f1) (utility shall recover in general rate case "the actual costs it has incurred in constructing a generating facility").

It is evident, then, that the General Assembly's intention was for the Commission to consider the cost of constructing the facility itself, rather than any associated interconnection costs. This is consistent with the Commission Rule R8-63, which requires the applicant for a merchant plant CPCN to submit information on "The nature of the proposed generating facility . . . the anticipated beginning date for construction; the expected commercial operation date; and estimated construction costs[.]" Rule R8-63(b)(2)(i). Although an applicant must submit a "description of the transmission facilities to which the facility will interconnect, and a color map showing their general location," Rule R8-63(b)(2)(i), there is no requirement that the applicant submit any information about the likely cost of Network Upgrades or Interconnection Facilities. Nor, as discussed *infra*, would it be practical for most projects to submit such information in their CPCN applications without seriously disrupting the project development cycle.

Although the Commission has on occasion referred to the CPCN analysis as a "two-part standard" considering both the need for the facility and "the public convenience," *see Recommended Order*, Docket No. EMP-93 Sub 0 (Nov. 1, 2018), Dissent of Commissioner Brown-Bland at 1, the Commission's historic practice, dating at least to the May 21, 2001 Order Adopting Rule R8-62 (Docket No. E-100 Sub 85), has been to focus its analysis on the need for the facility.[3] This is consistent with the acknowledged purpose of G.S. 62-110.1, which was "to provide for the orderly expansion of electric generating capacity in order to create a reliable and economical power supply and to avoid the costly overbuilding ***of generation resources***." *Order*

[3] It should be noted that the May 21, 2001 Order adopting the rule devoted considerable attention to how an applicant may demonstrate the need for the facility, but did not discuss the nature of the "public convenience" at all.

Granting Certificate with Conditions, Docket No. EMP-92 Sub 0 (Jan. 19, 2017) at 17 (emph. added) (citing *State ex rel. Utils. Comm'n v. High Rock Lake Ass'n*, 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)).[4]

To the extent that parties to CPCN proceedings have presented evidence of other issues, such as environmental impacts or land use concerns, the Commission has generally looked to whether some other government agency with jurisdiction has (or will) consider the issue, and has generally deferred to such agencies' authority over those issues. *See*, e.g., *Order Granting Certificate with Conditions*, EMP-92 Sub 0 (Jan. 19, 2017) at 11; *Order Granting Certificate of Public Convenience and Necessity with Conditions,* Docket No. SP-231, Sub 0 (Apr. 24, 2008) at 9 ("such decisions are, in most instances, best to the local community through the exercise of its zoning authority rather than made by the Commission."). To NCCEBA's knowledge, in no prior case has the Commission or the Public Staff taken the position that the "convenience" prong of the CPCN authorizes the Commission to deny a CPCN based on interconnection costs, whether borne by the applicant or otherwise.

NCCEBA submits that the Commission should continue to follow this approach with regard to merchant plant CPCN applications: examine the applicant's demonstration of the need for the project, because that is squarely within the Commission's statutory authority, but be wary of allowing collateral issues—especially those that are within the jurisdiction of another

[4] NCCEBA further notes that Chapter 62 provides a *separate* process for considering whether the construction of a new transmission line by a public utility or any other person is consistent with the public convenience and necessity. Gen. Stat. § 62-101. The General Assembly referred to this approval as a "certificate of environmental compatibility and public convenience and necessity," indicating a broader standard of review than for a generating facility.

government agency (as the Network Upgrades are under FERC's exclusive jurisdiction)—to factor into the Commission's analysis.[5]

As indicated in the Applicant's Pre-Hearing Brief, it appears that the Commission has never before considered the question of Network Upgrade costs in a CPCN proceeding, and there is no reason to deviate from this approach now. As explained further below, such an inquiry would not only violate federal law, but would also result in harmful unintended consequences for developers of FERC-jurisdictional projects.

B. The Commission does not have the authority under federal law to consider the potential impacts of a FERC-jurisdictional electric generating facility's Network Upgrade costs.

The allocation of the interconnection costs of FERC-jurisdictional projects is under the exclusive jurisdiction of the FERC, and federal law preempts any decision by this Commission that would "affect" that allocation. The Applicant has explained in detail these requirements of federal law and persuasively argued that under state and federal law this Commission does not have the authority to consider the cost of the Applicant's Network Upgrades in this proceeding. NCCEBA hereby incorporates by reference the arguments to that effect made in Applicant's Pre-Hearing Brief.

As further discussed in Applicant's Pre-Hearing Brief, the Federal Power Act gives the FERC exclusive jurisdiction over "any rate, charge, or classification, demanded, observed,

[5] NCCEBA acknowledges that there are a limited number of other issues that legitimately fall within the Commission's authority to supervise "public utilities" and generators, such as irregularities with respect to the applicant or facility design. NCCEBA believes the Commission's role extends to ensuring that electric generating facilities constructed in the North Carolina are built and operated by competent parties who have the necessary expertise to execute their plans successfully and do not have a history of performance problems or impropriety.

charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission" as well as "any rule, regulation, practice, or contract *affecting such rate, charge, or classification*." 16 U.S.C.§ 824e(a) (emphasis added).

FERC possesses even broader authority over the transmission of power in interstate commerce than it does over the sale of power. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 63 (D.C. Cir. 2014); *see also New York v. FERC*, 535 U.S. 1, 15 (2002) (recognizing that the U.S Supreme Court has "construed broadly" the grant of jurisdiction over interstate transmission of power). The Fourth Circuit Court of Appeals recently held that this grant of jurisdiction encompasses the allocation of costs for transmission facilities to retail ratepayers, finding that this "does not interfere with the traditional state authority that is preserved by Section 201" of the Federal Power Act. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d at 63-64 ("Even though Section 201(b) does 'limit FERC's *sale* jurisdiction to that at wholesale,' there is no textual warrant for the suggestion that the Commission lacks jurisdiction over retail transmission.")

Pursuant to its jurisdiction over the transmission of power in interstate commerce, FERC has thoroughly considered the question of whether repayment of the cost of Network Upgrades to interconnection customers is appropriate. In Order No. 2003, FERC established the default provisions of the OATT (including Section 11.4.1 of the standard Large Generator Interconnection Agreement), under which the Applicant will obtain repayment of the cost of its Network Upgrades from Duke. *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (July 24, 2003). In the initial rulemaking and in response to petitions for reconsideration of that Order, FERC carefully considered the question of whether the repayment of Network Upgrades and the allocation of the associated costs to other customers and native load was fair and reasonable, and whether it would improperly incentivize the development

of economically inefficient generating projects, at the expense of retail ratepayers. *See* Order No. 2003-A, 106 FERC ¶ 61,220 (Mar. 4, 2005).

For example, in response to the concern by petitioners that the reimbursement of Network Upgrades "shifts investment risk from the entity in control of such investment [in transmission facilities] (the Interconnection Customer) to the Transmission Provider's retail customers," FERC responded that:

> their concerns that these provisions will lead to improper subsidies are misplaced. . . . the Interconnection Customer's upfront payment, with provisions for the payment of interest, credits and reimbursements, serves not as a rate for interconnection or transmission service, but simply as a financing mechanism that is designed to facilitate the efficient construction of Network Upgrades. . . . by placing the Interconnection Customer initially at risk for the full cost of the Network Upgrades, the upfront payment provides the Interconnection Customer with a strong incentive to make efficient siting decisions and, in general, to make good faith requests for Interconnection Service.

Id. at P 607, 612-23. FERC acknowledged the concern that "while all Transmission Customers benefit generally from upgrades to the transmission network, all customers do not necessarily benefit equally from upgrades that may be required for a particular interconnection." *Id.* at P 614. But it concluded that the regulatory and contractual mechanisms associated with repayment of Network Upgrades would

> [e]nsure[] that the Interconnection Customer bears the risk associated with Network Upgrades that were built to accommodate its interconnection request and provides an incentive for efficient and cost effective siting decisions. More importantly, this modification also helps to ensure that other Transmission Customers, including the Transmission Provider's native load, will not have to bear the cost of the Network Upgrades if the Interconnection Customer ceases operation of the Generating Facility prematurely.

Id. at 614-16.

FERC went on to consider objections from the South Carolina Public Service Commission and other state commissions that this would lead to "inefficiencies" because the costs of

interconnection-related Network Upgrades must be passed on to other Transmission Customers regardless of whether they actually benefit from the Generating Facility or the related Network Upgrades. FERC disagreed with this claim, concluding that the repayment structure (which requires up-front payment for Network Upgrades by the Interconnection Customer) "will provide the Interconnection Customer with a strong incentive to make efficient siting decisions." *Id.* at P 623-27.

FERC further considered the repayment mechanisms under Section 11.4.1 of the form LGIA on reconsideration in Order No. 2003-B, reaffirming its conclusion that the LGIA "provides a reasonable balance between the objectives of promoting competition and infrastructure development, protecting the interests of Interconnection Customers, and protecting native load and other Transmission Customers." FERC Order No. 2003-B, 109 FERC ¶ 61,287 (Dec. 10, 2004) at P 33. FERC further "reaffirmed" its position that

> an important objective of our interconnection pricing policy continues to be the protection of existing Transmission Customers, including the Transmission Provider's native load, from adverse rate implications associated with Interconnection Facilities and Network Upgrades required to interconnect a new Generating Facility.

Finally, it clarified that any party concerned about the allocation of Network Upgrade costs to utility customers could seek recourse before the agency:

> Despite the unsupported hypothetical generalizations of some petitioners, we have not been presented with any evidence that native load and other Transmission Customers cannot be held harmless under our existing pricing policy. If a Transmission Provider (or an existing Transmission Customer) believes that, for an actual interconnection, it faces circumstances where native load and other customers are not held harmless, it should make that demonstration in an actual transmission rate filing. The Transmission Provider must explain the facts of the case and the assumptions on which its calculation is based and provide evidentiary support.

Id. at 47, 55-56.

Thus, FERC not only has jurisdiction to address the allocation of costs for Network Upgrades among FERC-jurisdictional Interconnection Customers, and Duke's wholesale and retail customer; it has thoughtfully exercised that jurisdiction in establishing the repayment mechanisms codified in Section 11.4.1 of Friesian's Interconnection Agreement. NCCEBA submits that this Commission should defer to FERC's considered judgements on this issue. More importantly, if denial of Friesian's CPCN application based on this allocation of costs would unquestionably "affect" FERC's allocation decisions, and thus run afoul of the federal jurisdictional grant of 16 U.S.C. § 824e(a). If the Commission does not agree with FERC's conclusions on this issue, its recourse is not to deny the Applicant's application but to seek relief from FERC, or petition Congress to change the law.

C. Considering the cost of Network Upgrades in the CPCN analysis is incompatible with the development cycle of energy projects interconnecting under the OATT.

Even if the Commission concludes that it does have the authority under federal law and Chapter 62 of the General Statutes to consider the cost of Network Upgrades associated with a merchant plant in deciding whether to grant it a CPCN, NCCEBA believes that such consideration is inappropriate because it would be hugely disruptive to the development process for such projects.

Friesian is unusual among FERC-jurisdictional merchant generation projects, in that by the time it filed its application under Rule R8-63, the project was far along in the interconnection process and it was clear that the project would trigger Network Upgrades and that the cost of those

Upgrades would be significant.[6] Most projects, whether proceeding under Rule R8-63 or R8-64, file their CPCN applications much earlier in the project development cycle. For R8-64 projects, this is in part because having a CPCN is required to establish a Legally Enforceable Obligation ("LEO") under PURPA. Merchant plants are generally not concerned with establishing a LEO, but obtaining a CPCN is a significant regulatory milestone that projects generally must achieve before they can obtain financing, not only to construct the project but also to fund Network Upgrades and Interconnection Facilities. Approval of a CPCN is also likely to be required before a commercial off-taker will execute a Power Purchase Agreement with a proposed generator.[7] But with any project there is significant uncertainty as to whether or when a CPCN will be issued. (This is especially true given the relatively small number of solar projects that have obtained CPCNs under Rule R8-63.)

As a result, prudent developers of both QF and merchant plants generally apply for CPCNs relatively early in the project development process. So an application may well be filed long before the project receives a completed Facilities Study Report, which is the first point in the interconnection process at which the project has even a general idea of what the costs of any Network Upgrade costs might be. **This makes it impractical, if not impossible, for the**

[6] This is because Friesian filed a CPCN application under Rule R8-64 in September 2016 in Docket No. SP-8467. At that time the Applicant expected to sell its power to DEP, and thus it was clear that its CPCN should be issued pursuant to that Rule. Had the Applicant known at that time that it would be selling to another offtaker, and that the Public Staff, at least, considered Rule R8-63 the proper avenue for a QF interconnected to Duke but selling to a non-Duke offtaker, Applicant would have filed its initial application under Rule R8-63 much earlier in the development process.

[7] The Application indicates that the Applicant already has a PPA with NCEMC. Although NCCEBA was not privy to the negotiations between those parties, it appears that Friesian already had a CPCN (albeit one issued under R8-64) before entering into that PPA.

Commission to consider the cost of Network Upgrades when a proposed merchant plant applies for a CPCN. And considering the cost of Network Upgrades only for projects that have that information when they apply for a CPCN would arbitrarily discriminate among projects depending on then they file their CPCN applications (and would also incentivize developers to strategically file CPCN applications depending on when that information will be available).

Nor would it be fair or reasonable to require a project to wait to file a CPCN application until after it has received a Facilities Study Report estimating its likely Network Upgrades. As stated, the Facilities Study is generally received fairly late in the development process. The Interconnection Costumer has almost no control over when that happens, and often has very little idea of when it will receive the study results (which are often delivered much later than the timeframes specified under the OATT). It would be unfair and unreasonable to require a project developer to wait until it receives a Facilities Study to even apply for a CPCN, especially given that even under optimal conditions it may take several months for the Commission to approve a merchant plant CPCN application.

Making such a requirement even more problematic would be the fact that under the OATT, receipt of a Facilities Study report puts the Interconnection Customer on a "clock" for executing a final Interconnection Agreement and commencing work on Interconnection Facilities and Network Upgrades. This entails significant financial commitments that most developers cannot make until they have secured offtake and arranged for financing. But as discussed, many projects cannot do either of those things without having a CPCN already in hand. So requiring accurate estimates of Network Upgrade costs before even starting the CPCN process would pose intractable timing and financing problems for FERC-jurisdictional projects.

D. It would be inappropriate and unreasonable for the Commission to consider the "resulting additional capacity made available" by Friesian to State-jurisdictional interconnection projects in this proceeding.

In its Motion, the Public Staff proposed that the parties address the following issue in their Pre-Hearing Briefs:

> whether the allocation of costs associated with interconnecting the Friesian project **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, "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 Interconnection Standard."

It is not entirely clear how the Public Staff would propose to consider the allocation of costs relating to "additional capacity . . . utilized by State-jurisdictional interconnection projects" in this proceeding. However, it is NCCEBA's view that it would be entirely inappropriate for the Commission to consider, in this docket, the potential allocation of costs related to Friesian's Network Upgrades to *other* interconnection customers. The Commission's stated objective of having interconnection costs be recovered, to the greatest extent possible, from the interconnection customers causing those costs is not grounds for ignoring or overriding federal law with respect to such cost allocation. Moreover, the fact that other customers may benefit from the Friesian upgrades, which is inherent to sequential queue processing, has nothing to do with the scope of this proceeding. The sole question before the Commission, by statute, is whether the "public convenience and necessity requires, or will require," construction of the Applicant's generating facility. Gen. Stat. § 62-110.1(a). In short, whether as a result of the Friesian project and its Network Upgrades going forward, other state jurisdictional projects may have the ability to be

built has nothing to do with whether Friesian is "needed" by the NCEMC customers who will be receiving and paying for its output.

The introduction of such remote issues into this CPCN proceeding would also be inconsistent with past Commission practice and would create significant regulatory uncertainty. Although "The standard of public convenience and necessity is relative or elastic, rather than abstract or absolute, and the facts of each case must be considered," *State ex rel. Utils. Comm'n v. Casey*, 245 N.C. 297, 302, 96 S.E.2d 8, 13 (1957), as discussed *supra* this Commission has long acknowledged that there are limits on the scope of issues that may legitimately be considered by the Commission when considering whether to grant a CPCN for a proposed generating facility. *See*, *e.g.*, *Order Granting Certificate Of Public Convenience And Necessity With Conditions*, Docket No. SP-231, Sub 0 (April 24, 2008). If the Commission deems it permissible to consider the possible allocation of Network Upgrade costs to *other* unidentified interconnection customers in this docket, it is hard to imagine that there would be any limitation on the issues that could be brought before the Commission by a party seeking to oppose a CPCN in the future. Such open-ended inquiry would cause significant regulatory uncertainty both for IPPs and for any utility that sought to construct a generating facility. That regulatory uncertainty could severely impact the development of future energy projects of all kinds in North Carolina.

Finally, those other "State-jurisdictional interconnection projects" that are referenced (but not identified) in the Public Staff's Motion are not parties to this docket. To address the allocation of interconnection costs to other (unidentified) projects without affording them the opportunity to be heard would be fundamentally unfair and violative of due process. If the Public Staff believes that the Commission should include such an inquiry in its CPCN analysis, it should file a petition for rulemaking rather than attempting to effectuate this change in a single CPCN docket.

III. CONCLUSION

For the reasons stated above, NCCEBA submits that the Commission's consideration of the cost of the Applicant's potential Network Upgrades, and the possible allocation of those costs to Duke's retail ratepayers, is contrary to state law and intrudes on the exclusive jurisdiction of FERC, which has thoroughly considered the allocation of Network Upgrade costs with respect to FERC-jurisdictional interconnection customers. More generally, including the cost of potential Network Upgrades to the CPCN analysis for merchant plants with FERC-jurisdictional interconnections would cause severe unintended consequences that could chill the development of further FERC-jurisdictional projects in North Carolina.

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

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CERTIFICATE OF SERVICE

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

This the 26th day of August 2019.

Benjamin L. Snowden