

**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. E-100, SUB 176**

In the Matter of:)	
Petition to Revise Commission Rules R8-63)	NCSEA’S MOTION TO
and R8-64)	STAY PROCEEDINGS
)	PENDING APPEAL

NCSEA’S MOTION TO STAY PROCEEDINGS PENDING APPEAL

NOW COMES the North Carolina Sustainable Energy Association (“NCSEA”), a pending intervenor in this docket¹, pursuant to Commission Rule R1-7, and respectfully moves for the North Carolina Utilities Commission (“Commission”) to stay proceedings in this docket pending resolution of the *Friesian* matter that is now before the North Carolina Court of Appeals.

I. BACKGROUND

In the Matter of Application of Friesian Holdings, LLC, for a Certificate of Public Convenience and Necessity to Construct a 70-MW Solar Facility in Scotland County, North Carolina in Docket No. EMP-105, Sub 0 (the “*Friesian* Proceeding”) was a proceeding wherein Friesian Holdings, LLC (“Friesian”) was denied the issuance of a Certificate of Public Necessity and Convenience (“CPCN”) for a 70-MW solar facility located in Scotland County, North Carolina by the Commission. The denial was issued via the *Order Denying Certificate of Public Convenience and Necessity for Merchant Generating Facility* (“Friesian Order”) from June 11, 2020. In the Friesian Order, the Commission found, among other things, that

12. The use of the levelized cost of transmission (LCOT) provides a benchmark as to the reasonableness of the transmission network upgrade cost associated with interconnecting a proposed new generating facility.

¹ NCSEA filed its Petition to Intervene contemporaneously with this Motion.

13. The potential for the Network Upgrades to lead to additional proposed generating capacity to be placed in service is too uncertain and speculative to be given substantial weight in support of the Application.

14. The Synapse Report does not provide sufficient evidence that either the Facility or the associated Network Upgrades would provide quantifiable ratepayer savings, emission reductions, or other environmental or health benefits.²

On August 10, 2020, NCSEA and the North Carolina Clean Energy Business Alliance³ filed the *Joint Notice of Appeal of the North Carolina Sustainable Energy Association and the North Carolina Clean Energy Business Alliance* (“Joint NOA”). On the same day, Friesian filed *Friesian Holdings, LLC’s Notice of Appeal and Exceptions* (“Friesian NOA”). Both the Joint NOA and the Friesian NOA noted exceptions stating that the Commission’s Friesian Order inappropriately considered Federal Energy Regulatory Commission (“FERC”)-jurisdictional costs in denying the CPCN.⁴ Furthermore, both the Joint NOA and the Friesian NOA identify that the Commission considering network upgrades and the levelized cost of transmission in determining whether to approve a CPCN application falls outside the scope of the CPCN rules.⁵ Both Friesian and NCSEA/CCEBA extensively briefed these subjects in the North Carolina Court of Appeals case, and Duke Energy Progress, LLC and the Public Staff – North Carolina Utilities Commission (“Public

² Friesian Order, pp. 6-7.

³ After the notice of appeal, North Carolina Clean Energy Business Alliance changed its name to Carolinas Clean Energy Business Association (thereafter herein “CCEBA”). This name change was documented with the North Carolina Secretary of State on January 19, 2021 through the filing of Amended Articles of Incorporation, available at https://www.sosnc.gov/online_services/search/by_title/_Business_Registration, Document ID C202101202839.

⁴ Joint NOA at 5-6; Friesian NOA at 3-7.

⁵ Joint NOA at 5-6; Friesian NOA at 7-8.

Staff”) filed reply briefs countering the same.⁶ An oral argument in the appeal of the Friesian Order has been scheduled for September 21, 2021.

On August 19, 2021, the Public Staff filed the *Public Staff’s Petition* (“Petition”) in the instant proceeding. In the Petition, the Public Staff stated regarding Rule R8-63, in pertinent part:

In the Friesian Order, the Commission found “[i]t is appropriate for the Commission to consider the total construction costs of a facility, including the cost to interconnect and to construct any necessary transmission network upgrades, when determining the public convenience and necessity of a proposed new generating facility.” Friesian Order at 6. Consistent with the Friesian Order, and to assess the impact of facilities potentially triggering network upgrades, the Public Staff has requested in discovery, and the Commission has issued orders in CPCN dockets requiring the filing of additional testimony addressing, information on these costs by merchant generating facilities[.] At this time, the Public Staff believes it is important to revise Commission Rule R8-63 to include the information needed from merchant generator applicants, including total construction costs, for the application to be considered complete by the Public Staff and the Commission.⁷

Regarding Rule R8-64, the Public Staff stated, in pertinent part:

The Public Staff also proposes to revise the application requirements for small power producers to incorporate the information that is necessary for review of applications by the Public Staff and the Commission, some of which the Public Staff typically requests of applicants during discovery. The revisions in Attachment B therefore add items that the Public Staff finds necessary for its review and typically requests after an application is submitted, if not included with the application. As discussed above, these changes have also been incorporated into the Commission Rule R8-63 revisions in Attachment A to align the two CPCN filing requirements.⁸

⁶ These briefs, filed at the North Carolina Court of Appeals, are voluminous and repetitive for the purposes of the underlying points made herein. Furthermore, some of these briefs were submitted under seal and, therefore, would require a confidential filing on NCSEA’s behalf for this Motion. For the purposes of efficiency and transparency to *this* filing, NCSEA has not included them as exhibits to this Motion. However, if the Commission believes these briefs will be instructive to review of this Motion, then NCSEA will gladly file them as a supplemental filing to this Motion.

⁷ Petition at 4.

⁸ Petition at 8.

Finally, the Public Staff has requested expedited review for comments on this proposed rulemaking docket, stating:

The Public Staff has seen a steady increase in the number of EMP applications that may either trigger affected system costs in DENC's service territory or are planning to enter the transition queue in the DEP or DEC service territories. These projects have the potential to shift significant costs to ratepayers. The Public Staff believes, at this time, that it is premature for it to provide the Commission with recommendations on such applications prior to receiving applications that contain more certain cost information. Therefore, the Public Staff requests that the Commission establish an expedited comment period on the proposed rule revisions of 15 days for initial comments and an additional 15 days for reply comments.⁹

II. MOTION TO STAY PROCEEDINGS

1. The appeal of the Friesian Order is pending before the North Carolina Court of Appeals and scheduled for oral arguments by the parties on September 21, 2021.

2. The outcome of that appeal will materially affect the underlying *Friesian* Proceeding, including, potentially, the Friesian Order upon which the Public Staff cites and relies upon in the Petition.

3. Should the North Carolina Court of Appeals make determinations about the Commission's jurisdiction to consider network upgrade costs, and related calculations, it would materially affect and potentially undermine the sought rulemaking revisions sought in the Public Staff's Petition.

4. Therefore, NCSEA believes it would be in the best interests of the ratepayers, independent power producers, the Commission, and the intervenors in this, and related CPCN proceedings, to stay proceedings in this docket and hold this docket in abeyance pending the outcome of the appeal.

⁹ Petition at 13.

5. Further, while NCSEA acknowledges the Public Staff's desire for an expedited review to allow it the opportunity to timely provide Public Staff review of CPCN applications and related recommendations, NCSEA believes that it would create more problems to move forward with this amendment to the underlying rules which may be undone or otherwise contorted by a pending appellate decision.

WHEREFORE, for all the reasons set forth herein, the North Carolina Sustainable Energy Association moves for the North Carolina Public Utilities Commission to stay proceedings in this docket and hold it in abeyance pending the outcome of the underlying *Friesian* appeal and for any further relief that the Commission deems just and proper.

Respectfully submitted, this the 26th day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing document by hand delivery, first class mail deposited in the U.S. mail, postage pre-paid, or by email transmission with the party's consent.

This the 26th day of August, 2021.

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