NORTH CAROLINA UTILITIES COMMISSION

NOTICE TO PARTIES

Docket No. EMP-93, SUB 0 Exceptions Due on or Before: November 16, 2018

Parties to the above proceeding may file exceptions to the report and Recommended Order hereto attached on or before the day above shown as provided in G.S. 62-78. Exceptions, if any, must be filed (original and thirty (30) copies) with the North Carolina Utilities Commission, Raleigh, North Carolina, and a copy thereof mailed or delivered to each party of record, or to the attorney for such party, as shown by appearances noted. Each exception must be numbered and clearly and specifically stated in one paragraph without argument. The grounds for each exception must be stated in one or more paragraphs, immediately following the statement of the exception, and may include any argument, explanation, or citations the party filing same desires to make. In the event exceptions are filed, as herein provided, a time will be fixed for oral argument before the Commission upon the exceptions so filed, and due notice given to all parties of the time so fixed; provided, oral argument will be deemed waived unless written request is made therefore at the time exceptions are filed. If exceptions are not filed, as herein provided, the attached report and recommended decision will become final and effective on November 19, 2018 unless the Commission, upon its own initiative, with notice to parties of record modifies or changes said Order or decision or postpones the effective date thereof.

The report and Recommended Order attached shall be construed as tentative only until the same becomes final in the manner hereinabove set out.

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. EMP-93, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Wilkinson Solar LLC for a Certificate of Public Convenience and Necessity to Construct a 74-MW Solar Facility in Beaufort County, North Carolina	))))	RECOMMENDED ORDER DENYING APPLICATION FOR AMENDED CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

HEARD: Monday, March 19, 2018, at 7:00 p.m. in the Beaufort County Courthouse, 112 W. Second St., Washington, NC

Wednesday, April 11, 2018, at 10:00 a.m. in Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, NC

BEFORE: Commissioners ToNola D. Brown-Bland; presiding, James G. Patterson, and Lyons Gray

APPEARANCES:

For Wilkinson Solar LLC:

Henry C. Campen, Jr., and E. Merrick Parrott, Parker Poe Adams & Bernstein LLP, 301 Fayetteville Street, Suite 1400, Raleigh, NC 27601

For Marshall Lilley, Joann Lilley, and Deb Van Staalduinen, Intervenors:

Brady W. Allen and Britton Allen, Allen Law Offices, PLLC, 1514 Glenwood Ave. Suite 200, Raleigh, NC 27608

For the Using and Consuming Public:

Dianna Downey, Staff Attorney, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, NC 27699

BY THE COMMISSION: On October 11, 2017, the Commission issued an Order granting Wilkinson Solar LLC (Applicant) a certificate of public convenience and necessity (CPCN) pursuant to N.C.G.S. § 62-110.1(a) and Commission Rule R8-63 for construction of a 74-MW_{AC} merchant plant solar photovoltaic (PV) electric generating facility to be located on the south side of Terra Ceia Road, between Vreugdenhil Road and Christian School Road, and the north side of Terra Ceia Road, east of Christian School Road in

Beaufort County, North Carolina. In its Order, the Commission noted that the Applicant filed an amended site map as part of a settlement agreement with Intervenor David Butcher and other interested parties. The Commission further noted that the Applicant's amended site map indicated that, without modifying the original project boundary, the Applicant no longer intended to place solar panels on the property adjoining the Terra Ceia Christian School and that the Applicant would move the substation and potential future battery storage facility to the southwestern portion of the project footprint, on the south side of Terra Ceia Road. Finally, the Commission noted that the placement of solar panels or other equipment on property other than that identified in the application, as amended, filed and approved in its Order would require an amendment of the CPCN and approval by the Commission.

On November 29, 2017, the Applicant filed a letter with the Commission stating that the footprint of the proposed facility expanded to the south and would incorporate additional land south of Terra Ceia Road, as shown on the revised site plan map attached thereto. Considering the Applicant's November 29, 2017 letter and revised site plan as an application to amend the CPCN previously granted in this docket, the Commission issued an Amended Order Requiring Publication of Notice and Further Review by State Clearinghouse on December 6, 2017, requiring the Applicant to publish notice of the application and requesting further review by the State Environmental Review Clearinghouse of the North Carolina Department of Administration (State Clearinghouse). In its Order, the Commission stated that if a complaint was received within ten (10) days after the last date of the publication of notice, the Commission would schedule a public hearing to determine whether a certificate should be granted, give reasonable notice of the time and place of the hearing to the Applicant and to each complainant, and require the Applicant to publish notice of the hearing in the newspaper in which the notice of the application was published.

On December 7, 2017, the Applicant filed a certificate of service stating that it had served a copy of the application on Virginia Electric and Power Corporation, d/b/a, Dominion Energy North Carolina (Dominion).

On or after December 12, 2017, approximately 55 consumer statements of position were filed in this docket.

On January 16, 2018, and January 26, 2018, the State Clearinghouse filed comments with the Commission concerning the application, stating that, because of the nature of the comments, no further review action was needed by the Commission to determine compliance with the North Carolina Environmental Policy Act.

On February 1, 2018, the Applicant filed an affidavit of publication prepared by an employee of The Washington (N.C.) Daily News, stating that the Applicant had caused publication of the notice of the application on December 8, 15, 22, and 29, 2017, as required by the Commission's December 6, 2017 Order.

On February 7, 2018, the Commission issued an Order setting the Applicant's application for amendment of its CPCN for hearing; requiring the Applicant to provide appropriate public notice; establishing deadlines for the filing of petitions to intervene, intervenor testimony, and rebuttal testimony; and requiring the parties to comply with certain discovery deadlines.

On February 16, 2018, the Applicant filed the direct testimony of April Montgomery.

On March 8, 2018, the Public Staff filed the supplemental testimony of Evan D. Lawrence, an engineer with the Electric Division of the Public Staff.

On March 9, 2018, the Applicant filed an affidavit of publication prepared by an employee of The Washington Daily News, stating that the Applicant had caused publication of the notice as required by the Commission's February 7, 2018 Order.

Also on March 9, 2018, Marshall and Joann Lilley, Kristina Beasley, and Deb Van Staalduinen filed petitions to intervene, pro se.

On March 15, 2018, the Commission issued an Order denying the petitions to intervene of Marshall and Joann Lilley and of Kristina Beasley, and granting the petition to intervene of Deb Van Staalduinen on the condition that she file a verification to supplement to her petition to intervene on or before March 19, 2018, the date of the hearing scheduled for the purpose of receiving public witness testimony.[1]

On March 16, 2018, the Commission issued an Order rescheduling the hearing scheduled for the purpose of receiving testimony from the parties and their witnesses from March 21, 2018, to April 11, 2018.

On March 19, 2018, the Commission conducted the public witness hearing at the Beaufort County Courthouse in Washington, North Carolina, as provided for in the Commission's February 7 Order, for the purpose of receiving testimony from public witness. Sixteen public witnesses testified at the hearing: William Wescott, Herbert Eckerlin, Bradley Van Staalduinen, Myra Beasley, Kristina Beasley, Carl Van Staalduinen, Jeanne Van Staalduinen, Deb Van Staalduinen,[2] and Brenda Forrest. The

[1] The Commission's practice is to reserve time at a public witness hearing for testimony by members of the public, and to afford parties and their witnesses the opportunity to testify at the expert witness hearing held for the purpose of receiving party and expert witness testimony. The requirement to file the verification was intended to resolve Ms. Van Staalduinen's status as either a member of the public or a party to this proceeding prior to the beginning of the public witness hearing. The Commission generally does not permit a party to testify at both the public witness hearing and expert witness hearing.

[2] Deb Van Staalduinen, whose participation as a party was conditionally granted pursuant to the Commission's March 15 Order, appeared at the hearing and confirmed that she did not file the verification required by that Order as a required condition of being granted intervention, and that she wished to withdraw her petition to intervene. Ms. Van Staalduinen made it clear on the record that she did not want to be the lone intervening party and that she understood that she was being allowed to testify as a member of the public because she was not a party to this proceeding. Therefore, the Presiding Commissioner allowed the

concerns expressed by the public witnesses primarily related to (1) compliance with the environmental laws for protection of wetlands and surface waters; (2) the proximity of the Applicant's proposed facility to load served by Dominion; (3) water contamination from the solar panels that make up the Applicant's proposed facility; (4) the potential impact to public health from siting the proposed facility; (5) the potential loss of productive farmland due to the siting of the Applicant's proposed facility; (6) the proposed facility's ability to withstand extreme weather events such as hurricanes, tornadoes, and floods; (7) the potential impact to wildlife from the siting of the Applicant's proposed facility; and (8) the potential impact on the value of properties located near the site of the Applicant's proposed facility. One public witness expressed support for granting the amended certificate.

On March 26, 2018, Deb Van Staalduinen, now represented by counsel, filed a second petition to intervene. Also on March 26, 2018, Marshall and Joann Lilley, now represented by the same attorney as Ms. Van Staalduinen, filed a motion for reconsideration of the denial of their petition to intervene.

On April 5, 2018, the Applicant filed the supplemental testimony of Joe Von Wahlde, Paul Thienpont, and John Barefoot.

On April 6, 2018, the Commission ruled on the March 26 petitions to intervene and issued an Order allowing Deb Van Staalduinen and Marshall and Joann Lilley to intervene in this proceeding.

Also on April 6, 2018, Ms. Van Staalduinen and the Lilley (collectively, Intervenors) filed a motion requesting that the Commission enter a ruling on their pending petitions to intervene and requesting that the Commission continue the hearing scheduled for April 11, 2018, to a later date. On the same day, the Commission issued an Order denying the Intervenors' request to continue the hearing and determining that the request for a ruling on the pending petitions was rendered moot by the Commission’s Order of the same day.

On April 11, 2018, the Commission resumed the hearing, as scheduled, for the purpose of receiving expert witness testimony of the parties.

On May 21, 2018, the Applicant and the Intervenors filed proposed orders and briefs.

withdrawal of Ms. Van Stallduinen’s petition to intervene and ruled that Ms. Van Staalduinen's participation at the hearing was as a member of the public, making her eligible to give testimony as a public witness.

Based upon the foregoing, including the testimony presented at the hearing and the entire record in this proceeding, the Commission makes the following:

FINDINGS OF FACT

1. By Order issued in this docket on October 11, 2017, the Commission issued the Applicant a CPCN pursuant to N.C.G.S. § 62-110.1 for construction of a 74-MW_{AC} solar PV electric generating facility to be located in Beaufort County, North Carolina, on the south side of Terra Ceia Road, between Vreugdenhil Road and Christian School Road, and the north side of Terra Ceia Road, east of Christian School Road, subject to the following conditions: (a) until Wilkinson Solar LLC has obtained all necessary easement(s) to connect the arrays, the CPCN should be effective only with respect to the portion of the facility proposed to be located north of Terra Ceia Road, and Wilkinson Solar LLC shall file a letter with the Commission verifying that legal control has been obtained before beginning construction on the portion of the proposed facility to be located south of Terra Ceia Road; (b) Wilkinson Solar LLC will construct and operate the generating facility in strict accordance with applicable laws and regulations, including any local zoning and environmental permitting requirements; (c) Wilkinson Solar LLC will not assert that the issuance of the certificate in any way constitutes authority to exercise any power of eminent domain, and will abstain from attempting to exercise such power; and (d) the certificate is subject to Commission Rule R8-63 and all orders, rules, regulations and conditions as are now or may hereafter be lawfully made by the Commission.

2. The Applicant properly filed with the Commission an application to amend the CPCN previously issued to the Applicant to reflect a change in the site layout of the Applicant's proposed facility. The application to amend the CPCN stated that the location of the proposed solar PV panels on the Respess property north of Terra Ceia Road had been removed from the layout of the proposed facility, and that the footprint of the proposed facility had been expanded to the south to incorporate additional land south of Terra Ceia Road. The application to amend the CPCN further stated that the revised location description of the proposed facility is as follows: the proposed facility will be located in Beaufort County, south of Terra Ceia Road, east and west of Christian School Road, and south of Vreugdenhil Road, with a portion on the north side of Terra Ceia Road, on the west side of Gaylord Road. Other than the change in the layout of the site of the proposed facility, all other aspects of the Applicant’s proposed facility are the same as presented in the Applicant’s original application for a CPCN.

3. The Applicant failed to demonstrate that its requested amendment to the CPCN previously issued is consistent with the public convenience where the Applicant failed to demonstrate by competent, material, and substantial evidence that the applicable environmental and public health regulations or the local zoning ordinance require measures that mitigate or eliminate the concerns expressed by the public witnesses regarding the potential for increased storm water runoff from the facility site, and the uncertainties related to contamination to surface or ground waters from the limited quantities of heavy metals contained in the solar PV panels that are components of the proposed facility.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

This finding of fact is essentially informational, procedural, and jurisdictional in nature, and is not in dispute. The evidence supporting this finding is found in the original application, in the application to amend the CPCN previously issued to the Applicant, and in the testimony of the Applicant's witnesses Montgomery and Schultz, and the Public Staff's witness Lawrence. This evidence is also found in the records of the Commission in this docket, and is summarized in the Commission's Order issued in this proceeding on October 11, 2017.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

This finding of fact is essentially informational, procedural, and jurisdictional in nature, and is not in dispute. The evidence supporting this finding is found in the verified letters filed by the Applicant in this docket on October 9, 2017, and on November 29, 2017, and in the testimony of the Applicant's witness Montgomery.

In the Applicant's verified letters filed in this docket on October 9, 2017, and on November 29, 2017, the Applicant stated that it is seeking to amend its application for a CPCN to reflect a change in the site layout. The Applicant proposed the following changes to the proposed facility and the proposed site layout for the facility that was included in the original application for a CPCN: (1) removal of the solar panels that were to be located on the Respess parcel; (2) location of the proposed substation and the proposed battery storage facilities on a southwestern portion of the proposed site of the facility not adjacent to Terra Ceia Road; and (3) expansion of the footprint of the proposed facility to incorporate additional land south of Terra Ceia Road. Reflecting the change in the proposed site layout, the Applicant provided the following revised location description for the proposed facility: the facility is located in Beaufort County south of Terra Ceia Road, east and west of Christian School Road, and south of Vreugdenhil Road, with a portion on the north side of Terra Ceia Road, on the west side of Gaylord Road. Included with the Applicant's verified letters were revised site maps demonstrating the original and revised site layouts for the proposed facility.

The Applicant's witness Montgomery testified that the Applicant's October 9, 2017 letter was filed to update the proposed site layout as part of the agreement with Intervenor David Butcher and the following interested persons (who are not parties to this proceeding): the Terra Ceia Christian School, Gertrude Respess, Harlene Van Staalduinen, and Stuart Ricks. Witness Montgomery further testified that, in accord with the agreement, the updated proposed site layout removed solar panels from approximately 200 acres of property located behind the Terra Ceia Christian School and the residence of Mr. Butcher, and Mr. Butcher withdrew his objection to the project.

Witness Montgomery also testified that, after the Commission issued the CPCN for the construction of the facility, the Applicant secured approximately 165 acres on which it now intends to install solar PV panels to and which would be substituted for the parcels removed from the proposed site pursuant to the agreement with Mr. Butcher and

the other interested persons. She further testified that, consistent with the verified letters filed in this docket, this additional acreage is south of Terra Ceia Road and does not abut the Terra Ceia Christian School or Mr. Butcher's property, both of which are located north of Terra Ceia Road.

The Public Staff's witness Lawrence testified in response to the Applicant's application to amend the CPCN previously issued in this proceeding. He testified that the purpose of the Applicant's application to amend the CPCN is to incorporate additional land to the south of Terra Ceia Road into the footprint of the facility. He further testified that this additional land was not included in the original application that was the basis for the CPCN issued to the Applicant on October 11, 2017. In addition, he testified that the removal of land from the proposed site of the facility on the north of Terra Ceia Road and the substitution of land to the south of Terra Ceia Road would result in the generating capacity of the facility remaining at 74 MW_{AC}. Based upon his review of the application to amend the CPCN, witness Lawrence recommended that that the Commission grant the Applicant's request to amend the CPCN.

Examination of the Applicant's application to amend the CPCN and the testimony of the Applicant's witnesses Montgomery and the Public Staff's witness Lawrence confirms that the Applicant has complied with the filing requirements to apply for an amendment to the CPCN previously issued to the Applicant for the construction of a 74-MW_{AC} solar PV merchant plant electric generating facility in Beaufort County, North Carolina. No party asserted that the application failed to include the information required by the Commission's rules, or that the filing was procedurally deficient in any manner. The uncontroverted evidence establishes that only the proposed layout of the site of the facility will change under Applicant's application to amend the CPCN. Therefore, consistent with the Commission's findings in its October 11, 2017 Order, the Commission finds that the Applicant has demonstrated that the application to amend the Applicant's CPCN was properly filed as required by N.C.G.S. § 62-110.1 and the relevant Commission rules, and that the Applicant has appropriately described the requested changes to the Applicant's CPCN.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NO. 3

The evidence supporting this finding of fact is found in the Applicant's original application and the application to amend the CPCN previously issued to the Applicant; the testimony of the public witnesses, the testimony and exhibits of the Applicant's witnesses Montgomery, von Wahlde, Thienpont, and Barefoot; and the supplemental testimony of Public Staff witness Lawrence.

The burden of proof is upon the Applicant to show that the public convenience and necessity requires, or will require, the construction of the Applicant's proposed electric generating facility. N.C. Gen. Stat. §§ 62-75; 62-110.1(a); State ex. rel. Utils. Com. v. Carolina Tel. & Tel. Co., 267 N.C. 257, 273 (1966). In this proceeding on the Applicant's request to amend the CPCN previously granted, the issue in controversy is whether the proposed addition of 165 acres on the south side of Terra Ceia Road for the purpose of

constructing the proposed electric generating facility is consistent with the public convenience. Determining whether the construction of a proposed electric generating facility is consistent with the public convenience is essentially a factual inquiry, to be made in light of the policies of the State as set out in N.C.G.S. § 62-2. State ex. rel. Utils. Com. v. Empire Power Co., 112 N.C. App. 265, 274 (1992). There is a substantial public purpose in the licensing of power generating facilities, including those sought to be constructed as merchant power plants, as the Applicant has proposed in this proceeding. Id. at 275. The Commission's findings, inferences, conclusions, or decisions must be supported by competent, material, and substantial evidence in view of the entire record. N.C. Gen. Stat. § 62-94(b).

Much of the testimony presented by the witnesses testifying at the public hearing in Washington, North Carolina, expressed concerns about (1) water runoff from the proposed site of the facility having an impact on adjoining or nearby properties, or on wetlands and surface waters near to the proposed site, (2) water contamination resulting from leachate from the proposed facility's solar PV panels, and (3) the potential impact to public health from the siting of the proposed facility. One public witness, who is party to a lease agreement for a portion of the facility site, expressed support for the issuance of the amended certificate.

The Applicant's witness Montgomery testified in response to the public witnesses concerns related to the potential environmental impact of the facility and to the siting of the facility. Witness Montgomery testified that any potential environmental impacts will be addressed through environmental permitting, and that the siting of the facility is a local land use matter. She further testified that the Applicant has obtained or will obtain all required local, state, and federal approvals, such as stormwater permits and soil erosion and control approvals. In addition, she testified that the Applicant will obtain from Beaufort County all other permits required to construct the facility. In her testimony, witness Montgomery cites to the Commission's October 11, 2017 Order, where the Commission concluded that the issues she addressed through her testimony are best left to agencies with expertise and regulatory authority in the areas of environmental and natural resource protection and public health and safety, and through the local zoning process. Tr. Vol. 5, p. 111. She did not testify to the measures that are required by environmental or local permitting, nor did she address how these measures mitigate or eliminate the concerns expressed by the public witnesses.

The Commission understands that witness Montgomery is relying on the Commission's historical approach exemplified by the Commission's April 24, 2008 Order in Docket No. SP-231, Sub 0. However, a witness reciting to the Commission its own historical approach does not provide competent, material, and substantial evidence sufficient to demonstrate that the public witnesses' concerns have been fully addressed or even partially mitigated. For example, witness Montgomery testified that "any potential environmental impacts will be addressed through environmental permitting," Tr. Vol. 5, at p. 111, without providing the Commission with any detail about how the requirements of environmental permitting address or mitigate the concern for water runoff from the site of the proposed facility. Therefore, the Commission determines that, where the record fails

to demonstrate what measures are required by the applicable environmental regulations and permits, or how these measures tend to address or mitigate the public witnesses' concerns, the Applicant has failed to meet its burden of coming forward with competent, material, and substantial evidence sufficient to demonstrate that its requested amendment to the CPCN previously issued is consistent with, or required by, the public convenience.

In response to the concerns raised by the public witnesses related to protection of surface waters, the Applicant's witness Joe von Wahlde testified regarding the jurisdictional wetlands delineation performed on the site of the proposed facility. He testified that a delineation methodology specific to the site of the proposed facility was agreed to by the United States Army Corps of Engineers, and that the wetlands delineations were performed in accordance with that methodology. He further testified that on December 6-8, 2017, a second wetlands delineation was performed on the additional acreage that is the subject of the requested amendment to the CPCN. In addition, he testified that the wetlands delineations of the approximately 900 acres identified "minimal jurisdictional areas" within the site of the proposed facility, and that the wetlands delineation report was provided to the Applicant's parent company. He also testified that the only natural waterway identified during the wetlands delineation was the Broad Creek Canal, located offsite to the southeast, and that the facility is sited in compliance with the Tar-Pamlico Buffer Rules. Finally, he testified that the Applicant had participated in discussions with the U.S. Fish and Wildlife Service regarding the wildlife habitat that was identified on the property in respect. On cross-examination, witness von Wahdle testified that the Applicant had not verified its jurisdictional delineation with the North Carolina Department of Environmental Quality (DEQ), nor with the Army Corps of Engineers. He further testified that sending the report to DEQ or the Army Corps of Engineers is "encouraged, but … not mandatory" at this stage in the development of the proposed facility because the presence of jurisdictional areas was "minimal" for the proposed facility. On cross-examination, witness von Wahlde also testified that there are drainage ditches, which he described as "straight channelized ditches," that were likely manmade features added to the site of the proposed facility many years prior to support crop production.

The Applicant's witness Barefoot also testified in response to concerns expressed by the public witnesses related to stormwater runoff from the site of the proposed facility. He first testified that he has been to Beaufort County, has walked the site of the proposed facility, and is well acquainted with the layout of the proposed facility, including the additional parcels proposed to be added to the site in the Applicant's request to amend the CPCN. He further testified that his firm, Kimley-Horn, prepared a preliminary review of stormwater requirements and anticipated stormwater management design for the proposed facility. He testified that he prepared a memorandum to the Applicant based on his review, in which he concluded that the facility's impact to existing drainage patterns and flows would be negligible, or, more likely, would result in a reduction in runoff from the site. He testified that this conclusion was equally applicable to the additional land added to the facility in the layout amendment. Despite reaching this ultimate conclusion, witness Barefoot also testified that he did not include the additional parcels that are the

subject of the requested amendment to the CPCN in his preliminary review. Instead, he testified that he didn't need to revisit the site to conduct further review of the additional parcels because he had seen the additional parcels and these parcels are similar in nature to the site of the facility as proposed in the original application for CPCN. On cross-examination, he testified that he was unaware that there are drainage districts in Beaufort County to which landowners finically contribute for the maintenance of ditches. In addition, he testified that mowing is the only maintenance necessary for the drainage ditches to keep "the grass from becoming too high in the ditch." Finally, he testified that although he does not see the ditches filling up with sediment as a "major concern," he acknowledged that there is a potential for flooding in the area, and that a "significant" event could remove vegetation that stabilizes ditches in the area, causing the ditches to fill with sediment and cease to be effective at removing water from the site of the proposed facility.

The public witnesses testified that the ditches on the proposed site of the facility carry water runoff from the proposed facility site to nearby streams. This testimony is supported by the public witnesses' opinions and inferences that the water runoff from the proposed site is likely to reach nearby streams by way of the existing ditches on or near the site. This public witness testimony is further supported by the public witnesses' personal experience in maintaining ditches in the area of the proposed site of the facility, and in participating in the communal maintenance of ditches through the drainage districts in Beaufort County. The Commission finds this testimony highly persuasive, as it is based upon the personal experience of the witnesses testifying.

On the other hand, the testimony of the Applicant's witnesses von Wahdle is significantly less persuasive. Witness von Wahdle's testimony failed to respond to these concerns in any material way. He testified that there are no waters that are subject to regulations, and ignored the public witnesses' concern that ditches on and adjacent to the proposed site of the facility will convey water from the facility site to other more permanent and environmentally sensitive waters. The Commission acknowledges that these surface waters may not be of sufficient size or permanence to meet the jurisdictional threshold for certain regulations; however, this alone is insufficient to demonstrate that the public witnesses' concerns are unfounded, or will be sufficiently mitigated or eliminated through measures required by environmental regulations.

Witness Barefoot's testimony is also unpersuasive for several reasons. First, the Commission is not persuaded that it was appropriate for witness Barefoot to extend the conclusions of his preliminary review of stormwater requirements and stormwater management design (which did not include the parcels that are the subject of the requested amendment to the CPCN and which was conducted at a time before the additional parcels were proposed to be made a part of the facility site) to the additional parcels that are the subject of the requested amendment without actually visiting the site a second time. Second, witness Barefoot's unawareness of the communal arrangement for the maintenance of ditches, through public drainage districts in Beaufort County, demonstrates a general unfamiliarity with the Terra Ceia community and its common provision for ditch maintenance that the Applicant might benefit from and be asked to

contribute toward. Third, witness Barefoot's ultimate conclusions that runoff from the site of the proposed facility would not increase as a result of the siting of the facility is undermined by his own testimony that a "significant" event could cause the failure of the ditches on and near the site of the proposed facility. Fourth, witness Barefoot's view that only mowing is required to maintain the functionality of drainage ditches is contradicted by the more persuasive testimony of the public witnesses based on their personal experience that drainage ditches require annual maintenance to prevent the ditches from filling with sediment and ceasing to perform the function of conveying water. The Commission, therefore, finds witness Barefoot's testimony unpersuasive.

The Commission determines that, where the Applicant failed to produce evidence sufficient to address the public witnesses' concern regarding water runoff from the proposed site of the facility, there is insufficient competent, material and substantial evidence to demonstrate the required showing that the construction of the facility is consistent with the public convenience. Therefore, the Commission concludes that there is insufficient evidence to grant the requested amendment to the CPCN on this basis.

The Applicant's witness Paul Thienpont testified in response to concerns related to the potential for water contamination and impacts to the public health from the siting of the proposed facility. He first addressed the concerns that the solar PV panels that will be a part of the facility will contain Gen-X, perfluorinated alkylated substances (PFAS), and heavy metals. He testified that Gen-X and PFAS are man-made chemicals that are used in certain manufacturing processes, but neither Gen-X nor PFAS is used in the production of any components that make up the solar PV panels that will be used in the Applicant's proposed facility. In support of his testimony, he submitted a memorandum from JinkoSolar, the manufacturer of the panels, which he testified confirms that these chemicals are not present in the solar panels. He further testified that the solar PV panels planned for use in the Applicant's proposed facility pass the U.S. Environmental Protection Agency's Toxicity Characteristic Leaching Procedure (TCLP) test, and that this test classifies the solar PV panels as non-hazardous waste, which allows for disposal in landfills. On cross-examination, witness Thienpont testified that solar PV panels are nonhazardous waste and permitted to be disposed of in landfills, and that solar PV panels contain "very limited quantities" of heavy metals and, thus, are compliant with the "RoHS standard"[3] and the TCLP test procedures. He testified that he was unable to answer questions about whether the residents of Terra Ceia get their drinking water from public sources or from private wells, nor could he offer an opinion as to what would be a safe distance from a landfill that contains solar PV panels to drill a well for drinking water. In addition, witness Thienpont testified that he was unaware of a 2014 report that JinkoSolar must face a shareholder lawsuit over violations of Chinese environmental regulations, which report was submitted as Thienpont Intervenor Cross Exhibit 1. He also testified that

[3] Witness Thienpont further testified that the Restriction of Hazardous Substances (ROHS) test is an international standard used to categorize the existence of heavy metals within various types of equipment. Tr. Vol. 5, p. 65-66.

the testing he relied upon in his testimony (the RoHS and TCLP tests) were conducted by a third-party testing laboratory and not JinkoSolar.

The public witnesses raised concerns about the chemicals contained in the solar PV panels that will be components of the Applicant's proposed facility. Although the public witnesses particularly identified chemical compounds (Gen-X and PFAS) that are not used in the production of solar PV panels, the Applicant's witness Thienpont acknowledged the presence of heavy metals in solar PV panels, consistent with the concerns of the public witnesses. However, witness Thienpont was unable to fully respond to questions related to chemicals used in the manufacturing or construction process for solar PV panels, undermining the persuasiveness of his testimony. The persuasiveness of witness Thienpont's testimony is undermined by his being unaware of JinkoSolar having been accused of large scale environmental violations in China and having faced a shareholder lawsuit in the United States as a result. Finally, that the solar PV panels contain "very limited quantities" of heavy metals, without more, does little to mitigate the concerns of the public witnesses about the cumulative effect of the presence of heavy metals where the proposed facility will contain 288,120 PV modules.[4] The Commission's understanding is that the public witnesses' concerns focused on the cumulative impact of what may be "very limited quantities" of heavy metals that are present in each of the solar PV panels that are components of the proposed facility. These concerns are supported by the fact that there are limited quantities of heavy metals in the solar PV modules that would be placed on the site that is the subject of the requested amendment to the CPCN.

The Commission expects that the expert witnesses appearing on behalf of the developer of a solar PV project to have knowledge of the industry in general, and, in particular, of the business dealings of its vendors, and to address the concerns of the public witnesses through his or her testimony. The Applicant's witness Thienpont lacked the credibility expected of an expert witness in both these regards, and, thus, the Commission finds his testimony unpersuasive. The Commission determines that the Applicant has failed to meet its burden of presenting sufficient competent, material, and substantial evidence addressing the uncertainties expressed by the public witnesses about limited quantities of heavy metals in the solar PV panels that will make up the proposed facility. The Commission, therefore, concludes that there is insufficient evidence to grant the requested amendment to the CPCN previously issued to the Applicant on this basis.

Finally, the Commission finds good cause to make clear that this Order does not depart from the Commission's traditional approach of deferring to local zoning authorities or regulatory agencies with expertise and authority in the areas of environmental and natural resource protection, and of protection of the public health. Nor does this Order

[4] See Application for a Certificate of Public Convenience and Necessity for a Merchant Plant, Ex. 2, NCUC Docket No. EMP-93, Sub 0 (filed Mar. 13, 2017).

preempt local zoning authority. As stated in the Commission's April 24, 2008 Order in Docket No. SP-231, Sub 0:

> [S]uch decisions are, in most instances, best left to the local community through the exercise of its zoning authority rather than made by the Commission. Local governing bodies are, generally speaking, in a better position than the Commission to make local land use planning decisions (so long as those decisions do not operate to thwart controlling State policy).

Thus, where, as in this case, the relevant local jurisdiction has adopted an ordinance addressing the appropriateness of siting a solar PV facility, the Commission generally will not substitute its judgment for that of the local jurisdiction. However, as with the testimony related to compliance with the environmental laws, in this case the Applicant's witnesses have merely recited this authority back to the Commission without demonstrating how compliance with the local zoning ordinance addresses, mitigates, or eliminates the concerns expressed by the public witnesses. Nor have the Applicant's witnesses demonstrated what measures are required by the local zoning ordinance that address, mitigate, or eliminate the concerns expressed by the public witnesses. This is insufficient to meet the Applicant's burden of demonstrating that the construction of the proposed facility is consistent with, or required by, the public convenience.[5]

Based upon the foregoing and the entire record herein, the Commission finds that the Applicant failed to demonstrate that its requested amendment to the CPCN previously issued is consistent with, or required by, the public convenience where the Applicant failed to demonstrate by competent, substantial, and material evidence that it had sufficiently addressed the public witnesses' concerns regarding the potential for water runoff from the proposed site of the facility, or the cumulative effect of the potential for contamination to surface or ground waters from heavy metals used in the construction of

[5] The Commission contrasts the Applicant's shortcoming on these points with the testimony presented in the proceeding on the original application for CPCN. For example, in that proceeding, the Applicant's witness Thienpont demonstrated that the building code requires wind load testing at a level that corresponds with the North Carolina Wind Zone Map, and that this testing informs the engineering of the site to assess pile sizing, spacing, and embedment depth to ensure that the system can structurally withstand the wind loads associated with the design criteria wind speeds, including the tracking motors and the module clips and mounting brackets. See Tr. Vol. 2, p. 84. This, as the Commission previously found, is sufficient competent, material, and substantial evidence to demonstrate that the measures required by the building code address, mitigate, and, perhaps, eliminate the concerns for flying debris that were expressed by the public witnesses. See Order Granting Certificate of Public Convenience and Necessity, at 12-13, NCUC Docket No. EMP-93, Sub 0 (2017). In addition, in that proceeding, the parties other than the Public Staff had reached a settlement, arguably making that proceeding uncontested.

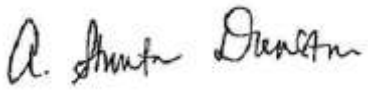
the solar PV panels. Therefore, the Commission concludes that the requested amendment to the CPCN issued to the Applicant on October 11, 2017, for the construction of a 74-MW_{AC} solar PV merchant plant electric generating facility to be located in Beaufort County, North Carolina, should be denied.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 1st day of November, 2018.

NORTH CAROLINA UTILITIES COMMISSION



A. Shonta Dunston, Acting Deputy Clerk

Commissioner ToNola D. Brown-Bland, dissenting.

The panel majority's decision departs from and is contrary to the Commission's long-standing consistent approach in deciding numerous and virtually indistinguishable applications to amend certificates of public convenience and necessity for the construction of electric generating facilities under N.C.G.S. § 62-110.1 and Commission Rule R8-63. In my view, this departure, combined with the fact that today's decision is both unsupported by and contrary to competent and substantial evidence of record, yields an arbitrary result. In addition, the decision of the panel majority deprives at least one property owner, who was not a party to this proceeding, of his right to the free use and enjoyment of his real property, subject to reasonable regulation, pursuant to a lease agreement he executed with the Applicant.

Furthermore, it is extremely troubling that the majority's decision is patently contrary to two recent decisions of the North Carolina Court of Appeals. See Innovative 55, LLC v. Robeson Cty., ___ N.C. App. ___, 801 S.E.2d 671 (2017) and Ecoplexus, Inc. v. Cty. of Currituck, ___ N.C. App. ___, 809 S.E.2d 148 (2017). These cases stand for the principle that a quasi-judicial body's denial of a requested permit or certificate must be based upon findings of fact which are supported by competent, material, and substantial evidence appearing in the record. Innovative 55, LLC at 677, citing Howard v. City of Kinston, 148 N.C. App. 238, 246 (2002) (emphasis in original). Further, the denial of a permit or certificate "may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use." Howard at 246, citing Woodhouse v. Board of Commissioners, 299 N.C. 211, 220, 261 S.E.2d 882, 888 (1980). Because the Applicant in this proceeding produced and introduced into the record sufficient competent, material, and substantial evidence to demonstrate that its application to amend its CPCN is justified by the public convenience and necessity, and because the majority's decision to deny the requested amendment, contrary to the holding in Howard, is based solely upon unsubstantiated speculation and generalized fears about the possibility of certain consequences that could result from the construction of this solar facility, I respectfully dissent.

I. The demonstrated need for the facility in the State or region has not changed since the original application for the CPCN was filed.

As the majority's opinion acknowledges implicitly by justifying its decision solely based on the public convenience prong of the two-part standard used to review applications for CPCNs, the relevant aspects of the proposed facility as they pertain to a showing of need have not changed since the Commission issued its October 11, 2017 Order finding, in relevant part, that the Applicant demonstrated the need for the facility based on (1) the public benefits of solar-powered electric generation, (2) state and federal law and programs promoting the development of renewable energy resources and merchant power plants, and (3) the Applicant's having demonstrated that Dominion and the PJM Interconnection show a need for the electric output from the facility over the next 15 years, based upon projected load growth and requirements for procurement of

renewable energy in Dominion's North Carolina service territory and in the PJM Interconnection region.

Applicant witness Montgomery[1] testified that, other than the substitution of the new acreage as proposed in the site layout amendment, all aspects of the proposed facility remain the same as presented in the Applicant's original application, including the facility's generating capacity (74 MW_{AC}), panel technology, and construction plans. Tr. Vol. 5, p. 109. She testified that the changes in the site layout resulting from the substitution of new acreage did not change or impact the previously demonstrated need for the facility. Although not specifically mentioned in witness Montgomery's testimony, the Applicant's verified filing of November 29, 2017, demonstrates that the Applicant's change in plan to move the substation and the battery storage facility to the western edge of the proposed site, adjacent to Terra Ceia Road and in close proximity to the new, proposed point of interconnection with Dominion, has no bearing or effect on the evidence upon which the Commission made its determination of need in the initial CPCN proceeding.

Public Staff witness Lawrence's[2] testimony also supports a finding that the changes which required the Applicant to seek an amendment of its CPCN did not alter or otherwise impact the necessity for the output of the electric power to be generated by the facility, which the Commission previously found was established by competent and sufficient evidence as part of the initial proceeding. Witness Lawrence testified that, based on his review of the application to amend the CPCN, the testimony filed in this proceeding, the comments provided by the State Clearinghouse, and responses to discovery requests, the Applicant's request to amend the CPCN should be granted. I note that the State Clearinghouse comments reviewed by witness Lawrence raised no concerns or objections to the issuance of an amended CPCN.

At the evidentiary hearing held in this proceeding on April 11, 2018, counsel for the Applicant stated during his opening that "the only question in this proceeding is whether to amend the existing CPCN to add [165 additional acres to the site of the proposed solar facility]," and that the need-related aspects were no different than they were at the time of the Commission's October 11, 2017 Order preceding the Applicant's request to amend its CPCN. Tr. Vol. 5, p. 21. Later, Intervenors' counsel confirmed this to be the case through the following colloquy:

---

[1] As described on page 2 of her prefiled direct testimony of March 13, 2017, witness Montgomery has "over nine years of experience in the renewable energy and sustainable development fields...," working "since 2010 on the development of multiple wind and solar energy projects throughout North Carolina and the southeast more generally," including specifically as it relates to "assisting private and public sector clients complete local, state and federal land use and environmental permitting protocols."

[2] Witness Lawrence is an engineer in the Electric Division of the Public Staff, representing the using and consuming public. He has a degree in engineering, with a concentration in electrical engineering, and has worked with the Public Staff since September 2016 reviewing applications for renewable energy projects, as well as interconnection standards.

> Commissioner Brown-Bland: And, just to be clear, I believe we were all in agreement in the pretrial discussion that the need is not an issue for today.
>
> Mr. Allen (counsel for Intervenors): Yes that is not an issue in terms of today, especially in regards that they've said that all aspects of the facility are the same as they were in the previous case. In terms of the specific land there is an issue there.[3]

Id. at p. 24.

Accordingly, the evidence in the record and the admission of the Intervenors, made through their counsel during the evidentiary hearing, support a finding that all aspects of the proposed facility that affect the required demonstration of need for the power to be generated by the facility have not changed since the Commission issued its October 11, 2017 Order. Further, that Order was not appealed, and the same evidence that supported the Commission's initial finding of necessity, in addition to additional testimony received in support of the request to amend Applicant's CPCN, is competent, material, and substantial, thus meeting the necessity requirement of N.C.G.S. § 62-110.1. The only change that required the Applicant to file an application for amendment of its CPCN was the addition of 165 acres to the facility site to replace the portion of the site north of Terra Ceia Road, which was removed pursuant to an agreement entered into with Mr. Butcher and other interested non-parties, over whom the Commission does not have jurisdiction in this proceeding.[4] The record in this proceeding is replete with evidence establishing

[3] The "specific land issue" became clearer in the Intervenors' proposed order when counsel attempted to make new law by arguing that the Applicant was required to prove that use of the specific additional land proposed as part of its facility was required to meet the public convenience and necessity standard set forth in N.C.G.S. § 62-110.1, and that the Applicant had failed to produce any evidence of the same. Neither this Commission nor the appellate courts of this State have accepted the Intervenors' interpretation that the necessity prong of N.C.G.S. § 62-110.1 requires a showing of the need for additional land proposed to be added to a facility site; instead, the necessity prong requires only that there be a showing of sufficient need for the power to be generated by the facility. Necessity, as used in N.C.G.S. § 62-110.1, focuses on the need for the electric output of the facility. For example, the Court of Appeals has noted that before issuing a CPCN, the Commission must establish a public need for the proposed generating facility. State ex rel. Utils. Comm'n v. Empire Power, 112 N.C. App. 265, 279-280, 435 S.E.2d 553, 561 (1994), citing In re Duke Power Co., 37 N.C. App. 138, 245 S.E.2d 787 disc. review denied, 295 N.C. 646, 248 S.E.2d 257 (1978); State ex. rel. Utils. Comm'n v. High Rock Lake Ass'n., 37 N.C. App. 138, 141-142, 245 S.E.2d 787, 791 (1978) (there was ample evidence of necessity and the Commission "[made] adequate findings that [the facility] was needed in the sense that its output was required to meet the projected growth in the area"). Clearly, necessity in the context of N.C.G.S. § 62-110.1 does not concern establishing that specific property is necessary for use in the facility or its construction, and this Commissioner is unaware of any Commission Order or case law holding otherwise.

[4] Having heard from a number of public witnesses on May 17, 2017, prior to issuing its October 11, 2017 Order granting a CPCN to the Applicant, the Commission encouraged the Applicant, Mr. Butcher, and everyone else attending and testifying at the public hearing to come together with others whose interests were implicated but who were not party to the proceedings and attempt to negotiate a resolution the opposing parties could accept in an effort to recognize and preserve Tera Ceia Christian School. According to the witnesses, the school is the heart of their community, and they and their ancestors have made many

that the Applicant needed to substitute the additional acreage in order to accommodate the solar panels required to construct its already-certificated 74-MW_{AC} solar PV electric generating facility.[5] This change does not negate or otherwise adversely impact the Commission's prior need determination and in no way minimizes or calls into question the weight of the substantial evidence and expert testimony of record regarding necessity.

Furthermore, neither the Intervenors nor the public witnesses presented any competent evidence contradicting the Applicant's testimony regarding the need for the power to be generated by the facility.[6] At the public hearing on March 19, 2018, one witness offered opinion testimony regarding the need for the facility. Tr. Vol. 4, p. 52. This testimony was received as lay witness testimony, with none of the public witnesses having been qualified to present expert testimony regarding any of the issues in this proceeding. The Applicant and the Public Staff, on the other hand, presented testimony tending to support issuance of the amended CPCN and offered expert testimony by individuals with educational and professional experience relevant to these type of CPCN matters pertaining to generating facilities.

Another public witness testified that the location of the Applicant's proposed facility in rural Beaufort County was inappropriate because the facility would be located miles away from a load center. This witness testified that the facility would experience significant transmission line losses because the power generated at the facility would be transmitted long distances to serve load outside of Beaufort County and, potentially, outside the State. This testimony was directed at the question of need for the electric output of the facility, based on the witness' view that the electric power generated at the

---

sacrifices over the school's more than 80-year existence to establish and maintain the school. The witnesses were very displeased at the thought of their school being completely surrounded by solar panels and feared, among other things, the future of the school might be threatened if parents would not enroll new students due to the sight of solar panels so near the school. Aware that the local Beaufort County Board of Commissioners had approved the facility pursuant to its zoning ordinance and aware of the manner in which the Commission, prior to today's departure, had consistently applied N.C.G.S. § 62-110.1, the panel advised the Applicant and the community several times to find their own mutually-agreeable solution, which the panel believed would likely be more satisfying to a larger number of interested persons than any decision that the Commission could make. See Tr. Vol. 1, pp. 64-65; Tr. Vol. 3, pp. 81-83; Order Requiring Additional Post-Hearing Filings (Aug. 3, 2017).

[5] On October 9, 2017, the Applicant filed a letter stating, in part, that "the Amended Layout still accommodates the 74-MW_{AC} capacity contemplated in the Application." On November 29, 2017, the Applicant filed a letter stating, in part, that "to compensate for the removal of these panels [proposed to be located north of Terra Ceia Road], the footprint of the proposed facility has expanded to the south and will incorporate additional land south of Terra Ceia Road." Applicant witness Montgomery testified that the Applicant secured "approximately 165 additional acres on which it intends to install panels to substitute for the panels removed pursuant to the above-referenced agreement [with Mr. Butcher]." Tr. Vol. 5, p. 109.

[6] As previously noted, the Intervenors, through their counsel, confirmed that they did not contest the issue of necessity for the electric power output to be generated by the facility. Although there was a line of questioning that related to the issue of need, Intervenors' counsel confirmed that the questions were not asked for the purpose of eliciting testimony to dispute the issue of need, which he had previously stated was not an issue contested by the Intervenors. See Id. at pp. 119-123.

Applicant's facility may not be used in its entirety to serve customers located in North Carolina. However, I need not, and do not, reach the question of whether this view is accurate, because the witness incorrectly articulated the standard for determining the need for a merchant plant facility, such as the one at issue here. As discussed in the Commission's October 11, 2017 Order, and as provided in Commission Rule R8-63, the correct standard incorporates consideration of the "need for the facility in the state and/or region." Applicant witnesses provided extensive and credible evidence demonstrating the need for the facility in the PJM Interconnection region, including in part that which is located within North Carolina, and the Commission previously found that this evidence sufficiently demonstrated the need for the facility to meet the requirements of N.C.G.S. § 62-110.1 and Commission Rule R8-63.[7]

In short, it is my opinion that the substantial, material, and competent evidence of record clearly shows that the Applicant has established by the greater weight of the evidence that the necessity prong delineated in the CPCN standard of N.C.G.S. § 62-110.1 has been met.

II. The Applicant demonstrated that the facility as proposed in the amended CPCN is consistent with the public convenience.

The Applicant demonstrated that its requested amendment to the CPCN previously issued is consistent with the public convenience based on (1) the public benefits of solar-powered electric generation; (2) the investment in the local economy; (3) the Applicant's commitments to decommission the facility when it is no longer in use or contemplated to be used for power generation; and (4) the Applicant's commitments to construct and operate the facility in compliance with federal, State, and local laws and all required permits. The majority's decision does not address any of this evidence. Instead, the majority relies on testimony evidence that is speculative and consists of generalized fears not supported by competent, material, and substantial evidence as required by N.C.G.S. § 62-94. "Substantial evidence [is] defined as more than a scintilla or a permissible inference. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." State ex rel. Utils. Comm'n v. Cooper, 367 N.C. 644, 648, 766 S.E.2d 827, 829 (2014) (citing State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 460, 500 S.E.2d 693, 700 (1998)) (alteration in original). Substantial evidence must do more than create a suspicion. Suspicion and conjecture are insufficient to support a decision of the Commission. See Innovative 55, LLC v. Robeson Cty., ___ N.C. App. ___, 801 S.E.2d 671 (2017).

Also, the Applicant sufficiently addressed the public witnesses' concerns regarding (1) any potential for water contamination from the solar panels that will be part of the Applicant's proposed facility; (2) any potential impact to public health from the siting of the proposed facility; (3) any potential negative effects of the loss of productive farmland due to the siting of the proposed facility; (4) the proposed facility's ability to withstand extreme weather events such as hurricanes, tornadoes, and floods; and (5) any potential

[7] See Commission's October 11, 2017 Order, at 13-14.

impact to wildlife from the siting of the Applicant's proposed facility. It should be noted, however, that one public witness who is a party to an agreement to lease his private property for a portion of the facility site expressed support for the issuance of the amended certificate.

In addition, no evidence aside from mere speculation was presented regarding the potential for a negative impact on the value of properties located near the site of the Applicant's proposed facility. Therefore, I conclude that the Applicant's compliance with the mandates of the local zoning ordinances, regulations, and mandatory permits for the protection of the environment and natural resources, as well as the conditioning of an amended CPCN based upon the Applicant's continued compliance with same (as the Commission has already done in this proceeding when it granted the original CPCN) would sufficiently mitigate any impact the project might have on adjoining properties and the environment, and, thereby, would adequately address most of the concerns raised by the intervening parties and public witnesses. The lack of sufficient and competent evidence to the contrary compels this conclusion.

Under the guise that the Applicant failed to meet its burden, the majority's decision denies the requested amendment despite a record full of evidence that has the same quality and character of evidence upon which the Commission (via the same panel) relied in its issuance of the original CPCN, and which is similar to the type of evidence regularly used to support issuance of and amendments to CPCNs in innumerable other proceedings decided by the Commission. See, e.g., Order Granting Certificate, Docket No. EMP-76, Sub 0 (Oct. 28, 2014); Order Granting Certificate (January 12, 2018) and Order Denying Motion for Reconsideration (May 4, 2018), Docket No. E-2, Sub 1150; Order Granting Certificate with Conditions and Accepting Registration of New Renewable Energy Facility, Docket No. EMP-86, Sub 0 (Dec. 3, 2014). As the record on the application to amend the Applicant's CPCN demonstrates, the public witnesses and Intervenors' concerns are unsupported by competent, material, and substantial evidence in view of the whole record. The majority's decision to the contrary is error of law, and the majority's decision to depart from the Commission's traditional approach of considering a local zoning authority with regard to special land uses, and otherwise to regulatory agencies with expertise in the protection of the environment, natural resources, and public health, is arbitrary and capricious. To find a Commission action to be arbitrary and capricious, the Commission must have shown a "lack of fair and careful consideration of the evidence or fail[ed] to display a reasoned judgment." State ex rel. Utils. Comm'n v. Piedmont Natural Gas Co., Inc., 346 N.C. 558, 488 S.E.2d 591 (1997) (citing State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 515, 334 S.E.2d 772, 776 (1985)). The complete disregard of the findings of a local zoning authority that considered many of the same factors that comprise the "public convenience" standard is concerning. The rationale for the majority's decision constitutes a slippery slope that could call into question the relevant analysis of future CPCN proceedings and any future Commission decisions rejecting unsupported speculation such as that upon which the majority's opinion relies. Moreover, to disregard the overwhelming evidence of record in support of the Application raises the specter of arbitrary and capricious decision-making.

Applicant witness Montgomery testified in response to the public witnesses' concerns related to the potential environmental impact and siting of the facility. She testified that any potential environmental impacts would be addressed through environmental permitting, and that the siting of the facility was a local land use matter. She further testified that the Applicant had obtained, or would obtain, all requisite local, state, and federal approvals, including stormwater permits and soil erosion and control approvals. She further testified that Beaufort County issued a letter to the Applicant on November 9, 2017, confirming that the amended site layout, as shown in the application to amend the CPCN, remains in general compliance with Beaufort County's ordinance regulating solar PV facilities. In addition, she testified that the Applicant would obtain from Beaufort County all other permits required to construct the facility.

In response to the concerns raised by the public witnesses related to protection of surface waters, Applicant witness von Wahlde[8] testified regarding the jurisdictional wetlands delineation performed on the site of the proposed facility. He testified that a delineation methodology specific to the site of the proposed facility was agreed to by the United States Army Corps of Engineers, and that the wetlands delineations were performed in accordance with that methodology. He further testified that on December 6-8, 2017, a second wetlands delineation was performed on the additional acreage which is the subject of Applicant's request to amend its CPCN. In addition, he testified that the wetlands delineations of approximately 900 acres identified "minimal jurisdictional areas" within the site of the proposed facility. He also testified that the only natural waterway identified during the wetlands delineation was the Broad Creek Canal, located offsite to the southeast, and that the facility is sited in compliance with the Tar Pamlico Buffer Rules. He testified that the Applicant participated in discussions with the U.S. Fish and Wildlife Service regarding the potential impact to the wildlife habitat that was identified on the property.

Applicant Witness Thienpont[9] testified that a jurisdictional wetlands study was conducted and that the Applicant took the results of the wetlands delineations into consideration during the engineering and design phase of development to help determine the layout of the proposed facility. He further testified that the facility was designed to avoid impacts to wetlands. In response to the public witnesses' concerns that certain organic soils in the area are combustible, witness Thienpont testified that a geotechnical engineering study was done to determine soil composition. This study, he testified, concluded that none of the soils sampled across the site of the proposed facility are categorized as "organic," *i.e.* not combustible. See Tr. Vol. 5, p. 57. Finally, witness Thienpont testified that the Applicant would coordinate with local law enforcement and fire departments to inform them about the project, and that usually such coordination

[8] Witness von Wahlde has a degree in Environmental Science, Biology, and Entomology. He is a Professional Wetlands Scientist with a PWS designation, which is a national certification from the Society of Wetland Scientists. He testified that he has 29 years of experience in this field. Prefiled Supplemental Testimony of Joe von Wahlde, p. 1 (April 5, 2018).

[9] Witness Thienpoint has a degree in atmospheric science and seven years of experience working in the renewable energy field.

starts late in the development process, just prior to the commencement of physical construction.

Applicant witness Thienpont also testified in response to concerns related to the potential for water contamination and any potential impact to the public health from the siting of the proposed facility. He first addressed the concerns that the solar PV panels could contain Gen-X, perfluorinated alkylated substances (PFAS), and heavy metals. Witness Thienpoint testified that Gen-X and PFAS are man-made chemicals used in certain manufacturing processes, but that neither Gen-X nor PFAS is used in the production of any component parts of the solar PV panels that would be used in the Applicant's proposed facility. In support of his testimony, he submitted a memorandum from JinkoSolar, the manufacturer of the panels, confirming that these chemicals are not present in the solar panels. He further testified that the solar PV panels planned for use in the Applicant's proposed facility pass the U.S. Environmental Protection Agency's Toxicity Characteristic Leaching Procedure (TCLP) test, and that said test classifies the solar PV panels as non-hazardous waste, which allows for their disposal in landfills. Further, with regard to concerns about flying debris, witness Thienpont testified that the Applicant would be required to obtain a building permit from Beaufort County and that the permit review process would incorporate wind load testing. The county permit review would require that the facility be designed to withstand the wind loads associated with the North Carolina Wind Zone Map, and the engineering of the site would assess the pile sizing, spacing, and embedment depth to ensure that the system could structurally withstand the wind loads associated with the design criteria wind speeds. Thus, in response to specific questions from the panel at the hearing, witness Thienpont answered that the facility would be constructed to withstand wind speeds applicable to the area and that this issue “would be handled throughout the building permit process.”

Applicant witness Barefoot[10] also testified in response to concerns expressed by the public witnesses related to stormwater runoff from the site of the proposed facility. He first testified that he had been to Beaufort County, had walked the site of the proposed facility, and was well acquainted with the layout of the proposed facility, including the additional parcels proposed to be added to the site in the Applicant's request to amend the CPCN. Based on his personal knowledge, he was familiar with the features of the area, including the existence of two ponds. He agreed that the area is subject to the possibility of flooding but testified that the facility as proposed, both initially and in the application to amend, not only would **not** increase stormwater runoff or the likelihood of area flooding, but would likely reduce the amount of runoff. Tr. Vol. 5, pp. 98-99. He further testified that his firm, Kimley-Horn, prepared a preliminary review of stormwater requirements and anticipated stormwater management design for the proposed facility. He testified that he prepared a memorandum to the Applicant based on his review, in which he concluded that the facility’s impact to existing drainage patterns and flows would be negligible, or, as noted above, more likely, would result in a reduction in runoff from

[10] Witness Barefoot has a degree in civil engineering, and is a licensed professional engineer with eight years of experience specializing in land development, water resources, and hydrology.

the site. He testified that this conclusion was equally applicable to the additional land added to the facility in the layout amendment.

I find that the foregoing evidence more than adequately responds to the concerns raised by the public witnesses related to compliance with the environmental laws for protection of wetlands and surface waters, water contamination from the solar panels that make up the Applicant's proposed facility, and any potential adverse impact to public health from siting the proposed facility. I further find that the concerns raised by the public witnesses, which are no doubt genuinely believed by the witnesses who raised them, should not be accepted as probative or persuasive. The majority accepts the *unsupported* speculation of public lay witnesses. However, unlike the public witnesses the expert witnesses 1) were qualified and competent to provide their expert opinion on the concerns raised by the lay witnesses, and 2) provided sufficiently reliable testimony that comprises the greater weight of the evidence. That there was no legal evidence produced by the Intervenors to support the speculation offered by the public witnesses or to overcome the evidence introduced by the Applicant and the Public Staff compels a decision just the opposite of that reached by the majority. Consistent with the Commission's historical approach to addressing similar concerns, and as exemplified in the Commission's October 11, 2017 Order, these issues should and would be better addressed by agencies with expertise and regulatory authority in the areas of environmental and natural resource protection, and protection of the public health. See, e.g., State ex rel. Utils. Comm'n v. High Rock Lake Assoc., 37 N.C. App. 138, 245 S.E.2d 787 (1978), disc. rev. denied, 248 S.E.2d 257 (stating, in part, there are "agencies better equipped to deal with environmental protection [sic], i.e. the North Carolina Department of Natural and Economic Resources [and the] the Environmental Management Commission…"). Therefore, I agree with Applicant witness Montgomery and find that the particular concerns raised by the public witnesses related to the appropriateness of the use of the site for a solar PV facility are best addressed through the local zoning process, in conjunction with various environmental permitting processes to the extent that such processes do not infringe upon or otherwise interfere with the purview of the Commission and other State regulators.

In the Commission's April 24, 2008 Order in Docket No. SP-231, Sub 0, the Commission stated:

> [S]uch decisions are, in most instances, best left to the local community through the exercise of its zoning authority rather than made by the Commission. Local governing bodies are, generally speaking, in a better position than the Commission to make local land use planning decisions (so long as those decisions do not operate to thwart controlling State policy).

Furthermore, where, as in this case, the relevant local jurisdiction has adopted an ordinance addressing the appropriateness of the siting of a solar PV facility, the Commission has never, insofar as I am aware, substituted its judgment for that of the local jurisdiction, nor should it. Moreover, the Applicant, by its testimony and application,

has committed to comply with the requirements of the Beaufort County zoning regulations. The County, through its zoning ordinance, and the Applicant, through its continued duty and commitment to comply with the local ordinance, have adequately addressed the public witnesses' concerns related to the potential for loss of productive farmland and whether the Applicant's proposed facility should be sited in an area where the land is generally used as farmland or as residences.

In the Commission's October 11, 2017 Order, the Commission issued a CPCN to the Applicant, subject to the following conditions: (1) that the Applicant construct and operate the facility in strict accordance with applicable laws and regulations, including any local zoning and environmental permitting requirements; (2) that the Applicant or any successor certificate holder will not assert that issuance of the CPCN in any way constitutes authority to exercise a power of eminent domain, and it will abstain from attempting to exercise such power; and (3) that the CPCN shall be subject to Commission Rule R8-63(e) and all orders, rules and regulations as are now or may hereafter be lawfully made by the Commission. The Applicant has agreed in its proposed Order that it would be appropriate to apply the same three conditions to the amended CPCN.

Based on the substantial evidence of record, I conclude that the CPCN should be amended as requested by the Applicant and that the amended CPCN should be subject to the same conditions as were imposed upon the Applicant in the issuance of the original CPCN. The Applicant’s ongoing duty to comply with the conditions related to protection of the environment, public health, and safety adequately addresses the concerns expressed by the public witnesses. These conditions would ensure that the facility is operated in a manner that protects the environment and natural resources, and would mitigate or eliminate any reasonably foreseeable potential harm to the public health and safety – at least to the extent that federal, state, and local policymakers have determined is required by law through mandatory permits or otherwise. The panel majority’s decision reversing the Commission’s long-standing course of deferring to local zoning authorities and/or environmental regulators is without any evidentiary support and is in error. See N.C.G.S. § 62-94.

Finally, I would find that insufficient evidence was presented regarding a potential reduction in property values resulting from the siting of the proposed facility. Again, I accept that the concerns of the public witnesses with regard to the potential impact on the value of property nearby or adjoining the site of the Applicant's proposed facility are genuinely held concerns. However, these are just that: concerns that are speculative at best and not supported by competent, material, and substantial evidence. Moreover, as previously stated, the Applicant has appropriately, and as would be expected and required, committed to develop the proposed facility in strict accordance with the applicable laws and regulations, including local zoning ordinances. Thus, the owners of adjoining and nearby properties would be adequately protected against potential negative impacts from any unlawful or inappropriate uses of the site of the proposed facility.

In conclusion, having determined that the Applicant met its burden complying with all legal requirements contained in N.C.G.S. § 62-110.1 and Commission Rule R8-63 and

demonstrating that its requested amendment is consistent with the public convenience and necessity,[11] I would grant the Applicant's requested amendment to its CPCN. The panel's decision to the contrary applies a discretionary standard beyond any which has previously been used by this Commission in reviewing CPCN applications. Had the Applicant failed to show by substantial evidence its compliance with N.C.G.S. § 62-110.1, Commission Rule R8-63, and/or other applicable federal, State, or local laws, I would reach the same conclusion as my colleagues writing for the majority; however, the Applicant more than satisfied its burden of proof in this proceeding, and consequently its application to amend its CPCN should be granted. For these reasons, I conclude that the panel's decision is affected by errors of law, is unsupported by competent, material, and substantial evidence, and is arbitrary and capricious; therefore, I respectfully dissent.

/s/ ToNola D. Brown-Bland

Commissioner ToNola D. Brown-Bland

[11] After the Applicant fully satisfied the burdens imposed by the statute, it had no additional obligation to disprove the unsubstantiated, speculative opinions advanced by Intervenors.