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September 9, 2019

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

RE: PRE-HEARING REPLY BRIEF OF FRIESIAN HOLDINGS, LLC
In the matter of the Application of Friesian Holdings, LLC for a Certificate of Convenience and Necessity to Construct a 70-MW Solar Facility in Scotland County, NC; Docket No. EMP-105, Sub 0

Dear Ms. Fulmore:

On behalf of Friesian Holdings, LLC, in the above referenced matter and docket, I herewith provide the Pre-Hearing Reply Brief.

Should you have any questions concerning this Brief, please do not hesitate to contact me.

Sincerely,

/s/ Karen M. Kemerait

Karen M. Kemerait

pbb

Enclosures

A Pennsylvania Limited Liability Partnership

California Colorado Delaware District of Columbia Florida Georgia Illinois Minnesota
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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. EMP-105, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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

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

ARGUMENT

Despite the fact that Friesian will be solely responsible for paying all costs to construct the Facility¹ and the Interconnection Facilities² associated with the Facility, the Public Staff is

¹ Unless otherwise specified herein, all capitalized terms shall have the same meaning set forth in the Pre-Hearing Initial Brief of Friesian Holdings, LLC, submitted in the above-captioned proceeding on August 26, 2019 (“Friesian Initial Brief”).

² The Federal Energy Regulatory Commission (“FERC”)-jurisdictional Interconnection Agreement specifies the rights and obligations for Duke Energy Progress, LLC (“DEP” or “Duke”) and Friesian in regard to the “Generating Facility,” the “Interconnection Facilities,” and the “Network Upgrades,” all of which are defined in Article 1 of the Interconnection Agreement. “Generating Facility” is defined as the “Interconnection Customer’s device for the production of electricity identified in the Interconnection Request, but shall not include the Interconnection Customer’s Interconnection Facilities.” “Interconnection Facilities” are defined as:

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

“Network Upgrades” are defined as “the additions, modifications, and upgrades to the Transmission Provider’s Transmission System required at or beyond the point at which the Interconnection Facilities connect to the

asking the Commission to override state and federal law so that it can consider FERC-jurisdictional Network Upgrade costs as part of this CPCN approval process. The only issue before the Commission is purely a legal question: can the Commission override the exclusive jurisdiction and authority of FERC and consider FERC-jurisdictional Network Upgrade costs in a state-jurisdictional CPCN proceeding for an electric generating facility? The Public Staff is asking the Commission to overrule state law, violate federal law, and take a position designed to bypass FERC jurisdiction over Friesian's non-state-jurisdictional Network Upgrades. In its initial brief, the Public Staff failed to provide evidence or citation of *any authority* that would allow the Commission to usurp FERC's exclusive jurisdiction over the transmission of electric energy in interstate commerce and consider FERC-jurisdictional Network Upgrade costs in a CPCN proceeding.

I. The Public Staff's opposition to Friesian's CPCN application is based on its objection to well-settled state and federal legal precedent, and the Public Staff is attempting to override the exclusive jurisdiction of FERC in opposing the CPCN

While specific arguments raised in the Public Staff's Initial Brief³ are refuted below, it is important for the Commission to recognize at a high level that the core of the Public Staff's opposition to Friesian's CPCN application is that it objects to the way that well-established federal and state legal precedent applies to the Facility and its Network Upgrades. However, rather than following this precedent, or seeking to address its concerns via an appropriate forum, the Public Staff is instead seeking to impermissibly co-opt this CPCN proceeding to achieve the ends that it seeks.

Transmission Provider's Transmission System to accommodate the interconnection of the Large Generating Facility to the Transmission Provider's Transmission System."

³ Pre-Hearing Brief of the Public Staff, submitted on August 26, 2019 in the above-captioned proceeding ("Public Staff Initial Brief").

The Public Staff's arguments in Section IV of its Initial Brief (in which the Public Staff discusses the supposed implications of granting the CPCN on cost allocations associated with projects that utilize the state-jurisdictional interconnection process)⁴ clearly demonstrate that the Public Staff's position is rooted in its disagreement with long-standing federal law and precedent. In Section IV of its Initial Brief, the Public Staff makes several policy driven arguments against granting the CPCN application, none of which have any sound basis in law.

First, the Public Staff repeats language from the Commission's guidance in the Interconnection Order⁵ in which the Commission directed 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 Interconnections Standard."⁶ However, the Public Staff fails to acknowledge that the Interconnection Order addressed the costs of the state-jurisdictional interconnection process for Public Utilities Regulatory Act ("PURPA") facilities, *not* the FERC-jurisdictional interconnection process for generators making non-PURPA wholesale sales. Accordingly, despite the Public Staff's desire to the contrary, the Commission's statement in the Interconnection Order has no bearing on the Commission's consideration of Friesian's CPCN application because it is not legally permissible (i.e., possible) for Friesian to pay for the Network Upgrade costs under federal law, as established in Duke's FERC-jurisdictional Large Generator Interconnection Process.⁷

⁴ See Public Staff Initial Brief, pp. 11-14.

⁵ June 14, 2019 *Order Approving Revised Interconnection Standard and Requiring Reports and Testimony* in Docket E-100, Sub 101 ("Interconnection Order").

⁶ See Public Staff Reply Brief, p. 11 (quoting the Interconnection Order).

⁷ See Friesian Initial Brief, pp. 29-30.

Next, the Public Staff discusses its concerns related to queue reform in North Carolina, including those related to the “misalignment” between Duke’s state- and FERC-jurisdictional interconnection queues.⁸ However, the Public Staff’s belief that queue reform is needed in North Carolina has nothing to do with Friesian’s CPCN application. In fact, the Public Staff makes it clear that queue reform is in no way related to Friesian’s CPCN application when it acknowledges that its concerns related to the Friesian project “highlights the need for the queue reform measures proposed by Duke in the 2019 Sub 101 Proceeding to continue to move forward.”⁹ Rather than raising its concerns related to the interaction between Duke’s state- and FERC-jurisdictional queues in that proceeding, the Public Staff has raised them here – in a completely unrelated CPCN proceeding.

Further, the Public Staff avers that “the different cost allocation and refund provisions in the state- and FERC-jurisdictional queues may invite renewable energy developers to seek to utilize the most advantageous option, reducing the effectiveness of the Commission’s directive that the utilities continue to seek to recover from Interconnection Customers all expenses associated with the generator interconnection process.”¹⁰ Even assuming *arguendo* that the Public Staff’s argument is valid (which it is not), the Public Staff’s argument relates to purported policy ramifications stemming from the manner in which Generating Facility, Interconnection Facilities, and Network Upgrade costs are allocated and assigned pursuant to FERC- and state-jurisdictional interconnection processes. However, longstanding federal precedent is clear that Qualifying Facilities (“QFs”) interconnecting under state-jurisdictional interconnection

⁸ See Public Staff Initial Brief, pp. 12-13.

⁹ See *id.* at 13.

¹⁰ *Id.*

procedures are required to pay costs associated with interconnecting to a utility's transmission system provided that such costs are assigned in a non-discriminatory manner.¹¹ Moreover, FERC has thoroughly considered the question of whether repayment of the costs of Network Upgrades to interconnection customers is appropriate, and has concluded that it is.¹² While the Public Staff is certainly free to challenge this longstanding federal precedent at FERC or before a court of competent jurisdiction, it has not done so, and instead is attempting to utilize this state-jurisdictional CPCN proceeding to improperly usurp this longstanding federal precedent.¹³

If there is any lingering doubt that the Public Staff's opposition to the CPCN application is based on the fact that it simply does not like the way in which federal law and longstanding federal precedent assign cost responsibility for Network Upgrades for projects that are in Duke's FERC-jurisdictional interconnection queue compared to projects that are in Duke's state-jurisdictional interconnection queue, any such ambiguity is extinguished by the July 31, 2019 email communication between current and former attorneys for the Public Staff. In responding to a query from the Public Staff, to see if the Public Staff's former attorney had "a few moments to talk about a FERC jurisdictional issue resulting from a merchant plant (EMP-105, Sub 0) seeking to be constructed in NC that is going to trigger very substantial transmission upgrade costs," the Public Staff's former attorney responded: "Transmission for a non-QF selling at wholesale is FERC jurisdictional, as you know, and the FERC's cost allocation/recovery rules

¹¹ See e.g. 18 C.F.R. 292.306(a).

¹² See e.g. North Carolina Clean Energy Business Alliance's Initial Pre-Hearing Brief, submitted August 26, 2019 in the above-captioned proceeding at 10-13 ("NCCEBA Initial Brief") (discussing FERC Order No. 2003 and its progeny that established the provisions of FERC's pro forma Large Generator Interconnection Agreement that allow for Interconnection Customers to be reimbursed for costs associated with Network Upgrades).

¹³ See Friesian Initial Brief at 20-29 (describing how the Public Staff is preempted by federal law from considering Network Upgrade costs in a CPCN proceeding).

would apply. *We were never thrilled with those rules as we thought they were tilted toward the generator.*” (Emphasis added.)¹⁴

This communication, along with Section IV of the Public Staff’s Initial Brief, makes it clear that the Public Staff does not like the cost allocation and recovery rules specified in Duke’s FERC-jurisdictional OATT and how they apply to the Friesian project. Rather than abiding by these rules and challenging them in an appropriate forum, the Public Staff is instead attempting to nullify these rules through this CPCN proceeding. The Commission should reject the Public Staff’s unprecedented attempt to negate the cost allocation and recovery provisions of Duke’s FERC-jurisdictional OATT applicable to Network Upgrades, and should comply with federal law by ruling affirmatively that Network Upgrade costs associated with the Friesian project will not be considered in evaluating the CPCN application.

II. The scope of Commission review of a merchant plant CPCN application is limited to consideration of costs of the Generating Facility

The Public Staff’s suggestion that the “consideration of cost and impact to ratepayers” of Network Upgrade costs in a CPCN application is “fully within the review of the Commission”¹⁵ is belied by the plain language of N.C. Gen. Stat. § 62-110.1, Commission Rule R8-63, along with long-standing Commission practice. In making this claim, the Public Staff erroneously conflates the construction costs of Interconnection Facilities and Network Upgrades with the costs of a Generating Facility (that the Commission is permitted to consider pursuant to N.C. Gen. Stat. § 62-110.1(c)). Contrary to the Public Staff’s statements, a Generating Facility, Interconnection Facilities, and Network Upgrades are separate and distinct facilities, and the

¹⁴ See Public Staff Response to Question No. 2 of Friesian’s Data Request No. 1 attached hereto as Exhibit 1.

¹⁵ See Public Staff Initial Brief, pp. 4-5.

Commission is only permitted to consider the construction costs of the Generating Facility in a CPCN proceeding. Nowhere in N.C. Gen. Stat. § 62-110.1 or Commission Rule R8-63 is there authority for the Commission to review Network Upgrade costs in a CPCN proceeding. In fact, in compliance with federal law, N.C. Gen. Stat. § 62-110.1 and Rule R8-63 provide no authority for consideration of Network Upgrade costs as a factor in evaluating a CPCN application. Both Section 62-110.1 and Rule R8-63 require the applicant to file an estimate of the construction costs of the Generating Facility only. Neither N.C. Gen. Stat. § 62-110.1 nor Rule R8-63 makes mention of construction costs for Network Upgrades. Therefore, N.C. Gen. Stat. § 62-110.1 and Rule R8-63 permit the Commission to consider the cost of Friesian's proposed Generating Facility (which will be borne entirely by Friesian and not by the ratepayers), but any inquiry into Network Upgrade costs would violate both state and federal law.

The Public Staff's argument that the Commission should consider "transmission and cost information" when deciding whether to grant the CPCN application because such information is submitted as part of the CPCN application¹⁶ is misleading and incorrect. As described in Friesian's Initial Brief, FERC-jurisdictional Network Upgrade costs have never been considered in a CPCN proceeding in North Carolina or any other state.¹⁷ Moreover, as described previously in this proceeding by Friesian and the North Carolina Clean Energy Business Alliance, North Carolina statutes and regulations do not permit the Commission to consider FERC-jurisdictional Network Upgrades in a merchant plant CPCN application.¹⁸ There is only one reference to "transmission" in N.C. Gen. Stat. § 110.1 and Rule R8-63, and that reference in no way expands

¹⁶ See Public Staff Initial Brief, p. 11.

¹⁷ See Friesian Initial Brief, pp. 13-14.

¹⁸ See *e.g., id.* at 14-20; NCCEBA Initial Brief, pp. 6-9.

the Commission's authority to allow it to consider Network Upgrade costs in a CPCN proceeding. Rule R8-63(2)(vi) simply requires the applicant to provide a "description of the transmission facilities to which the facility will interconnect, and a color map showing their general location" in the merchant plant CPCN application. For the foregoing reasons, the Public Staff's argument is misleading and should be rejected by the Commission.

III. The Friesian CPCN application is not for a new transmission line

The Public Staff seems to suggest that the Commission has the authority to consider Network Upgrade costs in this CPCN proceeding due to its (misplaced) belief that a new transmission line might be constructed.¹⁹ There is no merit to the Public Staff's assertion since it is clear that Friesian is not seeking to obtain a CPCN for a transmission line under N.C. Gen. Stat. § 62-101 and Rule R8-62, but is instead seeking a CPCN for an electric generating facility under N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-63.²⁰ Not only is Friesian not proposing a new transmission line, but the Public Staff's position is also contrary to the Federal Power Act ("FPA") and the plain language of N.C. Gen. Stat. § 62-101 and Rule R8-62. As discussed in Section II.D of Friesian's Initial Brief, states have jurisdiction over matters such as the construction and siting of most transmission,²¹ and FERC has jurisdiction over the allocation

¹⁹ See e.g. Public Staff Initial Brief, p. 3, note 2. As noted previously, Friesian is not seeking a CPCN for a transmission line, but of note, N.C. Gen. Stat. § 62-101(c)(2) specifically exempts the "replacement or expansion of an existing line with a similar line in substantially the same location or the rebuilding, upgrading, modifying, modernizing, or reconstructing of an existing line for the purpose of increasing capacity or widening an existing right-of-way" from having to obtain a certificate.

²⁰ N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-63 govern CPCNs for transmission lines.

²¹ See, e.g., *MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016) (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051, Order No. 1000, at P 227 (2011) ("FERC Order No. 1000"); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014)) (noting that FERC Order No. 1000 was not "limit[ing], preempt[ing], or otherwise affect[ing] state or local laws or regulations with respect to construction of transmission facilities," and that "'avoid[ing] intrusion on the traditional role of the [s]tates' in regulating the siting and construction of transmission facilities" was a "proper goal").

of interstate transmission costs, transmission planning,²² and the question of whether interstate transmission costs are recoverable in FERC-jurisdictional rates.²³ Chapter 62 of the North Carolina General Statutes complies with the division of responsibilities between FERC and the states. Specifically, N.C. Gen. Stat. § 62-110.1 addresses CPCNs for generating facilities, which aligns with states' jurisdiction over facilities used for the "generation of electric energy" under the FPA.²⁴ Similarly, N.C. Gen. Stat. § 62-101, which addresses CPCNs related to constructing and siting of new transmission lines, aligns with the traditional role of the states in regulating the siting and construction of transmission facilities.²⁵ The Public Staff's position would both violate the FPA and N.C. Gen. Stat. § 62-110.1 to give the Commission jurisdiction over the allocation of FERC-jurisdictional Network Upgrade costs *associated* with a generating facility. Accordingly, Public Staff's position should be rejected by the Commission.

IV. The Commission's E-100, Sub 85 proceeding makes it clear that Network Upgrade costs are not intended to be considered in a merchant plant CPCN proceeding

In citing to the Commission proceeding adopting Rule R8-63 in Docket No. E-100, Sub 85, the Public Staff again conflates construction costs for a Generating Facility with construction costs for Network Upgrades. In stating that "the Commission in adopting this rule found that it was appropriate for it to consider the costs of the *project*",²⁶ the Public Staff improperly

²² See e.g., FERC Order No. 1000 at P 107 (describing how FERC has jurisdiction over cost allocation and transmission planning, while states retain jurisdiction over "siting, permitting, and construction" of transmission facilities."); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d at 76

²³ See e.g. *Nat'l Ass'n of Regulatory Utility Com'rs v. F.E.R.C.*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (noting that FERC has "indisputable authority to disallow recovery of costs imprudently incurred by jurisdictional firms.").

²⁴ See 16 U.S.C. § 824(b).

²⁵ See *MISO Transmission Owners v. FERC*, 819 F.3d at 336.

²⁶ See Public Staff Initial Brief, pp. 5-7 (emphasis added).

combines construction costs for a Generating Facility with Network Upgrade costs (into general “project” costs) and misstates information in the Commission’s May 21, 2001 *Order Adopting Rule* and filings made by parties in the docket. All references to “construction costs” or “costs” related to the merchant plant rule in Docket No. E-100, Sub 85 relate to costs of the generating facility itself, and *not* to other costs associated with the project such as Network Upgrade costs, as suggested by the Public Staff.

Moreover, the merchant plant rule itself adopted by the Commission in the E-100, Sub 85 proceeding contradicts the Public Staff’s position. Specifically, Rule R8-63(a)(2) defines the term “merchant plant” as “an *electric generating facility*, other than one that qualifies for and seeks the benefits of 16 U.S.C.A. 824a-3 or G.S. 62-156, the output of which will be sold exclusively at wholesale and the construction cost of which does not qualify for inclusion in, and would not be considered in a future determination of, the rate base of a public utility pursuant to G.S. 62-133.” (Emphasis added). Like N.C. Gen. Stat. § 62-110.1, subsection (b)(2)(i) of Rule R8-63 requires the applicant to file “estimated construction costs” of the proposed generating facility. Subsection (b)(2)(iv) of Rule R8-63 requires “[a] general description of the transmission facilities to which the facility will interconnect, and a color map showing their general location. If additional facilities are needed, a statement regarding whether the applicant would need to acquire rights-of-way for new facilities.” Notably, and in accordance with Section 62-110.1, Rule R8-63 contains no mention of the cost of Network Upgrades.

The Public Staff does not contend in its Initial Brief that the Public Staff, the Attorney General, or any other party argued in the E-100, Sub 85 proceeding that Network Upgrade costs should be considered in a CPCN proceeding.²⁷ A review of the Commission’s orders and the

²⁷ See Public Staff Initial Brief, pp. 5-7.

filings made by the Public Staff, the Attorney General, and other parties in that docket confirms that no party represented that the Commission should – or had the authority – to consider Network Upgrade costs in a CPCN proceeding.

V. The Friesian Facility is a viable project

The Public Staff’s assertion that “[t]he sheer scale of the costs relative to the size and projected revenue from the facility, as well as the impact to customers raises concerns with the Public Staff regarding the viability of the facility” is baseless.²⁸ As stated previously and repeatedly, the costs of the Generating Facility and Interconnection Facilities will be borne entirely by Friesian. Further, Friesian will initially pay for the Network Upgrade costs and then be reimbursed for any amounts advanced in accordance with the applicable sections of Duke’s FERC-jurisdictional Interconnection Agreement.²⁹

Friesian has spent significant resources, time, and expenditures developing the Facility and obtaining financing for the Facility, and in doing so, has followed and relied upon all applicable and effective provisions of Duke’s OATT, Large Generator Interconnection Process, Interconnection Agreement, and state and federal law. However, it is the Public Staff’s attempt to ignore and violate the applicable and effective provisions of Duke’s OATT, Large Generator Interconnection Process, Interconnection Agreement, and state and federal law that might affect the “viability” of the Facility. In developing the Facility and conducting its business, Friesian has abided by all currently applicable laws and regulations. Now Friesian merely asks that the Commission order the Public Staff to do the same.

²⁸ *Id.* at 10.

²⁹ *See* Friesian Initial Brief at 12.

CONCLUSION

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

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



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CERTIFICATE OF SERVICE

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

This 9th day of September, 2019.



Karen M. Kemerait